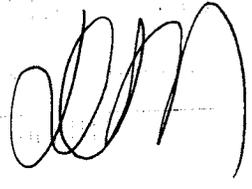


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No. 40792-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Scott Gueller,

Appellant.

Grays Harbor County Superior Court Cause No. 08-1-00529-4

The Honorable Judge Gordon Godfrey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Gueller's guilty plea to Count II was entered in violation of his Fourteenth Amendment right to due process.
2. The trial court erred by accepting Mr. Gueller's guilty plea to Count II.
3. The record does not affirmatively establish that Mr. Gueller's guilty plea to Count II (and to the associated aggravating factor) was knowing, intelligent, and voluntary.
4. The record of the plea hearing does not establish a sufficient factual basis for a violation of RCW 21.20.010.
5. The record of the plea hearing does not show that Mr. Gueller understood the alleged facts and their relationship to RCW 21.20.010.
6. The record of the plea hearing does not set forth a sufficient factual basis to establish a major economic offense.
7. The record of the plea hearing does not show that Mr. Gueller understood the alleged facts and their relationship to RCW 9.94A.535(d).
8. The trial court erred by making the following oral finding:
I'll find that you've knowingly, intelligently and voluntarily made this plea, that you understand the charges and the consequences of your pleas, that there is a factual basis for your plea on each count and for your plea to the aggravating circumstance and that you are in fact guilty on both counts and on the one count did commit the aggravating circumstances alleged and pled to at this time.
RP 9-10.
9. The trial court erred by entering the findings written on p. 9 of the Defendant's Statement on Plea of Guilty.
10. The trial court erred by adopting Finding of Fact No. 1.
11. The trial court erred by adopting Finding of Fact No. 2.
12. The trial court erred by adopting Conclusion of Law No. 1.

13. The trial court erred by adopting Conclusion of Law No. 2.
14. The trial court erred by adopting Conclusion of Law No. 3.
15. The trial court erred by adopting Conclusion of Law No. 4.
16. The trial court erred by adopting Conclusion of Law No. 5.
17. Mr. Gueller's guilty pleas were entered in violation of his state constitutional right to a jury trial.
18. The 120-month exceptional sentence on Count II was clearly excessive.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The record of a plea hearing must affirmatively establish the accused person's understanding of the law, the facts, and the relationship between the two. The record of Mr. Gueller's plea hearing does not establish a factual basis for his plea to Count II, his understanding of the factual basis, or his understanding of the relationship between the law and the facts. Was Mr. Gueller's guilty plea to Count II entered in violation of his Fourteenth Amendment right to due process?
2. The record of a plea hearing must affirmatively establish that a guilty plea to an aggravating factor was entered knowingly, intelligently, and voluntarily. The record of Mr. Gueller's plea hearing does not include a factual basis to establish a major economic offense, does not show Mr. Gueller's understanding of the factual basis, and does not show that he understood the relationship between the alleged facts and the law. Was Mr. Gueller's guilty plea to the aggravating factor in Count II entered in violation of his Fourteenth Amendment right to due process?
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. Gueller understood his

right, under the state constitution, to participate in the selection of jurors, to a fair and impartial jury, to a jury of twelve, and to a unanimous verdict. In the absence of such an affirmative showing, did Mr. Gueller's guilty plea violate his state constitutional right to a jury trial?

4. An exceptional sentence may be reversed if it is "clearly excessive." In this case, Mr. Gueller's standard range on Count II was 1-3 months in custody, but the court imposed a 120-month exceptional sentence, consecutive to the year imposed on Count One. Must his sentence be vacated because it is "clearly excessive?"

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Scott Gueller agreed to make investments for an acquaintance using his Ameritrade account. He received a total of \$90,000, all of which was lost in the economic downturn. Motion and Declaration for Warrant of Arrest, Supp. CP.

He was charged with and pled guilty to Unlawful Offer, Sale or Purchase of Securities.¹ CP 1. On his plea statement, he wrote: "On July 1, 2007 to July 30, 2007, I borrowed money with the intent of 'day-trading' securities in connection with the offer, sale or purchase of any security and indirectly did willfully engage in a practice which would

¹ The state also charged Mr. Gueller with Unlawful Issuance of Bank Checks for an unrelated incident. CP 41-42. He pled guilty to that charge, and it is not the subject of this appeal. Statement of Defendant on Plea of Guilty, Supp. CP.

operate as a fraud or deceit upon any person. I further agree that this is a major economic offense.” P. 8, Statement of Defendant on Plea of Guilty, Supp. CP. After reviewing the plea form with Mr. Gueller, the court made the following oral finding:

I’ll find that you’ve knowingly, intelligently and voluntarily made this plea, that you understand the charges and the consequences of your pleas, that there is a factual basis for your plea on each count and for your plea to the aggravating circumstance and that you are in fact guilty on both counts and on the one count did commit the aggravating circumstances alleged and pled to at this time.
RP 9-10.

At sentencing, the state and defense made a joint recommendation of an exceptional sentence of 18 months in prison.² RP 12-14. The court sentenced Mr. Gueller to 120 months in prison (the statutory maximum), consecutive to twelve months imposed on a companion charge. The court later entered written findings and conclusions to support the exceptional sentence. CP 3-12, 15-17; RP 16-17.

Mr. Gueller timely appealed. CP 13-14.

² The standard range is one to three months. Statement of Defendant on Plea of Guilty, Supp. CP.

ARGUMENT

I. MR. GUELLER'S CONVICTION AND EXCEPTIONAL SENTENCE ON COUNT II WERE ENTERED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

A. Standard of Review

The voluntariness of a plea may be raised for the first time on appeal. *State v. Mendoza*, 157 Wash.2d 582, 589, 141 P.3d 49 (2006).

The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996).

B. The record of a guilty plea hearing must affirmatively establish an accused person's understanding of the law, the facts, and the relationship between the two.

Due process requires an affirmative showing that an accused's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *In re Isadore*, 151 Wash.2d 294, 88 P.3d 390 (2004); *Ross*, at 284.

In order for a guilty plea to satisfy the requirements of due process, the accused must understand the law, the facts, and the relationship between the two:

A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements... Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty plea.

State v. R.L.D., 132 Wash.App. 699, 706, 133 P.3d 505 (2006); *see also State v. A.N.J.*, 168 Wash.2d 91, 118, 225 P.3d 956 (2010). The factual basis for the plea must be developed on the record at the time the plea is taken. *State v. S.M.*, 100 Wash. App. 401, 415, 996 P.2d 1111 (2000). Failure to sufficiently develop facts on the record at the time of the plea requires vacation of the conviction and dismissal of the charge. *R.L.D.*, at 706.

- C. The record of the plea hearing does not set forth a sufficient factual basis to support a violation of RCW 21.20.010, does not show Mr. Gueller's understanding of the alleged facts, and does not prove that he understood the relationship between the alleged facts and RCW 21.20.010.

Under RCW 21.20.010, “[i]t is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly... To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” These elements were incorporated into Mr. Gueller's plea form. P. 1, Statement of Defendant on Plea of Guilty, Supp. CP. His plea form also purports to state “what [he] did in [his] own words that makes [him] guilty of this crime.” P. 8, Statement of Defendant on Plea of Guilty, Supp. CP. His written statement regarding Count II begins “On July 1, 2007 to July 30, 2007 I borrowed money with the intent of ‘day trading’ securities...” From there, it goes on to parrot the language of the statute, without further

explanation of the facts or their relationship to the elements of the offense. P. 8, Statement of Defendant on Plea of Guilty, Supp. CP. Nor does the record of his colloquy with the judge establish any additional facts, or his understanding of their relationship to the elements of the offense. RP 7-8.

Borrowing money with the intent to “day trade” securities is not, by itself, a violation of RCW 21.20.010. Neither the plea form nor the colloquy outlines any particular conduct on Mr. Gueller’s part that could be described as an “act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” RCW 21.20.010. Because the record does not establish sufficient facts and does not show Mr. Gueller’s understanding of the relationship between the facts and the law, it is insufficient to support his guilty plea to Count II.

Mr. Gueller’s plea to Count II was entered in violation of his Fourteenth Amendment right to due process. *R.L.D., at 706; S.M., at 415.* Accordingly, his conviction must be reversed and the case remanded to allow him to withdraw his plea. *Id.*

- D. The record of the plea hearing does not set forth sufficient facts to establish a major economic offense, does not show Mr. Gueller’s understanding of the alleged facts, and does not prove that he understood the relationship between the alleged facts and RCW 9.94A.535.

To establish a “major economic offense” in support of an exceptional sentence, the prosecution must prove one of the following:

- (i) The current offense involved multiple victims or multiple incidents per victim;
- (ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;
- (iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
- (iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(d).

In this case, Mr. Gueller wrote in his plea form “I further agree that this is a major economic offense.” P. 8, Statement of Defendant on Plea of Guilty, Supp. CP. However, neither the plea form nor his colloquy with the judge established a factual basis for this aggravating factor. Statement of Defendant on Plea of Guilty, Supp. CP; RP 8.

As with the substantive offense, the record of the plea hearing does not include a sufficient factual basis for the aggravating factor. Nor does it establish that Mr. Gueller understood the factual basis, or its relationship to RCW 9.94A.535. Accordingly, the exceptional sentence must be vacated. *R.L.D.*, at 706; *S.M.*, at 415.

II. MR. GUELLER’S GUILTY PLEAS WERE ENTERED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A. Standard of Review.

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

- B. The state constitutional right to a jury trial is broader than its federal counterpart.

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 Wash.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

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 Wash.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*.

- C. 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 Wash.2d 54, 720 P.2d 808 (1986). Under *Gunwall*, waiver of the state constitutional right to a jury trial is valid only if the record shows that the defendant is fully aware of the meaning of the state constitutional right. This includes (among other things) an understanding of the right to participate in the selection of jurors, the right to a fair and impartial jury, the right to a jury of twelve, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.

1. The language of the state constitution.

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

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

The strong, simple, direct, and mandatory language (“shall remain inviolate”) implies a high level of protection, and, in fact, the Court has noted that the language of the provision requires strict attention to the

rights of individuals. In *Sofie v. Fibreboard Corp.*, the Supreme Court clarified the meaning of the term “inviolate:”

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

Sofie v. Fibreboard Corp., 112 Wash.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 Wash.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wash.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... Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived ... 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....

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.

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?... “[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,... 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). 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.^{5,6}

Prior to the adoption of our 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

⁵ Instead, they adopted the language of Article I, Section 21, which allowed the legislature to permit waiver only in civil cases.

⁶ 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.

Washington on whether or not a defendant could waive her or his right to a jury trial. See *State v. Ellis*, 22 Wash. 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. Gueller.

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 Wash.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 Wash. 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 Wash. 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 Wash.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 Wash.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 Wash.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, Sections 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. Gueller'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.⁷

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

Mr. Gueller's statement on plea of guilty referred to a "speedy and public trial by an impartial jury." Statement of Defendant on Plea of Guilty, Supp. CP. It did not make any reference to his right to participate in selecting jurors, his right to a fair and impartial jury, his right to a jury of twelve people, or his right to a unanimous verdict. Nor did the court's colloquy with Mr. Gueller address these rights. *See* RP 4-9.

In the absence of an affirmative showing that Mr. Gueller understood his state constitutional right to a jury trial, his guilty plea is invalid. The case must be remanded to the trial court to allow him to withdraw his plea.

⁷ 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 Wash. 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.

III. MR. GUELLER'S 120-MONTH EXCEPTIONAL SENTENCE WAS CLEARLY EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

A. Standard of Review

The length of an exceptional sentence is reviewed for an abuse of discretion. *State v. Delarosa-Flores*, 59 Wash.App. 514, 520, 799 P.2d 736 (1990). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes relying on unsupported facts, taking a view that no reasonable person would take, applying the wrong legal standard, or ruling based on an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

B. The ten-year sentence imposed on Count II was clearly excessive.

Under RCW 9.94A.585, a reviewing court may reverse a sentence outside the standard range if “the sentence imposed was clearly excessive.” RCW 9.94A.585(4)(b). Mr. Gueller’s 120-month sentence meets this requirement.

First, it was undisputed that Mr. Gueller had no criminal history. Plea Agreement, p. 2, Supp. CP. His standard range on Count II was 1-3 months. P. 3, Statement of Defendant on Plea of Guilty, Supp. CP.

Second, the sentence imposed was 40 times the high end of the standard range. Nothing in the record supports imposition of a sentence

this high. *See, e.g., Delarosa-Flores, at 520* (“The aggravating factors cited above are not so ‘unusually compelling’ or ‘severe’ as to justify a sentence approximately six times the standard range.”)

Under these circumstances, imposition of a 120-month sentence (consecutive to the one year sentence imposed in Count I) was clearly excessive, even in light of the stipulated aggravating factor. Accordingly, the court’s sentence on Count II must be vacated and the case remanded for a new sentencing hearing. RCW 9.94A.585(4)(b).

CONCLUSION

For the foregoing reasons, Mr. Gueller’s conviction must be reversed and the case remanded to the Superior Court for trial. In the alternative, if the conviction is not reversed, his exceptional sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on November 12, 2010.

BACKLUND AND MISTRY



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Appendix:
Verbatim Report of Proceedings

P R O C E E D I N G S

- October 19, 2009 -

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5 THE COURT: State versus Gueller. Scott Gueller.
6 Gueller.

7 MR. KUPKA: That matter's ready.

8 THE COURT: All right. This is on for pretrial?

9 MR. KUPKA: It is, Your Honor. My understanding is the
10 State will be filing an amended information. At that
11 point, if the Court accepts the filing of the amendment,
12 Mr. Gueller will plead guilty to two counts.

13 MS. SVOBODA: That's correct. Your Honor, in the
14 original information Mr. Gueller, it was alleged unlawful
15 issuance of a bank check, the amount being over \$250.
16 The second count being unlawful offer or sale of
17 securities with aggravating factor, that it was a major
18 economic offense. The only - the only amendment is just
19 in Count 1, the State is just not going to allege the
20 amount of the unlawful issuance of a bank check, making
21 it a gross misdemeanor. Count 2 is really the meat of
22 the information with the major economic offense.

23 Mr. Gueller has no felony history. He's agreed to
24 pay restitution to a third uncharged victim and that's
25 what the State feels is most important in this case. So

1 I'm asking the Court to accept the amendment.

2 THE COURT: All right. I take it --

3 MR. KUPKA: There's no objection.

4 THE COURT: -- you agree? I will sign the order
5 allowing the amendment.

6 Do you want to have me go over it with him or are
7 you going to waive reading?

8 MR. KUPKA: We'll waive reading, Your Honor. And if I
9 may approach.

10 THE COURT: Okay.

11 MR. KUPKA: I'll hand forward a plea agreement and
12 statement of defendant on plea of guilty.

13 THE COURT: Please state your name.

14 THE DEFENDANT: Scott Gueller.

15 THE COURT: And I take it that you read and write well?

16 THE DEFENDANT: Yes, sir, I do.

17 THE COURT: Did you carefully read this plea agreement?

18 THE DEFENDANT: Yes, I did.

19 THE COURT: Did you understand everything in it?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And you discussed it with your attorney?

22 THE DEFENDANT: I did, sir.

23 THE COURT: And you do understand that the
24 recommendation by the prosecutor is 180 days with the
25 remainder suspended for two years; and on Count 2, 18

1 months in prison?

2 THE DEFENDANT: Yes, Your Honor.

3 THE COURT: Do you also understand that the - was that
4 365 days with 180 - all but 180 --

5 MS. SVOBODA: Yes, Your Honor. That would be on
6 Count 1.

7 THE COURT: Okay. You understand that the top of the
8 range on Count 1 is 365 days in jail?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And the top of the range on Count 2 is
11 actually three months, but with the aggravating factor
12 that you're agreeing to that the Court could sentence you
13 up to the statutory maximum, which would be ten years in
14 prison?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: And you do understand that even though the
17 State is recommending 18 months on Count 2, the Court
18 could give you as much as ten years in prison because the
19 Court isn't bound by the recommendation of the
20 prosecutor?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: You understand all of the other terms and
23 conditions of the agreement?

24 THE DEFENDANT: Yes, Your Honor.

25 THE COURT: You did sign this plea agreement after you

1 carefully read it and understood it?

2 THE DEFENDANT: I did, Your Honor.

3 THE COURT: I find that it is consistent with the
4 interest of justice and prosecutorial standards.

5 And I - I guess regarding the plea agreement you
6 agree to the restitution to Paradise Decks and Awnings?

7 THE DEFENDANT: Yes.

8 THE COURT: And the other two amounts of restitution to
9 the Dodds and Kooyman are to be determined?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: All right. And did you carefully read the
12 statement of defendant on plea of guilty?

13 THE DEFENDANT: I did, Your Honor.

14 THE COURT: And did you understand everything in the
15 statement?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And you discussed it with your attorney?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you have any questions of me regarding
20 the statement?

21 THE DEFENDANT: No, sir.

22 THE COURT: Did you pay close attention to your
23 constitutional rights on the bottom of the front page and
24 going on to the top of the second page?

25 THE DEFENDANT: Yes, Your Honor, I did.

1 THE COURT: Did you understand those rights and the
2 fact that you give up those rights when you plead guilty?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: All right. How do you plea then to Count 1
5 in the amended information, unlawful issuance of bank
6 checks?

7 THE DEFENDANT: Guilty, Your Honor.

8 THE COURT: And did you on or about July 24, 2007 in
9 Grays Harbor County, Washington with intent to defraud,
10 did make, draw, utter, or deliver to another person a
11 check or draft, to-wit a check number 4159, on a bank or
12 other depository for the payment of money, knowing at the
13 time of such drawing or delivery that you did not have
14 sufficient funds in said bank and other depository to
15 meet said check or draft in full upon its presentation?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: And how do you plead to Count 2 in the
18 amended information, unlawful offer, sale or purchase of
19 securities?

20 THE DEFENDANT: Guilty, Your Honor.

21 THE COURT: Did you on or about or between July 1st,
22 the 2007 and July 30th, 2007 in Grays Harbor County,
23 Washington in connection with the offer, sale or purchase
24 of any security, directly or indirectly, number one, did
25 willfully employ any device, scheme or artifice to

1 defraud and/or, two, willfully make any untrue statement
2 of a material fact or to admit to state a material fact
3 necessary in order to make the statements made, in light
4 of the circumstances under which they were made, not
5 mislead - not misleading; is that correct?

6 MR. KUPKA: I believe that's what the statute says,
7 Judge.

8 THE COURT: Okay. And/or three, did willfully engage
9 in any act, practice, or course of business which
10 operates or would operate as a fraud or deceit upon any
11 person?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: All right. Has anyone forced you to plead
14 guilty on either of these counts?

15 THE DEFENDANT: No, sir.

16 THE COURT: Any --

17 MS. SVOBODA: Your Honor? I'm sorry, if I may
18 interrupt. I believe he also needs an admission on the
19 allegation that he's going to be --

20 THE COURT: Oh, yes. I'm sorry.

21 And do you also admit to the aggravating
22 circumstance as alleged in the amended information that
23 the current offense was a major economic offense and/or a
24 series of offenses as defined in RCW 9.94-A.535
25 subsection (3)(d)(i-ii)?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you understand that the State will be
3 asking for an exceptional sentence?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Has anyone forced you to plead guilty?

6 THE DEFENDANT: No, sir.

7 THE COURT: Any promises made other than what's in the
8 plea agreement?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: And do you understand that you may not
11 possess, own or have under your control any firearm
12 unless your right to do so is restored by a court of
13 record?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And you do understand that the Court could
16 consider what's called a first time offender status, but
17 that's an option for the Court, the Court doesn't have to
18 give you that option, which would be up to the 90 days?

19 THE DEFENDANT: Yes, Your Honor.

20 THE COURT: And did you sign the statement on plea of
21 guilty after you carefully read it and understood
22 everything in it?

23 THE DEFENDANT: Yes, Your Honor, I did.

24 THE COURT: I'll find that you've knowingly,
25 intelligently and voluntarily made this plea, that you

1 understand the charges and the consequences of your
2 pleas, that there is a factual basis for your plea on
3 each count and for your plea to the aggravating
4 circumstance and that you are in fact guilty on both
5 counts and on the one count did commit the aggravating
6 circumstances alleged and pled to at this time.

7 So we'll need to set a time for sentencing.

8 MR. KUPKA: Your Honor, we're looking at - right now
9 Mr. Gueller will waive his right to be sentenced within
10 40 days. We're asking that sentencing be set over to
11 Monday, December 14th at 8:30.

12 Before we go to sentencing, the intent of
13 Mr. Gueller and the parties is that a substantial step
14 towards payment of that restitution will be paid and we'd
15 like to present that opportunity to the Court.

16 THE COURT: What's the State's position on that?

17 MS. SVOBODA: It's agreed, Your Honor. Obviously the
18 restitution is - it's going to be significant in this
19 case and - and Mr. Gueller right now is fully employed.
20 So as long as he's making steady progress towards that
21 the State doesn't object to giving him a little bit
22 longer than usual for sentencing.

23 That date in December, I'm not even sure if that's
24 outside - it's close to the 40 court days, so that's not
25 a huge leniency. And if at that point if he hasn't made

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any progress, he can just be sentenced and do whatever time is ordered.

THE COURT: All right. Do you agree to waive speedy sentencing in case that goes beyond the 40 days?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: All right. I'll - I'll allow it and set it for 8:30 on December 14th.

MR. KUPKA: Thank you, Judge.

THE DEFENDANT: Thank you, Judge.

(End of Proceedings.)

P R O C E E D I N G S

- April 26, 2010 -

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5 THE COURT: State versus Scott Gueller.

6 MR. KUPKA: That matter's ready.

7 THE COURT: Let's go.

8 MS. SVOBODA: Thank you, Your Honor. This comes on for
9 sentencing. Mr. Gueller pled guilty to unlawful issuance
10 of a bank check, a gross misdemeanor, and one count of
11 securities fraud, a Class B felony.

12 There are three families that were victimized in
13 this case, one was an uncharged victim that Mr. Gueller
14 agreed to pay restitution to. But in the end he took a
15 little over \$120,000 from three people - from three
16 families, two of which he sort of ingratiated himself,
17 one through a familial connection, one because they
18 trusted him to invest the money on behalf of their
19 children and get a good return.

20 Mr. Gueller did plead guilty to this and admitted it
21 was a major economic offense, therefore he is eligible
22 for an exceptional sentence on Count 2. The State is
23 asking that the Court impose 365 days with all but 180
24 days suspended for two years on Count 1, that the Court
25 send Mr. Gueller to prison for 18 months on Count 2, the

1 costs and assessments and restitution as requested in the
2 statement of prosecutor.

3 The Dodds are present in court today. They
4 submitted a letter which should be on the file. The
5 Kooyman-Harpers have had to leave the state because of
6 financial problems and so they are not able to be here
7 today. I'd ask the Court to consider all of the facts
8 presented in this case and that it does merit an
9 exceptional sentence and that it merits prison time.

10 I believe Mr. Gueller is going to make a request for
11 some type of work release. However, I point out to the
12 Court that this has been - the sentencing has been
13 continued in this case since October to give Mr. Gueller
14 a chance to put money away and in trust towards
15 restitution. He told the Court he was going to be
16 working. And to my knowledge no monies have been paid.
17 And, in fact, I got - received a call from Mr. Gueller's
18 bank indicating they were making a suspicious transaction
19 report because he was wiring money out of his account.
20 It was certainly was not to the Clerk of Court. And
21 other than that I will defer to the Court.

22 MR. KUPKA: Your Honor, Mr. Gueller, apologizes to the
23 Court, as well as to the families that were involved in
24 this matter. He made promises to these families that he
25 would invest these funds in his own personal Ameritrade

1 account and provide principal and interest with returns.
2 He had hoped by doing so he would be able to profit
3 himself from the appreciation of - of these funds and
4 stocks. Unfortunately, at the time, the market had
5 collapsed and when timing is everything, he didn't have
6 it, very good timing at all. Mr. Gueller did this
7 against bank regulations and state laws. He's not a
8 licensed stock, bond or commodities broker and with -
9 licensed with any institution.

10 The Court was gracious enough to continue sentencing
11 to see if he could pay for restitution and work during
12 that time. He's struggled trying to find employment.
13 He's now gained employment with Aberdeen Honda. That is
14 his request, that whatever sentence the Court imposes,
15 that the Court allow him to work so that he's able to pay
16 restitution in this case in full to the victims.

17 THE COURT: What would you like to say?

18 THE DEFENDANT: Pardon me?

19 THE COURT: What would you like to say?

20 THE DEFENDANT: First of all, I would like to say that
21 I'm sorry for, Number 1, wasting the Court's time.
22 Number two, I'd like to apologize to the people that I
23 invested for. I - they were friends of mine. It was not
24 my intention to cheat anybody out of any money. At one
25 point the wanted me to open an account for them and trade

1 the money in their account, but I told them that was
2 against the law I couldn't do that because I wasn't a
3 licensed broker. So we came up with an idea to put the
4 money in my account and it turns out that that wasn't any
5 better. I - I - I hate losing their friendship. I hate
6 losing their trust. I didn't raise my sons that way.
7 And I - you know, I'm not very happy about it. I'm not
8 very happy with the way that things turned out.

9 Ms. Svoboda was good enough to do a continuance when
10 we came in for sentencing back in December. And the
11 economy hasn't been very good. I've been, you know,
12 struggling to find a job for the last year. I've worked
13 less than four months in the last year. I know I can do
14 this. I know I can pay these people back. And we'll
15 probably never be friends again. They shouldn't have to
16 suffer because of me. I - I have - I have work and I've
17 got some great prospects on the horizon.

18 I would ask that if - if nothing else, Your Honor,
19 if - if you just give me the chance to make it right, I
20 can make it right. I know I can do it. I know it's a
21 lot of money, but I have every intention of not just
22 paying it all back but being able to get my - my right to
23 vote back, my right to go hunting again. You know,
24 that - those things are important to me and I will do
25 everything I can to make it right.

1 THE COURT: This is a property crime, so the old 50
2 percent rule applies, doesn't it?

3 MS. SVOBODA: Most likely, Your Honor.

4 THE COURT: Right?

5 MR. KUPKA: I believe you're right, Your Honor.

6 THE COURT: Good. We all understand that. You know, I
7 was - it was very curious when I read this thing.

8 One other question, are they consecutive or
9 concurrent? Do I have to give it one way or the other?

10 MS. SVOBODA: The Court has discretion to run them
11 consecutive and the Court has discretion up to the
12 statutory maximum on both counts.

13 THE COURT: Mm-hmm. I never liked the SRA. You know,
14 we bring these guys in here and - all due respect, we do
15 all this stuff, the drug addict, drug addict, drug
16 addict, drug addict. We come in and do three months,
17 four months, two months, six months, 18 months. You go
18 18 months, you get out in nine months. I mean it's a
19 joke. It's a joke. And then I look at this crime right
20 here, you know. You ripped off on their grandkids. Can
21 you imagine saving your whole life to send your grandkid
22 to college and some guy - and guess what, the kid is not
23 going to college. Not only once, you did it numerous
24 times.

25 You can be as sorry as you want. How sorry do you

1 think they are if you've got to leave the state because
2 of financial things? You go down, you sign a bank - on a
3 loan and you are 70 some years old and lose everything
4 you've got. And we want to come in and get work release
5 or go I promise, I promise. You know how many times I've
6 heard "I promise" in this job? If I had 50 cents for
7 every time I heard that I would be in a condo in Hawaii,
8 free of charge, golfing everyday.

9 And this is one of the few times in my opinion I get
10 to do what I want to do. And I'm not bound by the SRA
11 junk. The thing I don't like is the 50 percent rule. I
12 send you up there, so what I'm saying to you is like cut
13 it in half is what it boils down to. So go do ten years
14 and you owe me another year consecutive.

15 I'll tell you guys right now, if I could do this to
16 half you guys I would do it. Where I come from, man, I
17 stick my hand in boiling water I don't do it twice. I
18 learn the first time.

19 Now, go do your time. Thank you.

20
21 (End of Proceedings.)
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CERTIFICATE OF MAILING

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

Scott Gueller, DOC #906463
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

and to:

Grays Harbor Prosecutor
102 W. Broadway, #102
Montesano, WA 98563

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

All postage prepaid, on November 12, 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 November 12, 2010.



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