

80587-3

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON
NO: 21989-5-III

STATE OF WASHINGTON

v.

JOHN EDWARD MINES, JR.

SUPPLEMENTAL BRIEF

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A. Identity of the Petitioner.

John E. Mines, Jr., Petitioner, by and through his attorney, Cynthia Jordan, and files this supplemental brief.

B. Decision.

The facts of this case have been set out in previous briefing on this matter by both parties. This case was stayed pending the decision of the Washington State Supreme Court in *State vs. Clarke*, 156 Wash. 2d 880, 134 p, 3d 188. That decision was rendered and supplemental briefing based on *Clarke* was ordered by the court. The Supreme Court ruled in the state's favor in *Clarke* but did not rule on one issue raised by amicus, Washington States Defenders Association, whether or not the Washington States' Constitution provides for more protection of the right of jury trial than does the U. S Constitution. Appellant John Mines Jr. raises the issue for this Court's consideration.

C. Argument.

I. 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 EXCEPTIONAL RCW 9.94A.712(3) SENTENCES.

Undoubtedly, after *Apprendi* and *Blakely*, sentencing laws are being subject to reexamination in courts across the country. There is a new concern for procedural fairness in the finding fact 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*, 98 Wn.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 Wash.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 1, Sections 21 and 22, under the *Gunwall* factors and has concluded that the right to a jury trial may be broader under Article 1, Section 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 fact of an aggravating factor to support an exceptional minimum mandatory sentence under RCW 9.94A.712(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 1, Section 21 provides that the right to jury trial shall remain inviolate *Webster's* defines “inviolate” as “free from change or blemish: PURE, UNBIEN ... free from assault or trespass: UNTOUCHED” 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 an exceptional sentence may be imposed under RCW 9.94A.712(3).

In *State v. Smith*, 150 Wn.2d 135 (2003), the Washington Supreme Court concluded that although “inviolate” in Article 1, section 21 indicates a strong protection of the jury trial right, Article 1, Section 22, limits that right to trials for offenses, and not sentencing proceedings.¹ This limited application and distinction of Article I, Section 22, is no longer acceptable under *Apprendi*, *Blakely*, and recent amendments to the sentencing reform act.²

¹ 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.”

² In particular procedures for a right to a jury determination of certain aggravating factors before an exceptional sentence may be imposed

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....” and 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 the general importance of the right under Washington's State Constitution. *State v. Smith*, 150 Wn.2d 135 (2003).

Constitutional history/Preexisting state law.

To determine the scope of the jury trial right under Washington's Constitution, it must be analyzed in light of the Washington law at the time of the adoption of the State constitution. *State v. Smith*, 150 Wn.2d 135 (2003), *Pasco v. Mace*, 98 Wn.2d 87, 99, 653 P.2d 618 (1982).

In *Smith*, Smith argued that Code of 1881 limited a court's right to impose punishment to that which was authorized by the jury's verdict.³ Although the court agreed that defendant's must be convicted of their offenses by a jury, the issue in *Smith* -- whether a jury needs to determine persistent offender- was a sentencing factor and not an element of the offense. *State v. Smith*, 150 Wn.2d 135 (2003), citing *State v. Thorne*, 129

³ Code of 1881, ch. LXVI, § 767.

Wn.2d at 780, 921 P.2d 514 (“A defendant's criminal history is a factor which has traditionally been considered by sentencing courts, and the legislature is well within its discretion in defining past crimes as sentencing factors rather than elements of a charge.”). By contrast, the factors set forth in RCW 9.94A.535 and incorporated by reference in RCW 9.94A.712(3) are not sentencing factors, but rather factors or elements that significantly alter the punishment. 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. *See Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).⁴

Thus, even if the U.S. Supreme Court ultimately concludes that *Apprendi/Blakely* rights apply only to statutory maximum sentences, and never to statutory mandatory minimum sentences, see *Harris*, the same conclusion does not necessarily follow under the state constitution. In fact, since Art. I § 21 and *Pasco v. Mace* provide a greater jury trial right, it necessarily follows that the holdings of Div. II in *Monroe, Brundage*, and *Barboa* are compelled on state constitutional grounds as well. *State v.*

⁴ 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 within the requirements of the common law, and it is not accusation in reason. *Id.* (quoting I J. Bishop, Criminal Procedure § 87 p. 55 (2d ed. 1872). Consistent with these principles, the Court concluded that other than a 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. *Blakely v. []*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

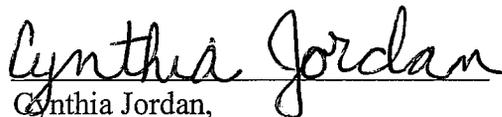
Smith, 150 Wn.2d 135 (2003), *State v. Hobble*, 126 Wn.2d 283, 892 P.2d 85 (1995).

D. Conclusion.

Based on the above arguments this case should be remanded for re-sentencing within the standard range.

Dated this 19 day of March, 2007.

Respectfully submitted by:



Cynthia Jordan,
Attorney for Appellant John Mines Jr.