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STATE OF WASHINGTON

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No. 33701-1

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON

v.

JERRY R. LAMPLEY

APPEAL FROM THE SUPERIOR COURT  
FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

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## TABLE OF CONTENTS

I.	Assignments of Error . . . . .	1
	1. It was error to find the defendant guilty of possession of stolen property in the second degree based on his possession of a forged check . .	1
	2. It was error for the court to answer the question from the jury in the manner it did . . . . .	1
	3. It was error for the court to sentence the defendant consecutive to his Pierce County sentence . . . . .	1
II.	Issues Presented . . . . .	1
	1. Is there sufficient evidence of value, when the only item alleged to have been in possession of the defendant is a forged check which had been reissued . . . . .	1
	2. Did the court err in answering the question from the jury in the manner it did . . . . .	1
	3. Did the court err in sentencing the defendant to consecutive sentences where there was no finding by a jury of any factor justifying an enhanced penalty . . . . .	2
III.	STATEMENT OF THE CASE . . . . .	2
IV.	STATEMENT OF FACTS . . . . .	3
V.	ARGUMENT . . . . .	6
VI.	CONCLUSION . . . . .	25

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<i>City of Seattle v. Gellein</i> , 112 Wn.2d 58, 62, 768 P.2d 470, 775 P.2d 448 (1989) . . . . .	6
<i>In re Rosier</i> , 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) . .	20
<i>Pasco v. Mace</i> , 98 Wn.2d 87, 99, 653 P.2d 618 (1982) . . . .	18, 23
<i>Sofie v. Fibreboard Corp.</i> , 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989) . . . . .	21
<i>State ex rel. Carrol v. Junker</i> , 70 Wn.2d 12, 482 P.2d 775 (1971) . . . . .	15
<i>State v. Foster</i> , 91, Wn.2d 466, 481, 589 P. 2d 789 (1979) . .	8
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005) . . .	15
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980) . . .	6
<i>State v. Gunwall</i> , 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986) . . . . .	20
<i>State v. Hughes</i> , 154 Wn.2d 118, 110 P.3d 192 (2005) . . . . .	17, 18 24
<i>State v. Lampshire</i> , 74 Wn.2d 888, 893, 447, P.2d 727 (1968) . . . . .	8
<i>State v. LeFever</i> , 102 Wn.2d 777, 690 P.2d 574 (1984) . . . .	16
<i>State v. Reichbach</i> , 153 Wn.2d 126, 101 P.3d 80, 84 n.1 (2004) . . . . .	20

<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 839 P.2d 1068 (1992) . . . . .	6
<i>State v. Smith</i> , 150 Wn.2d 135 (2003) . . . . .	21, 23
<i>State v. Strasburg</i> , 60 Wash. 106, 110 P. 1020 (1910) . . . . .	19
<i>State v. Thorne</i> , 129 Wn.2d at 780, 921 P.2d 514 . . . . .	23
<i>State v. White</i> , 135 Wn.2d 761, 769, 958 P.2d 982 (1998) . . . . .	20

Washington Court of Appeals Decisions

<i>State v. Klump</i> , 80 Wn.App. 391, 909 P.2d 317 (1996) . . . . .	15
<i>State v. Primrose</i> , 32 Wn.App 1, 3, 645 P.2d 714 (1982) . . . . .	8
<i>State v. Schaaf</i> , 109 Wn.2d 1, 13 - 14, 743 P.3d 240 (1987) . . . . .	22
<i>State v. Shiling</i> , 77 Wn.App. 166, 176, 889 P.2d 948 . . . . .	15
<i>State v. Skorpen</i> , 57 Wn. App. 144, 787, P.2d 54 . . . . .	7

United States Supreme Court Decisions

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2nd 435 (2000) . . . . .	10, 11 12, 18
<i>Blakely v. Washington</i> , U.S. 124 S.Ct. 2531, 159 L. Ed 2d 403 (2004) . . . . .	9, 11, 12, 13 14, 16, 17, 18 24
<i>Jones v. United States</i> , 526 U.S. 227 (1999) . . . . .	11

<i>Ring v. Arizona</i> , 536 U.S. 317, 104 S. Ct. 3081, 82 L.Ed. 2242 (2002) . . . . .	11, 12
<i>United States v. Booker</i> , U.S. 124 S.Ct. 1254, 151 L.Ed.2d 205 (2005) . . . . .	13
Federal Decisions	
<i>United States v. Kortgaard</i> , F.3d (C.A. 9, Hawaii, 2005) . . . .	17
<i>United States v. Malouf</i> , 377 F.Supp.2d 315 (D. Mass., June 14, 2005) . . . . .	12
Washington State Constitution	
Article I, §21 . . . . .	18, 21
Article I, §22 . . . . .	20, 22
Article IV, §16 . . . . .	7
Revised Code of Washington and Other Statutes	
RCW 9.94A.589(3) . . . . .	9, 14 16, 18, 21 24
Other	
Code of 1881, ch. LXVI, §767 . . . . .	24
J. Bishop, <i>Criminal Procedure</i> §87 (2d. ed. 1872) . . . . .	12
<i>Webster's Third International Dictionary</i> 1190 (1993) . . . .	21

## **I. ASSIGNMENTS OF ERROR**

1. It was error to find the defendant guilty of possession of stolen property in the second degree based on his possession of a forged check.
2. It was error for the court to answer the question from the jury in the manner it did.
3. It was error for the court to sentence the defendant consecutive to his Pierce County sentence.

## **II. ISSUES PRESENTED**

1. IS THERE SUFFICIENT EVIDENCE OF VALUE, WHEN THE ONLY ITEM ALLEGED TO HAVE BEEN IN THE POSSESSION OF THE DEFENDANT IS A FORGED CHECK WHICH HAD BEEN REISSUED?
2. DID THE COURT ERR IN ANSWERING THE QUESTION FROM THE JURY IN THE MANNER IT DID?

3. DID THE COURT ERR IN SENTENCING THE  
DEFENDANT TO CONSECUTIVE SENTENCES  
WHERE THERE WAS NO FINDING BY A JURY OF  
ANY FACTOR JUSTIFYING AN ENHANCED  
PENALTY?

### III. STATEMENT OF THE CASE

On April 15, 2005 the Greys Harbor Prosecuting Attorney charged, the defendant, Jerry R. Lampley, by information with one count of Possession of Stolen Property in the Second Degree for allegedly possessing a check payable to Juliatta Holt in the amount of \$621.10 on or about March 1, 2005, in violation of RCW 9A.56.160. CP 1. He was arraigned on the charge on May, 17, 2005 and a lawyer was appointed to represent him. CP 16. A plea of not guilty was entered and the matter was set for trial.

A CrR 3.5 hearing was held the morning of trial, but no motion to suppress the arrest of the defendant and subsequent search was made prior to trial. Findings of Fact and Conclusions of Law were entered that date. CP 27-29. The Statements made at the jail were ruled admissible and statements made prior to Miranda warnings were ruled to

be voluntary and could be used in cross examination. The trial proceeded immediately after the CrR 3.5 hearing. The trial lasted less than one day. The defendant did not testify. The court denied a motion to dismiss at the close the State's case for lack of evidence which was denied.

The jury after deliberating for a while asked two questions to the court. CP 30-33 . They asked " is the face value considered the day it was stolen or the day he was found with it?" and "Does reissue equal satisfied?" The court responded over objection by the defense: "1. The value of a written instrument is not affected by the fact that a replacement may have been issued." And 2. The value of the stolen property is determined as of the time of its possession. The answer was returned to the jury at 2.48 p.m. The jury returned a verdict of guilty.

On July 27, 2005 the defendant was sentenced to 17 months in confinement consecutive to Pierce County Cause #02-1-271-6. CP . The defendant timely filed his notice of appeal of the judgment and sentence.

#### **IV. STATEMENT OF FACTS**

The defendant, appellant herein was with two friends in the City of Montesano on March 1, 2005. They had previously been in a

vehicle driven by one of the defendant's friends, the vehicle was seen going into the parking lot of the Thrift Way at approximately 10:30. Officer Wilson ran the plate, and found that the registered owner was on the suspended list. He approached the three men who had already left the vehicle. The officer arrested the driver without incident. During the course of his dealing with the driver. Wilson asked the defendant and other passenger in the car for identification, allegedly, to find out who they were and to "make sure they were not going to be a threat to me". VRP 7. Wilson then asked the dispatch to run a drivers and wants check. VRP 7-8. Mr. Lampley was found to have an unconfirmed felony warrant out of Pierce County. VRP 9. The defendant was arrested.

During the course of an inventory check of the defendant a check inside the defendant's wallet was found that had been made out to one Juleatta Holt. Wilson questioned the defendant about the check at the scene for about five minutes. The defendant was asked if he knew Juleatta Holt and he was told that he did not. When asked why he had the check the defendant told that officer that he had written a phone number on it. He also allegedly told the officer that he may have received it from someone else and did not know the check was stolen. VRP 20.

After the defendant was transported to the jail, Wilson once again went to question him. This time he advised him of his Miranda warning which the defendant acknowledged and began to ask questions, without asking the defendant if he waived his rights.

Juleatta Holt testified that she was a state-paid provider of home care and that the check that was in the wallet of the defendant was for services rendered to a couple of clients. She had expected receiving it between the 5<sup>th</sup> and 8<sup>th</sup> of September 2004. The check was made out to her and endorsed on the back by some unknown person. Mrs. Holt never received the check so she notified her case manager who told her they would have to wait 30 days before a new check could be issued. She filled out a forgery endorsement and received lost or destroyed warrant and a new check was issued to her. VRP 35-37.

Wilson testified that he found the check in the wallet of the defendant and that he questioned him about the check after Mirandizing him. The defendant's attorney objected based on Hamrich; the objection was overruled. The Wilson testified similarly to the CrR 3.5 hearing that the defendant told him he did not know Juleatta Holt, that he must have been given the check by someone, probably at the Emerald Queen Casino

but he could not remember who. He added that he did not know the check was stolen and he had kept the check because he had written some phone numbers on the check. The officer assumed that the number that was on the back of the check was for a car that was for sale, but he did not call the number to confirm this information.

## V. ARGUMENT

### Value of the Check

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *City of Seattle v. Gellein*, 112 Wn.2d 58, 62, 768 P.2d 470, 775 P.2d 448 (1989). On a challenge to the sufficiency of the evidence, the appellate court decides whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences "must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."

In the case of *State v. Skorpen*, 57 Wn. App. 144, 787 P.2d

54 this court determined as follows:

In the present case, we conclude that the owner of the forged check that Skorpen stole did not lose anything of value. In *STATE v. MADEWELL*, 603 S.W.2d 692 (Mo. Ct. App. 1980), the court stated that a "forged check has no value as a chose in action and if there was a theft of the check the only thing stolen was a piece of paper having little, if any, intrinsic value." *STATE v. MADEWELL*, 603 S.W.2d at 695.

In this case there was no evidence adduced as to when Lampley came into the possession of the check or how it was endorsed by someone using the name of Juleatta Holt. So what the evidence showed was that Lampley possessed a forged instrument. There is no evidence that the check was negotiable when he obtained it, no evidence that he endorsed it. The only evidence adduced is that Juleatta Holt did not endorse it, therefore it was a forged instrument which had no value at the time of possession. It was at the time of possession just a piece of paper, on which he had written the phone number of someone. A worthless scrap of paper.

Response to Jury Question

The judge's answer to the jury question violated art. IV, § 16 of the Washington State Constitution, which provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

"Since a comment on the evidence violates a constitutional prohibition, [a] failure to object or move for a mistrial does not foreclose [him or] her from raising this issue on appeal." *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). Art. IV, § 16 prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case. *State v. Foster*, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). In addition, a court cannot instruct the jury that matters of fact have been established as a matter of law. *State v. Primrose*, 32 Wn. App. 1, 3, 645 P.2d 714 (1982).

Here the judge had instructed the jury, the defense had argued the case based on the instructions they were given, and the jury had begun deliberating on those instructions. The jury asked two questions.<sup>1</sup> The answer to the first question correctly stated the law. The answer to the second question was not responsive to the question. The answers are numbered in the opposite order of the two questions. Answer 1, The value of a written instrument is not affected by the fact that a replacement may have been issued. This is not always true as between the state and Mrs.

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Is the face value considered the day it was stolen or the day he was found with it?  
Does reissue equal satisfied?

Holt, the new check would have no value since it was replaced and the debt was satisfied between the two of them. Here the Court answered a question that was not asked by the jury and in fact, whether the check was satisfied was a question that the jury had to determine to and the court's answer interfered with the defendant's Sixth Amendment Right to have the jury decide his fate.

#### Consecutive Sentences

The trial court violated Mr. Lampley's Sixth Amendment Right by imposing a consecutive sentence based, necessarily, on facts that were not submitted to a jury, as mandated by *Blakely v. Washington*. In *Blakely v. Washington*, U.S., 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court held that the maximum sentence a judge may impose based "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant," under the Sentencing Reform Act (SRA) is the top of the standard range.

A review of the evolution of the decisions of the United States Supreme Court which culminated in the *Blakely* decision demonstrates that the trial court's imposition of a consecutive sentence under RCW 9.94A.589(3) was unconstitutional.

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court invalidated a criminal sentence on Sixth Amendment grounds because the defendant's maximum penalty had been enhanced by findings of fact made by a sentencing judge rather than a jury. In *Apprendi*, the prosecutor sought a sentencing enhancement under a separate "hate crime" law, which authorized an enhanced increase for both the maximum and minimum term to which the defendant was subject. *Apprendi*, 530 U.S. at 470.1 The United States Supreme Court, in reversing the enhanced sentence, concluded it was not whether the legislature characterized the aggravating factor (i.e., hate crime enhancement) as a sentencing factor or an element that mattered; rather what mattered was the effect of the hate crime finding in increasing the maximum available sentence for the offense. *Id.*2 The Court held that "[other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum *must be submitted to a jury, and proved beyond a reasonable doubt.*" *Apprendi v. New Jersey*, 530 U.S. at 490.

Under the New Jersey statute, the enhancement increased both the maximum and minimum sentence to which the defendant was

subject for possession of a firearm, from five to ten years to ten to twenty years, and for possession of an antipersonnel bomb, from three to five years to five to ten years. *Apprendi v. New Jersey*, 530 U.S. at 470, 120 S.Ct. 2348. 2 *Apprendi* was presaged by the United States Supreme Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), which reversed an exceptional sentence based on a judge's finding that "serious bodily injury" was a sentencing factor and not an element of the offense.

Then, in *Ring v. Arizona*, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2 242 (2002) (aggravating factors in capital cases function as elements of the greater crime), the court expressly rejected the argument that form can prevail over substance. The Court held that "the dispositive question 'is not one of form, but of effect.' If the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 122 S. Ct. at 2439-2440.

Thereafter, in *Blakely*, the Court defined the "statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 124 S.Ct. at 2537. *Blakely*, compelled

by *Apprendi* and *Ring*, required that all facts "which the law makes essential to the punishment" be subject to Sixth Amendment protections. *Blakely*, 124 S.Ct at 2537 (quoting 1 J. Bishop, *Criminal Procedure* § 87 (2d ed.1872)). Under this logical extension of *Apprendi* and *Ring*, what matters is that facts are necessary to increase punishment, not formalistic distinctions between sentencing factors and offense elements or statutory maximums and mandatory minimums. See *United States v. Malouf*, 377 F.Supp.2d 315 (D. Mass., June 14, 2005).

The Supreme Court, in *Blakely*, and in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), did not limit its holdings to specific types of statutes; *Blakely* and *Apprendi* apply to any situation in which the jury verdict authorizes one sentence and the trial court imposes a longer sentence based on additional findings, not submitted to a jury. The legal principle underlying both decisions, and the decision in *Ring v. Arizona*, is that it violates the Sixth Amendment to structure sentencing laws such that the sentence reflects factual findings not submitted to the jury. Essentially, the Supreme Court has held unconstitutional statutes, whether enhancements statutes, exceptional sentences statutes, or death penalty statutes, in which judicial fact finding

is as critical to the sentence imposed as the charged crime, or more critical. In those cases the defendant is denied his right to a jury trial.

The significant inquiry under *Blakely* is what sentence does the jury's verdict or the defendant's plea authorize the court to impose? If the court seeks to impose a greater sentence, then the factual basis for going beyond what the jury's verdict authorizes must also be submitted to the jury.

In *United States v. Booker* the Court reaffirmed this approach by concluding that the Sixth Amendment prevents federal judges from making factual determinations that mandatorily increase a defendant's sentence under the Federal Sentencing Guidelines on basis of facts not reflected in the jury's verdict. *United States v. Booker*, U.S., 125 S.Ct.1254, 161 L.Ed.2d 205 (2005).

In this case, Mr. Lampley was found guilty to one count of Possession of Stolen Property in the Second Degree. Without additional findings, the court was authorized to give a sentence within the range of 15 — 20 months concurrent to his prior Pierce County conviction. The trial court imposed a sentence of 17 months, but imposed the sentence to run consecutively to, rather than concurrently with, his prior sentence which he

was not under sentence at the time of the commission of the possession of stolen property charge which is the subject of this appeal. In imposing a sentence consecutive to an existing sentence, the Court went beyond what was authorized by the jury's verdict. The court concluded that RCW 9.94A.589(3) provided authorization for its decision to impose a consecutive sentence. RCW 9.94A.589 (3) instead authorizes a sentence to be concurrent, absent some additional finding by the court to sentence otherwise.

RCW 9.94A.589(3) states: whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively. (Emphasis added).

Thus, the presumption for a defendant who commits a crime with no outstanding sentence is that he will serve the sentence for the crime concurrently with any sentence imposed after the crime was committed. Under *Blakely*, this presumptively concurrent sentence is the sentence authorized by the jury verdict or by the admission of a defendant who pleads guilty only to the elements of the crime charged. Specifically, in order for the sentence to run consecutively to any sentence imposed

after the commission of the crime, in addition to the jury verdict or a plea of guilty, an express provision by the trial court imposing consecutive sentences is mandatory. Without that express provision of consecutive sentences in the judgment and sentence, by operation of law the sentences are concurrent. *State v. Shiling*, 77 Wn.App. 166, 176, 889 P.2d 948. If the judgment and sentence is silent, the sentences are concurrent.

Under *Blakely*, the defendant has a right to have any fact finding essential to the sentence made by a jury. Because Mr. Lampley's jury verdict authorized only a presumptively concurrent sentence, the trial court could not go beyond the concurrent sentence authorized by his plea. Any exercise of discretion by the trial court would be based on inferences from facts which were not presented to a jury or proven beyond a reasonable doubt. Therefore the sentence in this case should be imposed concurrently with his Pierce County sentence.

While the trial court has discretion under the statute to impose consecutive terms, this discretion must not be based on untenable grounds or exercised for untenable reasons. *State v. Klump*, 80 Wn. App. 391, 909 P.2d 317 (1996); *State ex rel. Carrol v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). Constitutional and statutory procedures protect

defendants from being sentenced on the basis of untested facts. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005) citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). As noted by the appellate court in *State v. LeFever*, 102 Wn.2d 777, 690 P.2d 574 (1984), "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." In other words, judicial discretion requires a conclusion that a decision is the proper decision based on the facts relevant to the decision.

As demonstrated in the trial court's oral ruling, it not only believed that the plea granted it unfettered authority to go beyond the mandatory "shall run concurrent" language in RCW 9.94A.589(3), but also that it didn't have to have any basis to impose a consecutive sentence.

A review of *Hughes* demonstrates that the court's implied "clearly too lenient" finding that supported a sentence to run consecutively, and thus beyond the presumptive concurrent sentence, was error. In *Hughes*, the Washington Supreme Court was asked to determine whether a sentencing court's finding whether a presumptive sentence was "clearly too

lenient" violated *Blakely*. The court reviewed three cases in which a "clearly too lenient" determination was made by the judge, and not a jury.<sup>4</sup> In one fact pattern (Anderson), the court reviewed the "clearly too lenient" factual determination as it related to the operation of the multiple offense policy. In another (Selvidge), the "clearly too lenient" finding was based on the defendant having an offender score that exceeded the highest on the Sentencing Reform Act grid. In the third fact pattern (*Hughes*), the issue was whether an ongoing pattern of the same criminal conduct could justify an aggravating factor and an exceptional sentence. The court concluded that "ongoing pattern" had to be more than merely the prior convictions since the offender score had already considered them, and thus must have

The Court consolidated three cases to address the issue of whether an implied finding of "clearly too lenient" was subject to a jury determination pursuant to *Blakely v. Washington*. The three cases consolidated were Anderson, Selvidge, and Hughes. *State v. Hughes* 154 Wn.2d 118, 110 P.3d 192 (2005). Additional factual determinations beyond the prior convictions must be determined by a jury. *State v. Hughes*, 154 Wn.2d 118, 141, 110 P.3d 192 (2005) See also, *United States v. Kortgaard*, F.3d, (C.A. 9, Hawaii, 2005). The court's determination that a

presumptive concurrent sentence was not justified, and imposition of an exceptional consecutive sentence, cannot, as determined in *Hughes*, be solely based on the prior criminal convictions. Therefore, the court's decision here, as it did in *Hughes*, implicitly involved a factual finding beyond the existence of prior convictions.

Since the Washington State Constitution's right to a jury trial provides more protection than does the United States Constitution, it mandates applicability of Blakely-type protections to consecutive sentences under RCW 9.94A.589(3). Undoubtedly, after *Apprendi* and *Blakely*, sentencing laws are being subject to re-examination in courts across the country. There is a new concern for procedural fairness in the fact finding that may impact the punishment. The holdings of *Apprendi* and *Blakely* are based on not just the due process clause, but also the right to a jury trial.

The Washington State Constitution, however, is more protective of the right to a jury trial than is the U.S. Constitution. In *Pasco v. Mace*, 98nWn.2d 87, 99, 653 P.2d 618 (1982), this Court explained of Wash. Const. art. I, § 21:

It is the general rule that where the language of the state and federal constitutions is similar, the interpretation given by the United States Supreme Court to the federal provision will be applied to the state provision. However, the state courts are at liberty to find within the provisions of their own constitutions a greater protection than is afforded under the federal constitution, as interpreted by the United States Supreme Court. Here, there are significant differences not only in the language of the pertinent provisions of the state and federal documents but also in the circumstances existing at the time of their enactment. *Id.* 98 Wn.2d at 96-97 (citations omitted). This Court concluded: "It is evident, therefore, that the right to trial by jury which was kept 'inviolable' by our state constitution was more extensive than that which was protected by the federal constitution when it was adopted in 1789." *Id.* 96 Wn.2d at 99.

This state constitutional right to a jury trial provides the criminal defendant with the right to have a jury determine every substantive fact bearing on the question of guilt or innocence. See generally *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). The Washington Supreme Court held that a court must consider certain factors when determining whether Washington's constitution should be interpreted

as extending broader rights than the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986). In assessing whether the Washington Constitution affords greater protection of a right than the federal constitution, the 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. *Gunwall*, 106 Wn.2d at 58. Parties asserting a violation of the state's constitution must brief and discuss these factors. *Gunwall*, 106 Wn.2d at 62 (citing *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

A party need not provide a *Gunwall* analysis, however, if the Washington Supreme Court has already analyzed the constitutional provision in the context at issue. *State v. Reichbach*, 153 Wn.2d 126, 101 P.3d 80, 84 n.1 (2004) (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)). The Washington Supreme Court has previously analyzed Article I, Sections 21 and 22, under the *Gunwall* factors and has concluded that the right to a jury trial may be broader under Article I, Sections 21 and 22 than under the Federal Constitution. *State v. Smith*, 150 Wn.2d 135 (2003). Nevertheless, a brief review of the *Gunwall* factors

provides sufficient evidence that broader protections include the right to a jury trial on the implied fact of "clearly too lenient" to impose a consecutive sentence under RCW 9.94A.589(3).

#### Textual Language

Article I, Section 21 reads:

SECTION 21 TRIAL BY JURY. 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.

Article I, Section 21 provides that the right to jury trial shall remain inviolate Webster's defines "inviolate" as "free from change or blemish: pure ... free from assault or trespass: intouched, intact." Webster's Third International Dictionary 1190 (1993). As stated in *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989), ("the term 'inviolate' connotes deserving of the highest protection.") "Inviolate" indicates that a jury trial must be provided to determine whether an aggravating factor exists before a consecutive sentence may be imposed under RCW 9.94A.589(3).

In *State v. Smith*, 150 Wn.2d 135 (2003), the Washington Supreme Court concluded that although "inviolate" in Article I, section 21

indicates a strong protection of the jury trial right, Article I, Section 22, limits that right to trials for offenses, and not sentencing proceedings.' This limited

Article I, Section 22: "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." application and distinction of Article I, Section 22, is no longer acceptable under Apprendi, Blakely, and recent amendments to the Sentencing Reform Act.

#### Textual Difference

Unlike the United States Constitution, the Washington Constitution contains two provisions regarding the right to trial by jury: "The right of trial by jury shall remain 'Inviolable . . . ."In addition, Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an "impartial jury." Article I, section 21 has no federal equivalent. *State v. Schaaf*, 109 Wn.2d 1, 13 — 14, 743 P.3d 240 (1987). The fact that the Washington Constitution mentions the right to jury trial in two provisions instead of one indicates

elements of a charge.") By contrast, the implied "clearly too lenient" factor supporting a consecutive sentence under RCW 9.94A.589(3) is not a sentencing factor, but rather a factor or element that significantly alters the punishment. *State v. Hughes*, 154 Wn.2d 118, 141, 110 P.3d 192 (2005). Consistent with the Code of 1881, the court's right to impose punishment is limited to that which is authorized by the jury's verdict or plea. See *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). 7 Code of 1881, ch. LXVI, § 767.

In *Blakely*, the Supreme Court set out the two longstanding tenets of common law supporting its finding: that the "truth of every accusation" to which a defendant is held accountable "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors" *Blakely v. Washington*, 542 U.S. 296 (quoting, 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation." This language requires that Mr. Lampley be brought back for sentencing and that he be sentenced concurrent with his Pierce County Conviction.

## VI. CONCLUSION

There was insufficient evidence to find the defendant guilty of the crime of possession of stolen property in the second degree for possessing a forged check and the court unconstitutionally commented on the evidence for these reasons the court should reverse and dismiss the charges against Mr. Lampley. If this Court does not, reverse it should order that Mr. Lampley be re-sentenced concurrent to his Pierce County conviction.

Respectfully submitted this 10 day of April, 2006.

A handwritten signature in black ink, appearing to read 'RH', is written over a horizontal line.

ROGER A. HUNKO, WSBA#9295

Attorney for Jerry R. Lampley

