



**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 2**

**ARGUMENT ..... 4**

**Mr. Howe’s conviction was entered in violation of his state  
constitutional right to a jury trial..... 4**

A. Under Wash. Const. Article I, Section 21, the parties  
to a felony prosecution may not waive jury if the case  
proceeds to trial..... 4

B. Even if waiver is permitted, Mr. Howe did not waive  
his state constitutional right to a jury trial. .... 16

**CONCLUSION ..... 19**

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) ..... 4

*Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882)..... 17

*Patton v. United States*, 281 U.S. 276, 74 L. Ed. 854, 50 S. Ct. 253 (1930) ..... 14, 15

*Taylor v. Illinois* 484 U.S. 400, 108 S.Ct. 646, 484 U.S. 400 (1988)..... 17

*U.S. v. Smith*, 17 F. 510 (C.C.Mass. 1883) ..... 7

*U.S. v. Taylor*, 11 F. 470 (C.C.Kan. 1882) ..... 7

**WASHINGTON CASES**

*Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945)..... 13, 14

*City of Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982)..... 4, 6, 7

*Gallwey v. Grimm*, 146 Wn.2d 445, 48 P.3d 274 (2002) ..... 5

*Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004)..... 11

*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989) ..... 5

*State v. Ellis*, 22 Wn. 129, 60 P. 136 (1900)..... 12, 13, 14

*State v. Forza*, 70 Wn.2d 69, 422 P.2d 475 (1966)..... 15

*State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986) 4, 6, 7, 11, 12, 15, 16, 18

*State v. Karsunky*, 197 Wn. 87, 84 P.2d 390 (1938)..... 13

*State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952) ..... 12, 14, 15

<i>State v. McCaw</i> , 198 Wn. 345, 88 P.2d 444 (1939).....	13
<i>State v. Norman</i> , 145 Wn.2d 578, 40 P.3d 1161 (2002).....	5
<i>State v. Pierce</i> , 134 Wn. App. 763, 142 P.3d 610 (2006).....	18
<i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987).....	7
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	7
<i>State v. Treat</i> , 109 Wn.App. 419, 35 P.3d 1192 (2001).....	17
<i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....	15
<i>Washington State Convention &amp; Trade Ctr. v. Evans</i> , 136 Wn.2d 811, 966 P.2d 1252 (1998).....	6

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI.....	4
U.S. Const. Amend. XIV.....	4
Wash. Const. Article 27, Section 2.....	11
Wash. Const. Article I, Section 21.....	i, 1, 4, 6, 7, 11, 12, 13, 14, 16
Wash. Const. Article I, Section 22.....	17
Wash. Const. Article I, Section 7.....	11

**WASHINGTON STATUTES**

RCW 10.01.060.....	12
--------------------	----

**OTHER AUTHORITIES**

Bennett & Heard, <i>Leading Criminal Cases</i> .....	8
<i>Black's Law Dictionary</i> (6th ed. 1990).....	5

Chitty, <i>Criminal Law</i> (1847).....	8
<i>Cordway v. State</i> , 25 Tex. Ct. App. 405 (1888).....	7
CrR 6.1.....	12
<i>Harris v. People</i> , 128 Ill. 585 (Ill. 1889).....	9
Laws of Washington, Chapter 23, Section 249 (1854-1862).....	11, 12
M. Bacon, <i>A New Abridgment of the Law</i> .....	8
M. Hale, <i>Pleas of the Crown</i> .....	8
<i>People ex rel. Swanson v. Fisher</i> , 340 Ill. 250 (1930).....	9
<i>State v. Carman</i> , 63 Iowa 130 (1884).....	9
<i>State v. Larrigan</i> , 66 Iowa 426 (1885).....	7
<i>State v. Lockwood</i> , 43 Wis. 403 (1877).....	7
<i>Territory v. Ah Wah</i> , 4 Mont. 149 (1881).....	9, 10
W. Blackstone, <i>Commentaries on the Laws of England</i> (1765).....	8

### **ASSIGNMENTS OF ERROR**

1. Mr. Howe's conviction violated his state constitutional right to a jury trial.
2. Mr. Howe did not knowingly, intelligently, and voluntarily waive his state constitutional right to a jury trial.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under the state constitution, the parties to a felony prosecution may not waive jury for a trial of factual issues. The conviction in this case was entered without a jury determination of the facts. Was the conviction entered in violation of Mr. Howe's state constitutional right to a jury trial?
2. Waiver of an accused person's rights under Wash. Const. Article I, Section 21 and Section 22 is invalid unless accompanied by an affirmative showing that the person understood her or his right to participate in the selection of jurors, to a fair and impartial jury, and to be presumed innocent by the jury. Mr. Howe's purported waiver was accepted without an affirmative showing that he understood any of these rights. Was Mr. Howe's purported waiver of his state constitutional right to a jury trial invalid?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

The state charged Nicolas Howe with Assault in the First Degree after a fight between Mr. Howe and Thomas Krulich. CP 1. While Mr. Krulich claimed that Mr. Howe attacked and stabbed him, Mr. Howe contended that he was simply defending himself against the much larger and stronger Mr. Krulich. RP (9/16/08) 6-126.

The day before trial was set to start, Mr. Howe's attorney set the case on the calendar for waiver of jury. RP (9/15/08) 10. The court reviewed a written document submitted by Mr. Howe's attorney. Waiver of Trial by Jury, Supp. CP. The following colloquy was held:

MR. ARCURI: ... I am going to hand forward, if I may, the waiver of trial by jury. I reviewed this with Mr. Howe this morning, and he has signed it. It is his desire to – that I try the case tomorrow before Judge McCauley, without a jury.

THE COURT: Are you Nicholas Howe?

THE DEFENDANT: Yes.

THE COURT: Mr. Howe, did you hear what your attorney just had to say?

THE DEFENDANT: Yes, sir.

THE COURT: Is it true, do you wish to waive your trial by jury tomorrow?

THE DEFENDANT: Yes, sir.

THE COURT: You wish to, instead, have your case tried to a judge, sitting without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that you have a constitutional right to a trial by jury?

THE DEFENDANT: Yes, sir.

THE COURT: That would be a jury of 12 citizens from Grays Harbor County. They contact those individuals would be

selected from a larger pool, people your attorney would have an opportunity to ask them questions to ensure that they were fair and impartial and could objectively hear the evidence and decide your guilt and innocence, do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You wish to waive that right?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe that it is in your best interests to waive your trial by a jury trial and proceed to a trial without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: And you have had an opportunity to discuss this with Mr. Arcuri and ask him any questions you may have about your right to a jury trial?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone threatened you or promised you anything to cause you to want to waive this right?

THE DEFENDANT: No, sir.

THE COURT: Any questions for me about your constitutional rights and your decision to waive a jury?

THE DEFENDANT: No.

THE COURT: I will accept the waiver.

RP (9/15/08) 11-13.

After the bench trial, the court found Mr. Howe guilty as charged.

RP (9/16/08) 127-130. Mr. Howe was sentenced, and this timely appeal followed. CP 6-14, 18.

## ARGUMENT

### **MR. HOWE'S CONVICTION WAS ENTERED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

- A. Under Wash. Const. Article I, Section 21, the parties to a felony prosecution may not waive jury if the case proceeds to trial.

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.

As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is not coextensive with the federal right.<sup>1</sup> See, e.g., *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

1. The language of the State Constitution.

The first *Gunwall* factor requires examination of the text of the State Constitutional provisions at issue. This includes an examination of

---

<sup>1</sup> 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).

the words themselves, their grammatical relationship with one another, and their context. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

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

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

*Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

In this context, the strong, simple, direct, and mandatory language (“shall remain inviolate”) prohibits jury waivers by either party in criminal trials. Furthermore, the provision expressly grants the legislature the authority to allow waivers only in civil cases. Under the maxim *expressio unius est exclusio alterius*,<sup>2</sup> this express grant of authority in civil cases prohibits waivers in criminal cases. *See, e.g., State ex rel. Washington*

---

<sup>2</sup> “The expression of one thing is the exclusion of another.” *Black’s Law Dictionary* (6th ed. 1990).

*State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 830, 966 P.2d 1252 (1998).

Thus, the language of Article I, Section 21 prohibits jury waivers in criminal cases.

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. Wash. Const. Article I, Section 21 has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace* found the difference between the two constitutions significant. 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 favor an independent application of the State Constitution. Even though waiver of the federal right may be found in appropriate cases, the Washington Constitution prohibits jury waiver in criminal prosecutions.

3. State constitutional and common law history demonstrates that drafters of the Washington Constitution intended to require jury trials for all felony prosecutions.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, at 96. See also *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003).

In 1889, when the state constitution was adopted, there was a nearly universal understanding that the right to a jury trial in felony cases could not be waived. See e.g., *State v. Lockwood*, 43 Wis. 403, 405 (1877) (“The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived”); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant “may waive any... right except that of trial by jury in a felony case”); *U.S. 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”); *U.S. v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (“The district judges in this district have thought that it goes even

beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...”)

This tradition was rooted in the common law:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327. This right of trial by jury in all capital cases -- and at common law a century and a half ago all felonies were capital -- was justly regarded as the great safe-guard of personal liberty. Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Black. Com. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court.

Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our Constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the Constitution above cited, the common law right to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily

follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

*Harris v. People*, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher*, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in “the soundest conception of public policy.” *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

*Carman*, at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person’s power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

Can a defendant, on his own motion, change the tribunal and secure to himself a trial before a jury not authorized by and unknown to the law?... Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the

prosecution or the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled... By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... “[T]he prisoner’s consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law... The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence... Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him.”...

“...[W]e think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority, which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger in limine, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.”

*Territory v. Ah Wah*, at 168-173 (citations omitted).

Despite the prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing “[t]he defendant and prosecuting attorney with

the assent of the court [to] submit the trial to the court, except in capital cases.” Laws of Washington, Chapter 23, Section 249 (1854-1862).

However, this experiment did not survive the passage of the constitution: the framers did not include language permitting the legislature to provide for waivers in criminal cases.<sup>3,4</sup>

The state constitutional and common law history shows that jury waivers are prohibited in felony cases. *Gunwall* factor three favors the interpretation of Article I, Section 7 urged by Mr. Howe.

4. Although pre-existing state laws permits jury waivers in felony cases, the constitutionality of such laws has yet to be properly analyzed.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62).

---

<sup>3</sup> Instead, they adopted the language of Article I, Section 21, which allowed the legislature to permit waiver only in civil cases.

<sup>4</sup> Furthermore, the 1854 statute was implicitly repealed by the adoption of Wash. Const. Article I, Section 21, because it was 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 27, Section 2.

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. However, the constitutionality of these enactments has never been properly analyzed under Wash. Const. Article I, Section 21. Instead, Washington courts have come to accept jury waivers in felony cases on the basis of *dicta*, and on authority relating to the federal jury right. Furthermore, the cases examining the issue all predate *Gunwall*, and lack the analytical structure outlined in that case.

The first case addressing the issue in *dicta* was *State v. Ellis*, 22 Wn. 129, 132, 60 P. 136 (1900), *overruled in part by State v. Lane*, 40 Wn.2d 734, 246 P.2d 474 (1952). Although the opinion reversed a guilty verdict reached by fewer than 12 jurors, the Court evidently believed the jury trial right could be waived:

It would seem to the writer of this opinion that the first clause of the section, viz., “that the right of trial by jury shall remain inviolate,” was simply intended as a limitation of the right of the legislature to take away the right of trial by jury, and that it did not intend to interfere with the right of the individual to waive such privilege.<sup>5</sup>

---

<sup>5</sup> The Supreme Court expressly reserved its opinion on the effect of the second clause of Article I, Section 21: “What construction might be placed upon the further provisions of the same section as indicating the intention of the members of the constitutional convention is not necessary to determine here, for the trouble with the case at bar is that the legislature has not attempted to provide any method by which the guilt or innocence of a defendant can be determined other than by a jury; and it must be conceded

*State v. Ellis*, at 131, 134. From this brief *dicta*, the Washington Supreme Court eventually found constitutional authority for the legislature to authorize waiver of the jury trial right even in felony cases.

First, however, the Court in *State v. Karsunky*, 197 Wn. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wn. 345, 88 P.2d 444 (1939), the Court held that this statutory prohibition also extended to misdemeanors.

In *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945), the Court held that a defendant could waive the right to a jury trial by pleading guilty:

It is undoubtedly true that, under [Article I, Section 21], the right of trial by jury may not, by legislative or judicial action, be annulled, nor be so impaired, obstructed, or restricted as to make of it a nullity. That does not mean, however, that a trial by jury is imperative and compulsory in every instance, regardless of whether or not the accused by his plea has raised an issue of fact triable by a jury. The purpose of the constitutional provision was to preserve to the accused the right to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury.

---

that, when the constitution speaks of a right of trial by jury, it refers to a common law jury of twelve men." *State v. Ellis*, at 131-132.

*Brandon v. Webb*, at 159.

In *Lane, supra*, the Court denied an appeal based on invited error, where the defendant had requested the trial court to allow an eleven person jury to reach a verdict. The Court also suggested in *dicta* (which relied upon the above-quoted *dicta* in *Ellis*, as well as a U.S. Supreme Court decision analyzing the federal jury right) that a waiver of the right to a jury trial would be permitted under the State Constitution:

[Article I, Section 21] is a guaranty that the right of trial by jury shall not be impaired by legislative or judicial action.... But, because an accused cannot be deprived of this right, it does not follow that he cannot waive it....[S]ee *Patton v. United States*, 281 U.S. 276, 293 et seq., 74 L. Ed. 854, 50 S. Ct. 253, 70 A. L. R. 263 (1930).... A right which can be waived is, in fact, a privilege... It is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done. ...The denial of that power of election would convert the privilege into an imperative requirement. *Patton v. United States, supra*, p. 298.

*State v. Lane*, at 739 (state citations omitted).

Finally, in 1966, relying on *Lane, supra* (and again citing *Patton, supra*), the Supreme Court upheld a defendant's waiver of his right to a jury trial (based on a 1951 statute authorizing such waivers):

The judgment of the trial court is affirmed on the authority of *State v. Lane*, 40 Wn.2d 734, 736, 246 P.2d 474 (1952), where we held that an accused can waive his privilege of a trial by a jury of 12 and submit his case to 11 jurors. That the right of an accused to waive the presence of one juror compels the conclusion that he may waive the entire jury, see also *Patton v. United States*, 281 U.S. 276, 74 L. Ed. 854, 50 Sup. Ct. 253, 70 A.L.R. 263 (1930).

...Constitutional guarantees are subject to waiver by an accused if he knowingly, intentionally, and voluntarily waives them.

*State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966).

As these cases show, the current practice of allowing waivers in felony prosecutions rests on *dicta* and on federal cases (allowing waiver of the federal right), rather than on sound analysis of the state constitution under *Gunwall*. Thus, even though the fourth *Gunwall* factor does not support Mr. Howe's position, this factor alone should not be dispositive.

5. Differences in structure between the Federal and State Constitutions.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that "[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power." *Young*, at 180.

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by Wash. Const. Article I, Section 21 is purely a matter of state or local 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

Five of the six *Gunwall* factors establish that the parties to a felony prosecution may not dispense with jury trials when there are issues of fact to be decided. Factor four (preexisting state law that is not of constitutional dimension) does not support Mr. Howe's position; however, it should not be permitted to influence the outcome of the analysis, because the cases examining jury waivers are not on sound footing.

The waiver in this case was entered in violation of Wash. Const. Article I, Section 21. Accordingly, Mr. Howe's conviction must be reversed and the case remanded to the trial court for a jury trial.

B. Even if waiver is permitted, Mr. Howe did not waive his state constitutional right to a jury trial.

As the preceding section establishes, Wash. Const. Article I, Section 21 is not coextensive with the corresponding federal right. In

addition, Wash. Const. Article I, Section 22 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.

Because the right is broader and more highly valued under the state constitution, a waiver of the state constitutional right—if permitted—requires more than a waiver of the corresponding federal right.<sup>6</sup> Prior to the adoption of the Washington 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). This, combined with the authorities outlined in the preceding section, suggest that the drafters of the constitution would have been loathe to permit a casual waiver of this important right.

---

<sup>6</sup> Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419, 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 484 U.S. 400 (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*.

Therefore, a valid waiver of the state constitutional right to a jury trial—if permitted—should require an affirmative showing that the accused person 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, and the right to be presumed innocent.<sup>7</sup>

In this case, the trial judge reviewed with Mr. Howe a written waiver of the jury trial right. RP (9-15-08) 11-13; Waiver of Trial by Jury, Supp. CP. Neither the written waiver nor the trial court's colloquy demonstrate that Mr. Howe fully understood (1) that he could participate in the selection of jurors, (2) that the jurors were required to be fair and impartial, and (3) that he'd be presumed innocent by the jury. Waiver of Trial by Jury, Supp. CP; *see also* RP (9-15-08) 11-13. Furthermore, there is no indication Mr. Howe had any understanding of how much time he'd be facing if convicted,

---

<sup>7</sup> Division II has held that *Gunwall* analysis does not apply to waiver of state constitutional rights: "*Gunwall* addresses the extent of a right and not how the right in question may be waived.... The issue here is waiver. Although Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived." *State v. Pierce*, 134 Wn. App. 763, 770-773, 142 P.3d 610 (2006) (citations omitted). *Pierce* should be reconsidered. Although (as the *Pierce* Court noted) "it does not *automatically* follow that additional safeguards are required" (*Pierce*, at 773), the Supreme Court, in *Gunwall*, has provided the appropriate framework for determining when such additional safeguards are required. 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 waiver where state constitutional rights are concerned, *Pierce* should be reconsidered.

or that the court might impose a deadly weapon enhancement on top of his standard range sentence. RP (9/15/08) 10-14. Under these circumstances, his waiver cannot be said to be knowing, intelligent, and voluntary.

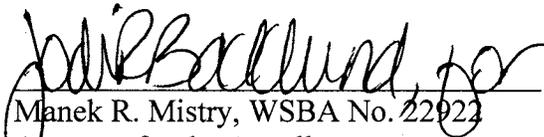
Because the record does not affirmatively demonstrate that Mr. Howe had a full understanding of his constitutional right to a jury trial and the consequences of waiver, his purported waiver is invalid under the state constitution. Accordingly, his conviction must be reversed and the case remanded for a new trial.

### CONCLUSION

For the foregoing reasons, Mr. Howe's conviction must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on May 14, 2009.

### **BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

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

CERTIFICATE OF MAILING

6/11/09 10:27  
STATE OF WASHINGTON  
BY: *KW*  
NOTARY

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

Nicholas Howe, DOC #324148  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA 99362

and to:

Grays Harbor Prosecuting Attorney  
102 West 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 May 14, 2009.

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 May 14, 2009.

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