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SUPREME COURT  
STATE OF WASHINGTON  
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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOHN E. MINES,

Petitioner.

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STATE OF WASHINGTON  
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**BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS**

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NORM MALENG  
King County Prosecuting Attorney  
DANIEL T. SATTERBERG  
Interim King County Prosecuting Attorney

JAMES M. WHISMAN  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>IDENTITY AND INTEREST OF AMICUS</u> .....	1
B. <u>INTRODUCTION</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	2
D. <u>ARGUMENT</u> .....	3
1. THE WASHINGTON CONSTITUTION DOES NOT REQUIRE A JURY TRIAL WHEN A COURT IMPOSES AN EXCEPTIONAL MINIMUM SENTENCE BASED ON AGGRAVATING CIRCUMSTANCES.. ..	3
a. Text.....	4
b. Constitutional History and Pre-existing Law. ....	6
c. Other Considerations. ....	11
E. <u>CONCLUSION</u> .....	12

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,  
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 2

Blakely v. Washington, 542 U.S. 296,  
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 2, 10, 12, 13

Washington State:

In re Sinka, 92 Wn.2d 555,  
599 P.2d 1275 (1979)..... 10

State v. Ammons, 105 Wn.2d 175,  
713 P.2d 719, cert. denied,  
479 U.S. 930, 107 S. Ct. 398,  
93 L. Ed. 2d 351 (1986)..... 6

State v. Evans, 154 Wn.2d 438,  
114 P.3d 627 (2005)..... 10, 11

State v. Fain, 94 Wn.2d 387,  
617 P.2d 720 (1980)..... 9

State v. Furth, 5 Wn.2d 1,  
104 P.2d 925 (1940)..... 11

State v. Gunwall, 106 Wn.2d 54,  
720 P.2d 808 (1986)..... 3, 4, 5, 11

State v. Mines, No. 21989-5-III, slip op.  
(Court of Appeals, filed June 9, 2005) ..... 2, 5

State v. Smith, 150 Wn.2d 135,  
75 P.3d 934 (2003)..... 4, 5, 6, 7, 8, 11

<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	6
---	---

Constitutional Provisions

Federal:

U.S. Const. amend. VI .....	5
U.S. Const. amend. VII .....	5

Washington State:

Const. art. 1, § 21.....	5
Const. art. 1, § 22.....	5, 6

Statutes

Washington State:

Code of 1881, chs. LXVI, et seq.....	8
Code of 1881, ch. LXVIII, § 35 -- 798.....	8
Code of 1881, chs. LXXXIX, §§ 1111-1136 .....	8
Laws of 1866, § 239.....	8
Laws of 1903, ch. 86 (Rem. Ball. Code, 2177-78).....	9
Laws of 1905, ch. 24, § 1 .....	9
RCW 9.92.060.....	9
RCW 9.94A.030 .....	6

RCW 9.94A.712 .....	2
RCW 9.95.....	10
RCW 9A.04.040 .....	6
Rem. Rev. Stat. § 2280 .....	9

Other Authorities

<u>Black's Law Dictionary, 974</u> (5th ed. 1979) .....	6
Annotation, <i>Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses committed by defendant</i> , 96 A.L.R.2d 768 (1964).....	11
David Boerner, <u>Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981, §§ 2.1- 2.2 (1985)</u> .....	10
Annotation, <i>Right of Court in Imposing Sentence to Consider Other Offenses Committed by Defendant, In Absence of Statute in that Regard</i> , 86 A.L.R. 832 (1933) .....	11
Annotation, <i>Right of Court to Hear Evidence for Purpose of Determining Sentence to be Imposed</i> , 77 A.L.R. 1211 (1932) .....	11

**A. IDENTITY AND INTEREST OF AMICUS**

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, which may significantly alter sentencing procedures that have been utilized in numerous cases over the course of state history.

**B. INTRODUCTION**

Washington courts have routinely permitted trial judges to consider a whole array of facts -- about the crime or about the defendant -- in deciding what sentence was appropriate. Indeed, under both determinate and indeterminate sentencing systems, judges decided factual issues like the issue here -- whether a crime was deliberately cruel -- in deciding what minimum sentence to impose. Never was it suggested that this practice violated the Washington constitution, nor is there anything in the text of the constitution that says only juries can make this decision. And, although Washington modified its sentencing procedures after

Apprendi v. New Jersey,<sup>1</sup> and Blakely v. Washington,<sup>2</sup> the new *federal* constitutional requirements did not create *state* constitutional rights.

**C. STATEMENT OF THE CASE**

As detailed in the briefs of the parties, Mines held a woman against her will in a van, and repeatedly raped her and beat her over a period of time. He was subsequently convicted of rape, kidnapping and assault. After finding that the crimes constituted deliberate cruelty, the trial judge imposed an exceptional aggravated sentence pursuant to RCW 9.94A.712, and raised the minimum term Mines would serve in prison.

Mines challenged the sentence on appeal and, after issuing an unpublished decision<sup>3</sup> and considering motions to reconsider and supplemental briefs, the Court of Appeals certified the case to this Court. Certification was accepted on September 12, 2007.

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<sup>1</sup> 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

<sup>2</sup> 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

<sup>3</sup> State v. Mines, No. 21989-5-III, slip op. (Court of Appeals, filed June 9, 2005).

**D. ARGUMENT**

Mines identifies two bases -- textual and historical -- for claiming the state constitution provides a right to jury trial on this sentencing issue. But neither the constitution's text nor Washington history support his argument that juries must decide sentencing facts. Mines' state constitutional argument should be rejected.

**1. THE WASHINGTON CONSTITUTION DOES NOT REQUIRE A JURY TRIAL WHEN A COURT IMPOSES AN EXCEPTIONAL MINIMUM SENTENCE BASED ON AGGRAVATING CIRCUMSTANCES.**

When determining whether the Washington Constitution affords greater protection of a right than the federal constitution, this Court considers six factors: (1) textual language, (2) differences between the texts, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court recently considered these Gunwall factors in rejecting a claim that the Washington constitution required a jury trial at sentencing before a defendant

could be found to be a persistent offender. State v. Smith, 150 Wn.2d 135, 149, 75 P.3d 934 (2003). The result in this case should be no different than the result in Smith.

a. Text.

First, the text of the Washington constitution does not expressly provide a jury trial as to factual issues that might influence a court to impose a higher minimum sentence. Thus, the first Gunwall factor does not support an independent interpretation of the state constitution. See Appendix A (Right to Jury Trial -- Constitutional Provisions).

Second, there is no material distinction between the texts of the federal and state constitutions as to whether factual issues that support an increase in the minimum sentence must be decided by a jury. In previous cases, this Court has observed that the right to jury trial is mentioned twice in the Washington Constitution, but only once in the federal constitution, indicating the "general importance" of that right to the Washington drafters. See State v. Smith, 150 Wn.2d at 151.

But, actually, the right to jury trial is mentioned three times in the federal constitution -- twice in reference to criminal matters --

and three times in the state constitution. Two of the references in the state constitution parallel the federal provisions, while the third state reference deals with a jury right in eminent domain cases. See Appendix A; Compare U.S. Const. Amends. VI (right to jury trial in criminal cases) and VII (right to jury trial in civil cases) with WA. CONST. Art. 1, § 22 (criminal) and WA. CONST. Art. 1, § 21 (civil). Thus, it is not correct to say, based simply on the number of times the right to jury is mentioned in the constitutional text, that the right was viewed as more important to Washingtonians than it was to the framers of the federal constitution. So, this Gunwall factor is not particularly illuminating with regard to this particular analysis. In any event, even if Mines were correct in reading the text, such minor textual differences "fail... to provide guidance as to the scope of th[e] jury trial] right." Smith, 150 Wn.2d at 152.

Further, "[b]y the plain language of article 1, section 22, [the jury trial] right only applies to trials for *offenses*, not to sentencing proceedings." Smith, 150 Wn.2d at 150. The "offenses" for which Mines was convicted were rape, kidnapping and assault. Mines, slip op. at 1. This Court has held under the Sentencing Reform Act (SRA) and the Persistent Offender Act (POAA) that recidivism is

not a separate offense, but a sentencing factor. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986); State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1996).

Moreover, an "offense" is understood throughout the criminal code to be a series of acts defined to constitute a crime. See e.g. RCW 9A.04.040(1) ("An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime"); RCW 9.94A.030 (an "offender" is a person who has committed a felony crime). See also Black's Law Dictionary, 974 (5th ed. 1979) (an offense is "... a breach of the criminal laws...a felony or a misdemeanor infringing public as distinguished from private rights, and punishable under the criminal laws"). Offenses and sentences are, thus, distinct concepts. By its plain language, the constitutional right to trial under article 1, section 22, applies only to "offenses."

b. Constitutional History and Pre-existing Law.

In Smith, the Court focused much of its analysis on the third and fourth factors - state constitutional and common law history and

preexisting state law.<sup>4</sup> The Court held that "in order to determine the scope of the jury trial right under the Washington Constitution, it must be analyzed in light of the Washington law that existed at the time of the adoption of our constitution." 150 Wn.2d at 153. The Court noted that "Washington specifically abolished the jury's role in sentencing by statute before the state constitution was adopted in 1889." 150 Wn.2d at 154. The Court also observed that the relevant law at the time provided that juries decided issues of fact in the indictment, not issues of fact in relation to sentencing. 150 Wn.2d at 155. The Court concluded:

Although the Gunwall analysis indicates that the right to a jury trial may be broader under article I, sections 21 and 22 than under the federal constitution, Smith has failed to provide sufficient evidence that this broader protection includes the right to a jury trial on the fact of prior convictions at sentencing. Historical evidence clearly demonstrates that in Washington in 1889, juries had no authority over sentencing, thus making it unlikely that the drafters of the state constitution meant to constitutionally protect such a right in article I, sections 21 and 22.

150 Wn.2d at 156. And the Court noted that the Washington legislature decided in 1866 that once a defendant is convicted, it is

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<sup>4</sup> The Court observed that the fifth factor, differences in structure of the constitutions, was not helpful in resolving the issue. 150 Wn.2d at 152. And the Court held that, under the sixth factor, providing jury trials for adult defendants was a matter of particular local concern, but that determination did not mean a jury trial was required in a particular instance. 150 Wn.2d at 152.

the judge, not the jury, who should set punishment. Smith, at 154 (citing Laws of 1866, § 239 ("After the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted")). No other Washington statute provided a role for juries on sentencing questions. See generally, Code of 1881, Chapters LXVI et seq. (An Act Relative to Crimes and Punishments and Proceedings in Criminal Cases); Code of 1881, Chapters LXXXIX, §§ 1111-1136, Judgments, Fines and Executions.

Thus, it is clear that in 1889, the jury's role ended upon returning its verdict as to the charged offense. After that, the judge had broad discretion to impose sentence within a wide statutory range, based on the judge's perception of the facts. See e.g., Code of 1881, Ch. LXVIII, § 35 -- 798 ("Any person convicted of manslaughter shall be punished by imprisonment in the penitentiary, not less than one year nor more than twenty years...").

For the 37 years between 1866 and 1903, which includes the years surrounding the drafting and adoption of our constitution, the law of the state of Washington did not provide a role for juries in sentencing. Thus, the drafters of Washington's constitution would

have arrived at the constitutional convention knowing that the jury's role ended when it delivered a verdict on the charged crime.

Not until 1903, 14 years after the constitution was adopted, did the Washington Legislature establish a role for juries in sentencing. In that year, the Legislature enacted Washington's first habitual offender statute. Laws of 1903, Ch. 86 (Rem. Ball. Code, 2177-78). That statute provided increased penalties upon proof that a defendant had previously been convicted of felonies. The statute was entitled, "AN ACT fixing the penalty for persons convicted a second and third time of a felony and providing a mode of procedure in such cases." A procedure was "provided" in the Act because, before 1903, no sentencing jury was authorized under Washington law.

Practice and procedure in the remainder of the 20<sup>th</sup> century confirms the view that juries need not decide sentencing facts. For instance, under indeterminate sentencing schemes, judges and administrative agencies decided a whole array of factual matters that had a substantial impact on the length of the defendant's sentence. See RCW 9.92.060 (providing for indeterminate sentences); Laws 1905, ch. 24, § 1; RRS § 2280; State v. Fain, 94 Wn.2d 387, 394-95, 617 P.2d 720 (1980)(noting that the parole

board is vested with authority to set minimum terms and retains jurisdiction, post-release, throughout the offender's natural life). See also Chapter 9.95, RCW (creating, inter alia, the Indeterminate Sentence Review Board); David Boerner, Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981, §§ 2.1- 2.2 (1985) (discussing Washington's sentencing history). Indeed, the Parole Board had considerable discretion in setting a minimum term, taking into account the facts of the crime and other information about the defendant. In re Sinka, 92 Wn.2d 555, 559-61, 599 P.2d 1275 (1979). Under Mines's rationale, this practice violated the Washington State Constitution; under the Respondent's interpretation, it did not.

Moreover, most recently, in State v. Evans, 154 Wn.2d 438, 446-48, 114 P.3d 627 (2005), this Court recognized that traditionally judges had more discretion in considering facts when setting the appropriate sentence and that Blakely represented a *new rule of law*:

At common law, after a trial of the facts on the merits by a jury, sentencing was largely up to the sound discretion of the trial judge. Many factors considered by the sentencing judge were not traditionally subject

to the right of trial by jury. But sentencing procedures have changed considerably over the years.

154 Wn.2d at 446 (internal citations omitted).

Finally, the right of judges to decide sentencing facts is hardly unique to Washington. See Annotation, *Right of Court to Hear Evidence for Purpose of Determining Sentence to be Imposed*, 77 A.L.R. 1211 (1932); Annotation, *Right of Court in Imposing Sentence to Consider Other Offenses Committed by Defendant, In Absence of Statute in that Regard*, 86 A.L.R. 832 (1933), *superseded by*, Annotation, *Court's Right, in Imposing Sentence, to Hear Evidence of, or to Consider, Other Offenses committed by defendant*, 96 A.L.R.2d 768 (1964).

Thus, analysis of the Gunwall factors does not support Mines's claim.

c. Other Considerations.

It should be noted that issues troubling to the dissenting justices in Smith are not present here. First, this case does not concern mandatory life sentences, or any increase at all in the maximum sentence. Thus, concerns expressed in State v. Smith, *supra*, or in State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940), are

inapposite. Second, unlike mandatory life sentences, there is no legal precedent in Washington -- statutory or decisional -- suggesting that facts supporting an increased *minimum* sentence must be submitted to a jury. Finally, under Mines's interpretation, a defendant has a state constitutional right to a jury finding as to facts supporting a *minimum* sentence, but not as to facts supporting a *maximum* sentence. Such a result would be illogical.

Thus, as long as Washington judges do not decide sentencing facts that require imposition of punishment above the statutory maximum sentence, there is no constitutional requirement --state or federal -- that such facts be decided by a jury. This Court should reject Mines's state constitutional claim and hold that there is no right to a jury trial for facts used to set an exceptional minimum term for an indeterminate sentence.

#### **E. CONCLUSION**

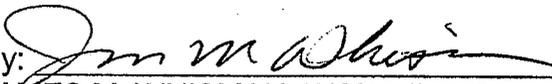
In Blakely, the United States Supreme Court explained why indeterminate-type sentencing schemes do not run afoul of the Sixth Amendment: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail." Blakely, 124 S. Ct. at 2540. Here, when Mines

committed rape, kidnapping and assault, he was on notice that he faced a maximum term of life, and that the sentencing judge could raise his minimum term based on aggravating factors. This Court should reaffirm that this procedure does not violate the state constitution.

DATED this 26<sup>th</sup> day of October, 2007.

Respectfully submitted,

NORM MALENG  
King County Prosecuting Attorney  
DANIEL T. SATTERBERG  
Interim King County Prosecuting Attorney

By:   
JAMES M. WHISMAN, WSBA #19109  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

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## RIGHT TO JURY TRIAL -- CONSTITUTIONAL PROVISIONS

US Const. Art. III, § 2, Clause 3 provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. Amend VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...

U.S. Const. Amend. VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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WA. CONST. Art 1 § 16: provides:

... No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner ... which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law.

WA. CONST. Art 1, § 21 provides:

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.

WA. CONST. Art. 1, § 22 provides:

In criminal prosecutions the accused shall have the right to ... have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ...

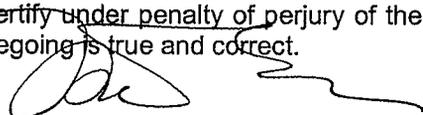
## APPENDIX A

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS, in STATE V. JOHN EDWARD MINES, Cause No. 80587-3, in the Supreme Court, for the State of Washington.  
directed to:

- Cynthia Ann Jordan, the attorney for the appellant, at 921 W. Broadway Avenue, Suite 201, Spokane, Washington 99201-2119; and
- Kevin Korsmo, Deputy Prosecuting Attorney for Spokane County, at Spokane County Prosecuting Attorneys Office, 1100 W. Mallon Avenue, Spokane, Washington 99260-2043.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name Bora Ly  
Done in Seattle, Washington

\_\_\_\_\_  
Date 10/26/07