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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 40113-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Fraser Rotchford,

Appellant.

Jefferson County Superior Court Cause No. 09-1-00114-1

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Rotchford's 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. Rotchford threatened to kill another person.
3. The prosecution did not prove beyond a reasonable doubt that Mr. Rotchford's words or conduct placed another person in reasonable fear that he would carry out a threat to kill.
4. Mr. Rotchford was denied his constitutional right to the effective assistance of counsel.
5. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Rotchford and his court-appointed attorney.
6. The trial judge erred by denying Mr. Rotchford's request for appointment of new counsel.
7. Mr. Rotchford's conviction was entered in violation of his state constitutional right to a jury trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for felony harassment requires proof that the accused person threatened to kill another person and, by words or conduct, placed them in reasonable fear that the threat to kill would be carried out. Mr. Rotchford told his probation officer that he was disturbed by his homicidal feelings, and asked to be taken into custody. Was the evidence insufficient to prove that Mr. Rotchford threatened to kill another person, and by words or conduct placed that person in reasonable fear that the threat to kill would be carried out?

2. An accused person has a right to be represented by conflict-free counsel. When Mr. Rotchford complained about the relationship he had with his attorney, the trial court discouraged him from explaining the problem and refused to inquire further. Did the trial court's refusal to inquire into Mr. Rotchford's relationship with his attorney violate his Sixth Amendment right to the effective assistance of counsel?

3. 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. Rotchford understood his right, under the state constitution, to participate in the selection of jurors, to be presumed innocent by the jury unless proven guilty, and to a unanimous verdict. In the absence of such an affirmative showing, did Mr. Rotchford's conviction violate his state constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Fraser Rotchford was on probation with Jefferson County district court during the spring and summer of 2009. He was assigned two probation officers, Tracie Wilburn and Tracy Lake, because he needed a lot of assistance and time. RP 30, 58-59. His court order required him to obtain a mental health evaluation, follow its recommendations, and take any prescribed medication. RP 37, 120-121. He was compliant with probation, and his supervision went well. RP 31.

Mr. Rotchford's medication had been an ongoing concern for him. He had been prescribed Risperdal by the local mental health agency, and he felt that the medication made him feel homicidal. RP 35, 44, 48, 101, 121. He frequently talked about his anger and frustration at mental health for prescribing this substance to him. RP 35-36, 42, 44, 64, 101, 136. More than once during his time on probation, he told his probation officers that he wanted to kill mental health. RP 36, 128. Ms. Wilburn contacted staff at the mental health agency multiple times to discuss Mr. Rotchford's feelings toward them. RP 47, 64. She was told that homicidal thoughts could be a side effect of the medication, but that Mr. Rotchford's dosage was too low to cause such thoughts. RP 48, 65.

On June 15, 2009, Mr. Rotchford came to court to check in with his probation officers. RP 31. He had missed his check-in the week before, which was very unusual for him. RP 31, 45. Both of his probation officers described him as subdued, upset, and “down” on that day. RP 35, 59.

The probation officers met with Mr. Rotchford in the hallway outside of the courtroom. RP 29, 34. He told them that he had missed his appointment the week before because he was “going insane.” RP 32. They discussed the local mental health agency and Mr. Rotchford’s aversion to going to their office. RP 32, 60. He told them both that he “wanted” to kill “them.” RP 32, 61, 128. He said that the medication that they had prescribed for him was affecting him adversely by interfering with the normal function of his brain. RP 33, 60.

Mr. Rotchford was scheduled for an appointment at the mental health agency the following Monday, and Wilburn told him to come in and see her in the morning if he was still having those feelings. RP 33, 127. She later testified that this was because she wanted to support him and to be available as an outlet for him, and because of her general preference that people on probation be open and honest with her, even about inappropriate thoughts. RP 33, 49. She also told Mr. Rotchford that she would be passing on the information to staff at mental health. RP 37.

Mr. Rotchford left the court hallway area after this thirty-to-forty minute meeting. RP 36, 38.

He returned ten-to-twenty minutes later and said that he felt his thoughts were becoming more “justified” and that he needed to go to jail. RP 36, 40, 55. He repeated that he wanted to kill them (mental health). RP 36, 40, 62. Mr. Rotchford cried, and seemed very defeated. RP 56.

Wilburn contacted law enforcement, and officers arrested Mr. Rotchford for a probation violation. RP 40, 63, 73. The arresting officer heard one of the probation officers telling Mr. Rotchford that he had done the right thing. RP 68. After waiving his rights, Mr. Rotchford told an officer that he had not threatened mental health, that he did not know who he wanted to hurt or how, and that he was very frustrated about his medication. RP 70, 72, 78. The two arresting officers heard him say more than once that he wanted to kill mental health. RP 70, 79.

Wilburn then called staff at mental health, and was referred to Sheila Hunt-Witte. RP 41, 53. She told Hunt-Witte that Mr. Rotchford was in custody, and described the statements he had made. RP 41, 50-51, 53.

The state charged Mr. Rotchford with Felony Harassment – Threats to Kill. CP 1.

On August 14, 2009, the court held a hearing to discuss Mr. Rotchford's request for the appointment of new counsel. Motion to Withdraw as Counsel (filed 8/7/09), Supp. CP. At the hearing, the following colloquy took place:

MR. ROTCHFORD: Uh, I didn't feel that Mr. Critchlow was representing me accurately. He wasn't actually.

COURT: Let me tell you a few things, Mr. Rotchford. First, Jefferson Associated Counsel is the best team of criminal defense attorneys we have around here. Secondly, they're busy, but they represent their clients well. Third, you don't get to come here and say...

MR. ROTCHFORD: Well, I mean in terms of what...

COURT: Just listen up.

MR. ROTCHFORD: Okay.

COURT: Third, when you're appointed counsel at public expense, unless there is a, some kind of disqualifying conflict, uh, I don't-- they're going to represent you. We don't appoint other counsel just because sometimes, you get-- a lot of times people come and say, oh, I don't like the way Mr. Charlton is doing something. I don't think he's doing the job he's supposed to. I wanted him to talk to somebody, he didn't talk to them. Those are not reasons to disqualify or appoint different counsel. I'm not saying you don't have a reason, but I'm just giving you the general idea. It's got to be some disqualifying conflict before I would appoint. I think I've done it twice in about six years since I've been on, five years I've been on the bench, to appoint substitute counsel at the request of the defendant. Because, they do a good job. But, having heard all of that...

MR. ROTCHFORD: Having heard that, all right.

COURT: Do you have a reason you would like to advance?

MR. ROTCHFORD: Well, I am concerned. Because he has said things that I didn't say, in court. Such as I would like to kill...

COURT: Yeah, those are the kind of things I don't want to hear.

MR. ROTCHFORD: You don't want to hear that. Okay.

COURT: I don't want to hear that. Because it sounds like to me you're about to get into something he says that you disagree with, or something. Those are not...

MR. ROTCHFORD: Not that I disagree with, but I didn't say.

COURT: All right.

MR. ROTCHFORD: Uh...

COURT: But you don't want to jeopardize whatever defense you have...

MR. ROTCHFORD: Right.

COURT: ...by, uh, I don't know what your defense is. I don't even know what the charges are really. But, uh, by making statements on the records here that the State could use against you, can use against you. But, go ahead.

MR. ROTCHFORD: Right. That's my concern, Your Honor. I...

COURT: All right. Well, I would suggest you talk with Mr. Critchlow about your concerns and, uh, if...

MR. ROTCHFORD: I, I have, Your Honor.

COURT: If he feels it's...

MR. ROTCHFORD: Okay.

COURT: ...a gump, it's possible to withdraw. I'm sure he'll make the motion to have himself withdraw.

MR. ROTCHFORD: He did not make the motion himself.

COURT: He filed a motion saying that you wanted to come in— "Mr. Rotchford seeks to explain his reasons when appearing at the hearing on this motion." I'll listen to your explanation. Go ahead.

MR. ROTCHFORD: Um, this is a very ideological case, in my opinion. And, I'm uncomfortable with the fact that my attorney has expressed that he does not share the same conceptions of what's happening, and maybe that doesn't actually affect the showing of the case.

COURT: It doesn't. I was a defense attorney for like twenty years and, um, most of the time I didn't share my clients' viewpoints on lots of things. But, believe me it doesn't, it doesn't affect the ability of the attorney to effectively represent you under the law. That I can assure you. Okay?

MR. ROTCHFORD: Okay.

COURT: I mean, he might disagree with your philosophy but it won't affect his ability to represent you.

RP 3-6.

The court did not appoint a new attorney. RP 6.

On November 20, defense counsel told the court that Mr.

Rotchford wanted to waive his right to a jury trial. RP 11. The following colloquy took place:

COURT: Mr. Rotchford, I've been handed this Waiver of Jury Trial. You've been, you know that you have a right to have your case heard by a 12-person jury, an impartial jury selected from this county. And, this says you've consulted with Mr. Critchlow regarding the decision that you want to have the case heard by me, or another judge, whoever the judge is, and not have a jury to determine whether or not the State has proved this crime beyond a reasonable doubt. And that's your desire?

MR. ROTCHFORD: Yes, Your Honor.

COURT: It says you freely and voluntarily give up your right to be tried by a jury and request a trial by the Court, as opposed to the jury. And you've talked this over with Mr. Critchlow?

MR. ROTCHFORD: Yes, I have.

COURT: And you understand all of that?

MR. ROTCHFORD: Yes, I do.

COURT: And the judge will just listen to the evidence and make a determination, whoever the judge is. It may be me, it may be somebody else, and that's okay with you?

MR. ROTCHFORD: Yes.

MR. CRITCHLOW: Judge, I'd just supplement that by advising the Court that Fraser, I don't know if this is known to the Court or counsel. He did submit to a jury trial in District Court. So it's not that he's unaware of what that...

COURT: The proceeding.

MR. CRITCHLOW: ...the proceedings, yeah.

COURT: I'll consent to the Waiver of Jury Trial and I've signed the statement so indicating. I'm confident that Mr. Rotchford knows what he's doing.

RP 12-13.

The case was set for a bench trial. RP 13-14.

At trial, Mr. Rotchford's probation officer Ms. Wilburn testified about his statements. She was clear during her testimony that Mr. Rotchford did not ever say he intended to kill anyone, just that he wanted to. RP 32. She testified that he did not take the statements back or say that he was joking. RP 45. She also indicated that he never offered a plan to her, but just said that he "want[ed] to kill them." RP 35. Wilburn stated that he did not ever identify any particular person he wanted to kill, or how he would kill them, or when he would kill them. RP 52. She said that it was her impression that Mr. Rotchford was asking for her help. RP 56.

The state identified Hunt-Witte as the victim of the threat because she took the call from the probation officer. RP 17, CP 1. Hunt-Witte testified that she was fearful of Mr. Rotchford and took his statements seriously. RP 86-88. She could not remember exactly what Wilburn had told her when she called on June 15. RP 92. She also told the court that Mr. Rotchford's specific disorder increased the risk of loss of volitional control, and that he could act out based on a delusion system. RP 96. Erik Nygaard, the crisis director at mental health, testified that he and the entire agency took the statements about Mr. Rotchford's homicidal thoughts seriously. RP 103-104.

Mr. Rotchford testified, acknowledging that he had made the statement that he wanted to kill mental health. He explained that because he had said that to his probation officer before, and they had not taken it seriously, he did not think that they would this time. RP 128.

The court found Mr. Rotchford guilty of the charge. RP 151-156. Mr. Rotchford was sentenced as a first-time offender, and he timely appealed. RP 6-13, 5.

ARGUMENT

I. MR. ROTCHFORD'S FELONY HARASSMENT CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

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 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.

- B. Conviction of felony harassment requires proof that the accused threatened to kill another, and (by words or conduct) placed that person in reasonable fear that the threat would be carried out.

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 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*.

A person is guilty of harassment if she or he “knowingly threatens...[t]o cause bodily injury immediately or in the future to the person threatened or to any other person [and] [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.” RCW 9A.46.020. The word “threat” means “to communicate, directly or indirectly the intent... [t]o cause bodily injury in the future to the person threatened or to any other person.” RCW 9A.04.110(27).

Felony harassment based on a threat to kill requires proof “that the person threatened was placed in reasonable fear that the threat to *kill*

would be carried out.” *State v. Mills*, 154 Wn.2d 1, 10, 109 P.3d 415 (2005) (emphasis added) (citing *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003)). It is not sufficient to prove that the person threatened reasonably feared that bodily harm would be inflicted. *C.G.*, at 609-610.

C. The prosecution failed to prove that Mr. Rotchford threatened to kill another person.

In this case, the prosecution failed to prove that Mr. Rotchford threatened to kill another person. The evidence showed that he had homicidal thoughts, which disturbed him greatly. RP 28-65. He confessed these thoughts to his probation officer (as she had requested). RP 32-36. Although he admitted *wanting* to kill “mental health,” he did not ever say that he *intended* or *planned* to kill anyone. RP 28-65. Under these circumstances, Mr. Rotchford did not “communicate, directly or indirectly the intent... [t]o cause bodily injury,” as required under RCW 9A.46.020.

It is not a crime to have disturbing thoughts or feelings; nor is it a crime to confess to having such feelings. In the absence of testimony that Mr. Rotchford said he intended to kill someone, the evidence was insufficient to prove felony harassment. RCW 9A.46.020; RCW 9A.04.110(27). Accordingly, Mr. Rotchford’s conviction must be reversed and the case dismissed with prejudice. *Smalis, supra*.

- D. The prosecution failed to prove that Mr. Rotchford's words or conduct placed another person in reasonable fear that a threat to kill would be carried out.

The evidence was insufficient for conviction even if Mr.

Rotchford's statements are construed as threats. First, the thrust of his communication with his probation officer was that he was disturbed by his homicidal thoughts, not that he intended to act on them. Second, his statements were accompanied by a request to be taken into custody, and he was immediately taken into custody. RP 28-65.

Mr. Rotchford's words and conduct would not place anyone in reasonable fear that he would attempt to carry out his "threat." RCW 9A.46.020. Instead, Mr. Rotchford's words and actions were those of a person dealing responsibly with an acute mental health problem.

The evidence was insufficient to prove that Mr. Rotchford's words and conduct placed another person in reasonable fear, as required by the statute. RCW 9A.46.020. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *Smalis, supra.*

II. THE TRIAL COURT VIOLATED MR. ROTCHFORD'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL BY FAILING TO INQUIRE WHEN MR. ROTCHFORD REQUESTED THE APPOINTMENT OF NEW COUNSEL.

A. Standard of Review.

A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248 -1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

B. Mr. Rotchford was guaranteed the right to conflict-free 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.¹ The state constitution includes a similar guarantee. Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)). Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *Cross*, at 607. To compel an accused to ““undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.”” *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979), quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970).

¹ 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)

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, at 607-610; *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). An adequate inquiry must include a full airing of the concerns and a meaningful evaluation of the conflict by the trial court. *Id.* at 610. The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’” *Id.* at 776-777 (citations omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.* at 777-778. The proper focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.* at 778-779.

C. The trial court failed to adequately inquire into the nature and extent of the conflict.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict. Mr. Rotchford requested the appointment of new counsel when he appeared in court on August 14, 2009. RP 3-8; Motion to Withdraw as Counsel (filed 8/7/09), Supp. CP. He complained that his attorney was not representing him “accurately.”

RP 3. Before giving Mr. Rotchford a chance to explain himself, the judge told him he couldn't have a new attorney if his complaint was

I don't like the way Mr. Charlton is doing something. I don't think he's doing the job he's supposed to. I wanted him to talk to somebody, he didn't talk to them. Those are not reasons to disqualify or appoint different counsel.

RP 4.

When Mr. Rotchford complained that his attorney had "said things that I didn't say, in court," the court responded: "Yeah, those are the kind of things I don't want to hear." RP 4-5. When Mr. Rotchford said that he was "uncomfortable" because of ideological differences between himself and his attorney, the judge did not ask about the extent of the discomfort.

RP 3-4.

Instead of inquiring into the specifics of Mr. Rotchford's complaints and the extent of his discomfort, the judge erroneously discouraged him from explaining further.² By telling Mr. Rotchford "[t]hose are not reasons to disqualify or appoint different counsel," and "those are the kind of things I don't want to hear," the judge discouraged

² Contrary to the court's assertion that certain complaints "are not reasons to disqualify or appoint different counsel," complaints of the sort described by the judge might be based on specific facts that show ineffective assistance or a complete breakdown of communication. *See, e.g., State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (failure to investigate constitutes ineffective assistance); *Cross* at 611 (a violation of constitutional rights occurs when a "disagreement about strategy actually compromises the attorney's ability to provide adequate representation..."). Such problems would warrant the appointment of new counsel.

Mr. Rotchford from articulating the reasons he wanted his attorney removed from the case. Although the judge asked Mr. Rotchford to “advance” a reason for his dissatisfaction, and said “I’ll listen to your explanation,” these invitations occurred after he had already dissuaded Mr. Rotchford from raising his concerns.

Because the conflict was raised early in the proceedings, and because the trial court failed to adequately inquire, Mr. Rotchford was denied the effective assistance of counsel. *Cross, supra.* conviction must be reversed and the case remanded for a new trial. *Craven, supra.* In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott, at 1249-1250* (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

III. MR. ROTCHFORD’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 (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.³ 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.⁴

- 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

³ 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).

⁴ 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*.

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... 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.

...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. 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.

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. Rotchford.

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." *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. Rotchford'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.⁵

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

Mr. Rotchford's written waiver did not make any reference to his right to participate in selecting jurors, his right to jury of twelve, his right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and his right to a unanimous verdict. Waiver of Jury Trial, Supp. CP. The court's colloquy addressed only some of the rights missing from the written waiver: the right to a jury of twelve, and the right to proof beyond a reasonable doubt. *See* RP 13. Mr. Rotchford was not informed that he could participate in the selection of jurors, that the jury would be required to presume him innocent, and that he could only be

⁵ 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.

convicted upon a unanimous verdict. Waiver of Jury Trial, Supp. CP; RP
13.

In the absence of an affirmative showing that he understood these rights, Mr. Rotchford'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.

CONCLUSION

For the foregoing reasons, Mr. Rotchford's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded to the superior court for a new trial. If the conviction is not reversed, the case must be remanded for a hearing to determine the extent of the conflict between Mr. Rotchford and his attorney.

Respectfully submitted on June 14, 2010.

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CERTIFICATE OF MAILING

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

Fraser Rotchford
333 Benedict St.
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and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368

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

All postage prepaid, on June 14, 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 14, 2010.



Jodi R. Backlund, WSBA No. 22917
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