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NO. 67572-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

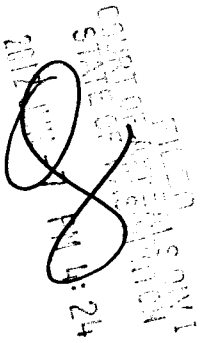
v.

GUY ROOK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF



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A. ASSIGNMENTS OF ERROR

1. The trial court order requiring Mr. Rook to be restrained during trial violated his due process right to be present at trial without physical restraints. U.S. Const. amend. XIV; Const. art. I, § 22.

2. Mr. Rook's sentence of life without the possibility of parole violated article I, section 14's prohibition against cruel punishment.

3. Mr. Rook's sentence of life without the possibility of parole violated the Eighth Amendment's prohibition against cruel and unusual punishment.

4. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. Rook had two prior convictions that qualify as "most serious offenses" violated his right to due process and a jury determination of every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV.

5. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination by a preponderance of the evidence that Mr. Rook had two prior convictions that qualify as "most serious offenses" violated his right to equal protection of the law. U.S. Const. amend. XIV.

6. The trial court erred by finding that Mr. Rook was convicted of vehicular assault by means of driving while under the influence of alcohol or drugs when the jury specifically found that Mr. Rook was not under the influence of alcohol or drugs.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has the due process right to appear at trial without being physically restrained, and the trial court may only restrain a defendant upon finding he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner. The trial court ordered Mr. Rook to wear a stun-belt that would shock him with electricity upon activation by a jail guard. Was Mr. Rook's constitutional right to appear at trial free from restraint violated where the stun belt and the apprehension it created interfered with Mr. Rook's ability to be present and fully participate in his defense?

2. Article I, section 14 prohibits the State from imposing cruel punishment. Mr. Rook was convicted of vehicular assault for driving in a rash or heedless manner and thereby causing substantial injury to another person, and he was sentenced to life in prison without the possibility of parole. Does Mr. Rook's sentence violate article I, section 14 where (1) the elements of the crime do not include the intentional infliction of great bodily harm, (2) the purpose of the sentencing statute is

to punish violent repeat offenders, (3) Mr. Rook would not receive this sentence for similar conduct in any other state of the Union, and (4) the sentence of life without the possibility of parole could not be imposed for the most similar Washington offense?

3. The Eighth Amendment prohibits cruel and unusual punishment. Mr. Rook was convicted of vehicular assault for driving in a rash or heedless manner and thereby causing substantial injury to another person, and he was sentenced to life in prison without the possibility of parole. Does Mr. Rook's sentence violate the Eighth Amendment because it is (1) grossly disproportionate to his conduct, (2) disproportionate to the sentence received by similar offenders in Washington, and (3) disproportionate to the sentence he would receive for the same conduct in the other 49 states?

4. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court violate Mr. Rook's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. Rook had twice before been convicted of most serious offenses?

5. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are not necessary to further a compelling government interest. The government has an interest in punishing repeat offenders more harshly than first-time offenders, but for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others – like those at issue in the Persistent Offender Accountability Act – the existence of prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Does the Persistent Offender Accountability Act violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

6. The jury found Mr. Rook guilty of vehicular assault by means of reckless driving and found by special verdict that he was not under the influence of drugs or alcohol. Must Mr. Rook's Judgment and Sentence be remanded to correct the Judgment and Sentence which states the jury found Mr. Rook guilty of vehicular assault under both means?

C. STATEMENT OF THE CASE

The King County Prosecutor charged Guy Rook with vehicular assault, by either operating a motor vehicle in a reckless manner or while under the influence of alcohol, and with hit and run driving for an

automobile accident occurring shortly before midnight on August 25, 2009. CP 52-53.

Mr. Rook was with his girlfriend Tracy Rectenwald that evening. 6/16/11RP 13; 6/29/11RP 14. Ms. Rectenwald had been drinking all day, and after the couple got into an argument, Mr. Rook began driving her to her father's house in his 1995 Pontiac. 6/29/11RP 15-16, 31. Mr. Rook was in the area north of Sea-Tac airport, when Ms. Rectenwald, who was still angry, dumped a full cup of coffee and whiskey onto Mr. Rook's lap. 6/29/11RP 18, 31. Mr. Rook's car briefly went a few feet into the oncoming lane of traffic as he looked down in response to the hot beverage. 6/27/11RP 37; 6/29/11RP 17-19, 32. Mr. Rook noticed a police car driving in the opposite direction and accelerated away, going up a rise at about 30 to 35 miles per hour. 6/29/11RP 19-21.

As Mr. Rook neared the intersection at South 154th Street and 24th Avenue South, Ms. Rectenwald waived her arms, striking Mr. Rook in the face and knocking his glasses off his head. 6/16/11RP 13-14; 6/29/11RP 21. 6/29/11RP 23. Mr. Rook is very near-sighted and could not see. 6/29/11RP 23.

Mr. Rook took his foot off the gas as he looked for his glasses, but continued through the intersection because the light was green when he

last saw it. 6/29/11RP 21, 23, 32. He then heard Ms. Rectenwald scream and felt the impact of striking something with his car. 6/29/11RP 23-24.

Mr. Rook's car struck the passenger side of a 1997 Geo driven by Christopher Kalalui, which spun and hit a light pole. 6/16/11RP 17, 57; 6/27/11(MT)RP 3, 6.[1] Mr. Kalalui had been waiting at a red light, and he was about half-way through the intersection after the light turned green. 6/16/11RP 54; 6/27/11(MT)RP 5-7. Lori Patridge was in the car in front of Mr. Kalalui and had been the first one waiting for the light to change. She observed the Pontiac hit the Geo and remained at the scene with Mr. Kalalui until police and medics arrived. 6/16/11RP 57-58, 68-69, 75; 6/27/11(MT)RP 45-46.

Mr. Kalalui was taken to Highline Hospital and then transferred to Harborview. 6/27/11(SR)RP 7; 6/28/11RP 18. Mr. Kalalui's spleen was lacerated, but it stopped bleeding on its own. 6/28/11RP 47-48. Mr. Kalalui's pelvis, hips, and buttocks were bruised but not fractured. 6/28/11RP 28-29, 33, 42, 46. A small piece of Mr. Kalalui's fourth lumbar vertebra, the "transverse process," however, was broken off.

[1] The two transcripts for June 27, 2011, are referred to by date and the initials of the respective court reporters. The transcripts are confusing because one court reporter was replaced by another for a brief period. Michael Townsend Jr. prepared the transcript that includes the testimony of William Butterfield and Sergeant Flynn. 6/27/11(MT)RP 2-81. Sheri Reynolds then took over for the testimony of Mr. Kalalui and the beginning of Andy Conner's testimony. 6/27/11(SR)RP. Mr. Townsend completed the day taking the continued examination of Deputy Conner. 6/27/11(MT)RP 82-93.

6/28/11RP 33, 37-39; see Ex. 63 (illustrative). Afterwards, Mr. Kalalui underwent physical rehabilitation and continued to suffer pain in his shoulder at the time of trial. 6/27/11(SR)RP 8-10.

Port of Seattle Sergeant Dan Flynn was driving the police car that Mr. Rook noticed driving in the opposite directly shortly before the accident. 6/27/11(MT)RP 31, 35. Sergeant Rook pulled his car over to avoid being hit by Mr. Rook's vehicle, which he believed was speeding. 6/27/11)(MT)RP 35-36. After Mr. Rook's car passed, the sergeant turned and followed, but he arrived at the intersection after the crash occurred. 6/27/11(MT)RP 37-38, 40.

After Sergeant Flynn reached the accident site, Mr. Rook got out of his car with difficulty, stumbled across the street and down an embankment into some bushes. 6/16/11RP 61-65; 6/27/11(MT)RP 43. He was not wearing eyeglasses. 6/16/11RP 83. Mr. Rook returned shortly afterwards and repeatedly asked if anyone was hurt; he was immediately arrested. 6/16/11RP 72-74; 6/27/11(MT)RP 48, 50.

Prior to trial, Mr. Rook waived his right to counsel and represented himself until shortly before jury selection when the Honorable James Cayce reinstated defense counsel at Mr. Rook's request because Mr. Rook felt he was "in over his head." Supp CP __ (sub. no. 61, 11/22/10); 11/22/10RP 24; 4/19/11RP 2-4. During the period of time Mr. Rook was

representing himself, the trial court ordered that he wear a "Band-it" stun-belt during his trial. Supp CP ___ (Order on DAJD Motion that Defendant be Restrained During Trial, sub. no. 157, 4/13/11) (hereafter Order Restraining Defendant)

The jury convicted Mr. Rook of vehicular assault and found him not guilty of hit and run driving. CP 191-93. The jury answered a special verdict form indicating it found Mr. Rook guilty of vehicular assault only under the means of operating the motor vehicle in a reckless manner. CP 192.

> Question 1: At the time of causing the injury, was the defendant operating the motor vehicle while under the influence of intoxicating liquor or drugs?
>
> Answer: NO (Write "yes" or "no" or "not unanimous").

CP 192.

The court sentenced Mr. Rook to life without the possibility of parole after finding by a preponderance of the evidence that he had prior convictions for first degree robbery in 1985 and rape of a child in the first degree in 1994. CP 489, 491; 8/19/11RP 35-36, 53. This appeal follows. CP 474-85.

D. ARGUMENT

1. The unwarranted use of a stun belt throughout his jury trial violated Mr. Rook's constitution right to due process of law.

a. Due process protects the right of a defendant to appear in court without physical restraints. Criminal defendants have long been entitled to appear in front of the jury free from bonds and shackles absent extraordinary circumstances. U.S. Const. amends. VI, XIV; Const. art. 1, § 22; Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); In re Personal Restraint of Davis, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); State v. Williams, 18 Wash. 47, 50, 50 P. 580 (1897) (referring to the "ancient" right to appear in court free from shackles). Physical restraints denigrate the defendant's constitutional right to a fair trial by reversing the presumption of innocence and prejudicing the jury against him. Deck v. Missouri, 544 U.S. 622, 630, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); Allen, 397 U.S. at 344; Davis, 152 Wn.2d at 693-94. The use of restraints is also an affront to the dignity accorded to an American courtroom. Deck, 544 U.S. at 631; Allen, 297 at 344. In addition, restraining a defendant restricts his ability to assist counsel during trial, interferes with the right to testify in one's own behalf, and may even confuse or embarrass the defendant sufficiently to impair his ability to reason. Deck, 544 U.S. at 631; Allen, 397 U.S. at 345; State v. Finch, 137

Wn.2d 792, 845, 975 P.2d 967 (and cases cited therein), cert. denied, 528 U.S. 922 (1999); Williams, 18 Wash. at 50-51.

Given the constitutional rights at stake, a court may require a defendant be restrained in court only when necessary to protect the safety of others or prevent escape. Finch, 137 Wn.2d at 846; Williams, 18 Wash. at 51.

> The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner in the courtroom.

Davis, 152 Wn.2d at 695 (quoting Finch, 137 Wn.2d at 850). Restraints should only be used as a "last resort," when less restrictive alternatives are not possible. Allen, 397 U.S. at 344; Davis, 137 Wn.2d at 693.

b. The trial court ordered Mr. Rook to wear a stun-belt. Shortly after the case was assigned to Judge Cayce, the King County Department of Adult and Juvenile Detention (Jail) filed a motion asking the trial court to order that Mr. Rook be restrained during his court appearances.[2] Supp CP___ (DAJD Motion for Order that Defendant be Restrained at Trial, sub. no. 108, 3/25/11) (hereafter DAJD Motion); 4/6/11RP 2, 18-19, 34-35. The criminal prosecutor took no position on the motion. 4/6/11RP 19.

[2] DAJD operates the King County Jail and provides transportation and guards for inmates during their appearances in King County Superior Court.

The Jail argued that restraints were necessary because Mr. Rook received seven infractions while incarcerated which revealed "a lack of deference to authority, frequent and repeated displays of rage and lack of control, not to mention threats and assaults." CP 80-82. None of the infractions showed that Mr. Rook attempted to escape. CP 80-82. Instead, he kicked a door on one occasion and twice made unsuccessful threats to fight. CP 82. The Jail also referred to Mr. Rook's age, height and weight, his prior record, and the sentence he faced if convicted. CP 109. The jail also claimed there were limited alternatives for restraining a prisoner during trial and recommended the stun-belt. CP 83, 85-89; DAJD Motion at 16-17.

The court determined the motion based upon the declarations provided by the Jail, Mr. Rook's testimony and pre-trial exhibit as well as unsworn information from Jail Captain Danley.[3] 4/6/11RP 27-38, 40-44.

Mr. Rook denied that the infractions cited by the Jail had occurred and pointed out that he had never attempted to escape and his criminal history did not include any assaults. 4/6/11RP 29-33, 35. He added that he walked with a limp and weighed less than the Jail had asserted. 4/6/11RP 26-27, 31. Mr. Rook promised that he would not misbehave in

[3] Although the trial court admitted the information Mr. Rook provided as a pre-trial exhibit, the clerk never filed the information as an exhibit. 4/6/11RP 28.

the courtroom. 4/6/11RP 33-35. "I'm not going to act a fool in the courtroom, you know, I need that jury on my side." 4/6/11RP 34.

During the course of Mr. Rook's testimony in opposition to the Jail's motion, the court inquired as to which method of restraint he would prefer:

> Court: Do you suggest any alternatives?
>
> Mr. Rook: You've got armed guard in here that are told to kill you if you try to do anything stupid.
>
> Court: Other than having a guard kill you?
>
> Mr. Rook: I don't know, it is just whatever your Honor wants, I mean, I guess
>
> Court: Well, the jail has made some other suggestions. Is there anything else that you feel would be better than what they are suggesting if I do find – I'm not finding anything at this point.
>
> Mr. Rook: You know, this – I guess the best thing, if you decide that I'm going to be a fool, would be that leg band thing that the jury can't see it . . .

4/6/11RP 34. Later the attorney for the Jail asked Mr. Rook what form of restraint he would prefer, and Mr. Rook stated the stun-belt was his choice "if I am ordered to do that." 6/4/11RP 37.

Without determining if Mr. Rook was a security risk who warranted restraints during trial, the court stated it had "serious concerns that I'm not going to express on the record about security in this

courtroom" that could only be addressed by having Mr. Rook "closely guarded by the [jail] officers." 4/6/11RP 39, 40. The court added that "anyone facing life should be considered a serious security risk." 4/6/11RP 39. After discussing where the restraint belt would be placed on Mr. Rook's body, the court reiterated that "the security . . . is going to be much different if you chose to have it or I order it, even over your objection." 6/4/11RP 43-45. Mr. Rook responded, "Go ahead and order it, I've got no problem." 6/4/11RP45.

The court then ordered that Mr. Rook be restrained with the REACT stun belt during the trial. Order Restraining Defendant. The court declined to enter specific written findings of fact and conclusions of law, but based its oral ruling upon (1) the court's unrevealed concerns about the security of the courtroom, (2) the life sentence Mr. Rook was facing, and (3) Mr. Rook's agreement to the use of the stun belt.[4] 4/6/11RP 39, 45, 52.

Mr. Rook was first placed in the stun-belt for his CrR 3.5 hearing. He argued that the belt would hamper his ability to defend himself because he was not permitted to get out of his chair, even to cross-examine witnesses or present opening argument, and was forbidden from using body language or approaching the jury. 4/14/11RP 7, 12-13. The court

[4] When the court explained the ruling was based upon Mr. Rook's agreement, Mr. Rook said he did not remember making such a statement. 4/6/11RP 47.

informed Mr. Rook that he needed to provide a written brief on the issue. 4/14/11RP 13, 14. The court again threatened Mr. Rook with more severe restrictions if he did not agree to the stun-belt. "You will be more restricted if you don't have a band, I will guarantee that." 4/14/11RP 13.

c. The trial court abused its discretion by ordering Mr. Rook to wear a stun-belt in the absence of evidence that he was an escape risk, was likely to injure anyone in the courtroom, or would not behave in an orderly manner. The trial court has discretion to ensure that the courtroom is safe. Allen, 397 U.S. 343; State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). But that discretion must be exercised based upon facts of the individual case set forth in the record. Hartzog, 96 Wn.2d at 492. Those facts must show that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner in the courtroom. Finch, 137 Wn.2d at 850.

i. Mr. Rook did not waive his constitutional right to be free from restraints during trial. The trial court based its decision in part upon Mr. Rook's agreement to the stun-belt. The court's colloquy with Mr. Rook, however, shows that Mr. Rook did not knowingly, intelligently or voluntarily waive his constitutional right to be free from restraints during trial.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). Thus, the waiver of a constitutional right must be knowing, intelligent and voluntary. State v. Strode, 167 Wn.2d 222, 229 n.3, 217 P.3d 310 (2009) (right to be public trial); City of Seattle v. Klein, 161 Wn.2d 554, 560, 166 P.3d 1149 (2007) (right to appeal); City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 209-10, 691 P.2d 957 (2008) (rights to counsel and jury trial). The State bears the burden of proving a knowing, intelligent and voluntary wavier of a constitutional right. Klein, 161 Wn.2d at 561.

Mr. Rook did not have the information needed to make an informed decision about waiving his constitutional rights. The court never told Mr. Rook that he had a constitutional right to appear without restraints. The judge stated he had concerns about the security of his courtroom but declined to reveal what they were. 4/6/11RP 39-40. The court also stated he would position the jail security officers in specific areas of the courtroom if Mr. Rook did not agree to other restraints, but would not reveal how many he would require and where they would be positioned. 4/6/11RP 40. The court only warned Mr. Rook that the security would look "much different" than it did at the pre-trial hearing. 4/6/11RP 44-45.

Because he was not provided with information about the alternatives, Mr. Rook could not validly waive his constitutional rights. Mr. Rook's agreement was not a valid waiver of his constitutional right to attend his trial without restraints because it was not knowing or voluntary. As the trial court observed, Mr. Rook agreed to the stun-belt only because of the court's "comments about the way security is going to look in the court." 4/6/11RP 45. Mr. Rook was thus under the impression that he would face repercussions that would hurt his chances at a fair trial if he did not agree.

Courts require that defendants be fully informed before they are asked to waive important constitutional rights. For example, when the State seeks to justify a warrantless search of the defendant's home based upon consent, the government must prove that the consent was voluntary. State v. Ferrier, 136 Wn.2d 103, 110, 960 P.2d 927 (1998). The police must therefore inform the homeowner of her right to refuse consent, to revoke consent, and to limit the scope of the search. Ferrier, 136 Wn.2d at 118-19. Otherwise, the Ferrier Court reasoned, the State would be unable to prove the consent was voluntary.

> If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the State would be

> unable to meet its burden of proving that a knowing and voluntary waiver occurred.

Id. at 116-17.

Similarly, law enforcement officers must clearly and unequivocally inform a suspect in police custody of his constitutional rights to remain silent and to counsel before interrogating the suspect. Miranda v. Arizona, 384 U.S. 436, 467-68, 471, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Miranda warnings are "indispensible" to overcome the pressures of interrogation "and to insure that the individual knows he is free to exercise the privilege at that point in time." Miranda, 384 U.S. at 469. In addition the police are required to inform the defendant that anything he says can be used against him in court so that he will understand the consequences of waiving his right to remain silent. Id. at 469. "It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." Id.

The trial court never informed Mr. Rook that he had a constitutional right to appear in court without restraints. The court also threatened Mr. Rook with visible and more intensive security if he did not agree to the stun-belt, but would not describe this alternative. Mr. Rook lacked the information necessary to make an intelligent decision and was threatened with greater security if he did not agree. Thus, the State cannot

prove that Mr. Rook's agreement to the stun-belt was either a knowing or a voluntary waiver of his constitutional right to appear in court without restraints.

ii. *The trial court's fears concerning the safety of the courtroom are not on the record*. The court's decision to order Mr. Rook to wear the stun-belt was based in part about the judge's concern for the security of his individual courtroom. In determining the security measures necessary in a courtroom, a trial court judge must rely upon facts in the record. Hartzog, 96 Wn.2d at 400. The court, however, did not describe its concerns about courtroom security or otherwise place them on the record. Thus, there is nothing to support the court's conclusion that the courtroom was not safe with traditional security measures.

iii. *The sentence Mr. Rook faced did not justify the use of a stun-belt*. The trial court also reasoned that the stun-belt was a necessary precaution because Mr. Rook faced a life sentence if convicted of vehicular assault. The possibility of a life sentence, however, is not a sufficient reason in itself to warrant restraining the defendant. Finch, 137 Wn.2d at 849 (citing People v. Boose, 66 Ill.2d 261, 267, 362 N.Ed.2d 303, 5 Ill.Dec. 832 (1977)). Instead, the court must focus on factors showing the defendant actually poses a risk of escape or assaults on others. Id. at 851. The trial court's reliance upon Mr. Rook's possible

sentence was improper in the absence of findings that Mr. Rook was an escape risk or would assault a participant or disrupt the court proceedings.

iv. *The trial court did not consider less restrictive measures*. In deciding to restrain a defendant during trial, the court must order the least restrictive form of restraint possible. Finch, 137 Wn.2d at 853-54; Gonzalez v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003). The only alternatives considered by the court on the record appear to be more, rather than less restrictive than the stun-belt. These include the measures mentioned by the jail and placing jail officers "over there when you testify, or not allowing you to testify from there." CP 85-95; 4/6/11RP 34, 39. The court made no mention of other security measures, such as moving the witnesses. See, Hartzog, 96 Wn.2d at 401 (court must consider wide variety of choices). The trial court thus erred by not considering less serious security measures. Finch, 137 Wn.2d at 854.

v. *The trial court's decision to restrain Mr. Rook violated his constitutional right to appear at his jury trial free from restraints*. A court may not require an offender to appear in trial in restraints because of a nebulous concern that he is "potentially dangerous." Finch, 137 Wn.2d at 852; Hartzog, 96 Wn.2d at 400. The record is devoid of any evidence that Mr. Rook was disruptive in court, the Jail did not argue that he had been, and the court did not base its decision on Mr. Rook's past courtroom

behavior. This Court has the transcripts for over 20 court appearances, and Mr. Rook did not verbally or physically threaten any party. See Finch, 127 Wn.2d at 852 (defendant attended numerous pre-trial hearings without incident). There was similarly no evidence Mr. Rook was an escape risk. Mr. Rook's prior record does not include any assaults or escapes. CP 491; Supp CP ___ (Presentence Report of King County Prosecuting Attorney, sub. no. 191, 8/18/11) at 9 (hereafter State's Presentence Report).

In Finch a defendant facing the death penalty for two murders was placed in leg shackles throughout his jury trial and handcuffs were added for the testimony of two witnesses. Finch, 137 Wn.2d at 804, 850. Finch was not an escape risk, he had been compliant at all prior hearings, and he had no history of violence, but the court ordered the restraints based upon the concerns of the jail correctional officers. Id. at 851-52. The Supreme Court found the court erred by ordering shackling when the defendant "was never disruptive in court, he was not an escape risk, and he posed no threat to anyone other than possibly [one witness]." Id. at 864.

The trial court similarly erred in Mr. Rook's case. Mr. Rook's agreement to the stun-belt was not a valid waiver of his constitutional rights, as the court threatened Mr. Rook with more severe and unnamed security measures if he did not agree. The court's concerns for the

existing security in the courtroom are not in the record. And the life sentence Mr. Rook faced does not justify the use of trial restraints. The use of the stun-belt violated Mr. Rook's constitutional rights.

d. Mr. Rook's conviction for vehicular assault must be reversed and remanded for a new trial. The unwarranted use of restraints during trial is a constitutional error that is presumed prejudicial. State v. Damon, 144 Wn.2d 686, 632, 25 P.3d 418 (2001); Finch, 137 Wn.2d at 839. The State thus bears the burden of proving harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Damon, 144 Wn.2d at 632. In deciding if constitutional error is harmless, Washington courts utilize the "overwhelming untainted evidence" adopted in State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Finch, 137 Wn.2d at 859. Under this test, the appellate court looks only to the untainted evidence to determine if it is "so overwhelming that it necessarily leads to a finding of guilt." Guloy, 104 Wn.2d at 426.

i. *Mr. Rook's constitutional right to be present at trial and present his defense were violated.* In some cases, Washington courts have looked to whether the restraints were visible and therefore had an injurious effect on the jury verdict. Damon, 144 Wn.2d at 693; State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) (finding error harmless

because restraints were not visible to jury), cert. denied, 525 U.S. 1157 (1999); State v Flieger, 91 Wn.App. 236, 242, 955 P.2d 872 (1998) (reversing conviction where shock-box visible to jury implied that unique force was needed to control defendant), rev. denied, 137 Wn.2d 1003 (1999). There is no evidence that Mr. Rook's jury saw the stun-belt. But the stun-belt impacts the defendant's trial in another way – by interfering with his mental faculties and his constitutional right to defend himself and work with counsel.

The "Band-it" is attached to the defendant's arm, or leg. When activated by a corrections officer from up to 150 feet away, it delivers an eight-second long, 50,000-volt electric shock which temporarily immobilizes the wearer and destroys his "focus." CP 97, 107. The potential dangers of similar stun belts have been addressed in other jurisdictions.[5] The activation of the belt causes the wearer to lose control of his limbs and fall to the ground. Some people urinate or defecate, and others may shake uncontrollably. United States v. Durham, 287 F.3d 1297,

[5] The stun belts addressed in Mar, Durham, and Wrinkles appear to be the same as the one Mr. Rook wore. The only exception, that Mr. Rook wore the belt on his leg rather than on his waist, is immaterial. Compare, CP 97, 107; Mar, 52 P.3d at 97 (device "delivers an eight-second-long, 50,000-volt, debilitating electric shock when activated by a transmitter controlled by a court security officer"); Durham, 287 F.3d at 1305 (belt administers a 50,000 – 70,000 volt shock for eight seconds that causes the wearer to lose control of his limbs and often urinate and defecate on himself, and the belt's position on the wearer's back causes some discomfort); Wrinkles, 749 N.Ed.2d at 1193 (two nine-volt batteries connected to prongs attached to left kidney region; when activated remotely the wearer receives eight –second 50,000-volt shock, knocking down most people and causing them to shake uncontrollably, remaining incapacitated for up to 45 minutes).

1305 (11th Cir. 2002); Wrinkles v. State, 749 N.E.2d 1179, 1193 (Ind. 2001), cert. denied, 535 U.S. 1019 (2002); see, Philip H. Yoon, The "Stunning Truth: Stun Belts Debilitate, They Prejudice, and They may even Kill, 15 Cap. Def. J. 383, 384-88 (2003).

The California Supreme Court, for example, has explained that sitting through a trial with the understanding that a jail security officer could activate the stun belt, releasing a debilitating burst of electricity into the defendant's body, may impact the defendant's mental faculties and prejudicially affect his constitutional rights. People v. Mar, 28 Cal.4th 1201, 52 P.3d 95, 106, 124 Cal.Rptr.2d 161 (2002).

> Even when the jury is not aware that the defendant has been compelled to wear a stun belt, the presence of the stun belt may preoccupy the defendant's thoughts, make it more difficult for the defendant to focus his or her entire attention on the substance of the court proceedings, and affect his or her demeanor before the jury – especially on the witness stand.

Mar, 52 P.3d at 106. The court added that most people "would experience an increase in anxiety if compelled to wear such a belt while testifying at trial. Id. at 110; accord Pliler, 341 F.3d F 900-01 (stun belt would increase defendant's anxiety when testifying and impact demeanor). California therefore requires the trial court to consider the potential adverse psychological consequences of wearing the belt, the chance of accidental activation, and the special danger to people with medical conditions such as

heart problems, before requiring a defendant be forced to wear a stun belt in court. Id. at 112-14.

The Eleventh Circuit similarly noted that wearing a stun belt negatively impacts the defendant's right to be present at trial and participate in his defense because such a device necessarily makes it difficult for the defendant to concentrate on the proceedings and can even impact the defendant's trial strategy. Durham, 287 F.3d at 1305-06 (11th Cir. 2002).

> Stun belts are less visible that many other restraining devices, and may be less likely to interfere with a defendant's entitlement to the presumption of innocence. However, a stun belt imposes a substantial burden on the ability of a defendant to participate in his own defense and converse with his attorney during trial. If activated, the device poses a serious threat to the dignity and decorum of the courtroom.

Id. at 1306. Indiana has gone so far as to ban the use of stun belts in the courtrooms of their state, noting the use of other forms of restraint "can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated." Wrinkles, 749 N.E.2d at 1194-95 (Ind. 2001).

Mr. Rook was the only witness for the defense, and his demeanor was of critical interest to the jury in evaluating credibility. Thus the impact of wearing the stun-belt on Mr. Rook's ability to be fully present in court

and participate in his defense is reversible error even though the stun-belt was apparently not visible to the jury.

ii. *The constitutional error in this case is not harmless.*

The evidence in Mr. Rook's case was not so overwhelming that it necessarily leads to the conclusion he was guilty. The crime of vehicular assault requires a finding beyond a reasonable doubt that the defendant operated a motor vehicle in "rash or heedless manner, indifferent to the consequences." CP 206; State v. Roggenkamp, 153 Wn.2d 614, 630, 106 P.3d 196 (2005). Mr. Rook's testimony established that he was not driving rashly or heedlessly. Instead, his actions were those of a man who was distracted by circumstances he could not control: Ms. Rectenwald's actions spilling coffee on him and knocking the glasses off his face, and his inability to see without them. While Mr. Rook was responsible for the automobile accident, he was not driving in a rash and heedless manner.

Mr. Rook presented a much more compelling defense than did the defendant in Finch, where this Court held the use of restraints harmless as to the guilt phase of a death penalty case. The issue at trial was premeditation. Finch shot one man in front of two witnesses, telling them he had planned to do so for three months and telling the 911 operator the murder was intentional. Finch, 137 Wn.2d at 802. Finch then shot a deputy sheriff who arrived to investigate and told a SWAT team

negotiator that the killing was premeditated. Id. at 803. Thus, the evidence of premeditation was compelling and reversal of the conviction was not required. Id. at 862.

In contrast, Mr. Rook's driving was explained by the coffee spilled on his lap and the loss of his eyeglasses, thus showing he was not acting rashly or heedlessly. This Court cannot conclude the evidence against Mr. Rook was so overwhelming that any reasonable trier of fact would necessarily reach the same result. His conviction must be reversed and remanded for a new trial. Damon, 144 Wn.2d at 695-96.

2. **Mr. Rook's sentence of life without the possibility of parole violates the cruel punishment clause of the Washington Constitution.**

Mr. Rook was convicted of vehicular assault for an automobile accident where the jury found he drove his car in a rash and heedless manner and caused substantial bodily injury to another person. Mr. Rook did not intentionally hurt anyone, and the accident did not cause serious bodily injury or death. The maximum sentence for vehicular assault is ten years, but the court sentenced Mr. Rook to life in prison without the possibility of parole based on his prior convictions. The sentence violated the cruel punishment clause of the Washington Constitution and must be reversed.

The Persistent Offender Accountability Act (POAA) defines a "persistent offender" as a defendant being sentenced for a "most serious offense" who has two or more prior convictions for crimes that are also "most serious" offenses. RCW 9.94A.030(37)(a). Vehicular assault is a "most serious offense" if it is committed by means of driving under the influence of alcohol or drugs or driving a vehicle in a reckless manner. RCW 9.94A.030(32)(q). Whenever the sentencing court concludes an offender is persistent offender, the court must impose the sentence of life, and offender is not eligible for parole or any form of early release. RCW 9.94A.570.

The POAA was designed to punish serious, violent repeat offenders, but that purpose is not served by sentencing Mr. Rook to life without the possibility of parole. Mr. Rook's sentence is disproportionate to the sentence he would receive for the same conduct in every other state of the Union, and it is also disproportionate to the sentence he would receive in Washington for analogous offenses. Mr. Rook's sentence thus violates the Washington Constitution's prohibition against cruel punishment.

a. Article I, section 14 prohibits cruel punishment. Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."

The Framers of the Washington Constitution considered language identical to the Eighth Amendment of the United States Constitution, which prohibits punishment that is both "cruel" and "unusual," but decided that the single word "cruel" best described their purpose. U.S. Const. amend. VIII; State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (citing The Journal of the Washington State Constitutional Convention: 1889 501-02 (B. Rosenow ed. 1962)); Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution, A Reference Guide 28 (2002). Because of the differing language and intent, Washington courts have held that Article I, section 14 is more protective of individual rights than the Eight Amendment.[6] State v. Roberts, 142 Wn.2d 471, 505-06, 14 P.3d 713 (2000); State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996); Fain, 94 Wn.2d at 393.

Life sentences for persistent offender have been upheld by Washington appellate courts, but in each case the defendant was sentenced for a crime involving greater injury and/or a higher degree of mental culpability than vehicular assault. State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (second degree assault and unlawful imprisonment); Thorne, 129 Wn.2d at 772-76 (first degree robbery and first degree

[6] No Gunwall analysis is necessary in light of the established principle that article I, section 14 is interpreted independently from the Eighth Amendment. Roberts, 142 Wn.2d at 505 n.11.

kidnapping); State v. Rivers, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996) (second degree robbery); State v. Manussier, 129 Wn.2d 652, 912 P.2d 473 (1996) (second degree robbery), cert. denied, 520 U.S. 1201 (1997); State v. Johnson, 150 Wn.App. 663, 679-80, 208 P.3d 1265 (three counts of first degree robbery), rev. denied, 167 Wn.2d 1012 (2009); State v. Flores, 114 Wn.App. 218, 56 P.3d 622 (2002) (first degree child molestation), rev. denied, 148 Wn.2d 1025 (2003); State v. Morin, 100 Wn.App. 25, 995 P.2d 113 (first degree robbery, first degree burglary, and indecent liberties by forcible compulsion), rev. denied, 142 Wn.2d 1010 (2000). These cases do not end the inquiry for Mr. Rook, however. As the Thorne Court stated, "We recognize there may be cases in which application of the Act's sentencing provisions runs afoul of the constitutional prohibition against cruel punishment." Thorne, 129 Wn.2d at 773 n.11.

b. The Fain factors demonstrate life without the possibility of parole is cruel punishment for Mr. Rook. The Fain Court found that a sentence of life with the possibility of parole for second degree theft by the fraudulent issuance of several small checks under Washington's former habitual criminal statute violated article I, section 14.[7] Fain, 94

[7] Under Former RCW 9.92.090, a jury could find a defendant was an habitual criminal if it found beyond a reasonable doubt that he had two prior felony convictions. The court could sentence the defendant to life in prison, and the defendant would be

Wn.2d at 389-90, 402. To analyze whether the sentence was disproportionate to the crime and therefore violated article I, section 14, the Fain Court utilized four "useful" factors. Id. at 395-97. The factors are: (1) the nature of the offense, (2) the legislative purpose behind the sentencing statute, (3) the punishment the defendant would have received in another jurisdiction for the same offense, and (4) the punishment meted out for similar offenses in Washington. Id. at 397 (using factors enunciated in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974), overruling recognized, Hutto v. Davis, 454 U.S. 370, 373 (1982)); accord, Manussier, 129 Wn.2d at 677 (omitting factor 2); Thorne, 129 Wn.2d at 773.

While the POAA was clearly designed to provide lengthy incarceration for repeat offenders, the initiative's backers emphasized the need for such punishment for only the most serious and violent offenders. Mr. Rook was convicted of a crime based upon reckless conduct that inflicted only substantial injury. Appellate counsel has not identified any sister states where an offender whose conduct mirrored the elements of vehicular assault found by Mr. Rook's jury would receive a sentence of life without the possibility of parole. A review of the Fain factors thus

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eligible for parole after 15 years or less. Fain, 94 Wn.2d at 390, 390 n.2, 393; State v. Hennings, 100 Wn.2d 379, 382, 670 P.2d 256 (1983). The court could also suspend the sentence. State v. Gibson, 16 Wn.App. 119, 127-28, 553 P.2d 131 (1976).

demonstrates Mr. Rook's sentence is disproportionate to his crime and thus "cruel" for purposes of article I, section 14.

i. *Factor One – The nature of the offense*. Vehicular assault is a Class B felony with a maximum term of 10 years in prison and/or a $20,000 fine. RCW 46.61.522(2); RCW 9A.20.021(1)(b). Its SRA seriousness level is only 4, in a scheme of seriousness levels ranging from 1 to 16, with 16 reserved for aggravated murder in the first degree. RCW 9.94A.515. If Mr. Rook had not been a persistent offender, he would have been sentenced within a standard range of 53 to 70 months, and the State had originally agreed to recommend a 10-year sentence if Mr. Rook had pled guilty early in the process. RCW 9.94A.510, .515; State's Presentence Report at 9; 8/19/11RP 45, 46-47.

The elements of vehicular assault found by the jury were that Mr. Rook (1) drove a motor vehicle in a reckless manner and (2) caused substantial bodily harm to another person. RCW 46.61.522(1)(a); CP 181-82. The defendant's mental state is a key component in determining his culpability. See, Tison v. Arizona, 481 U.S. 137, 156, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) ("Deeply engrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). Thus, vehicular assault does not involve the intentional or knowingly

infliction of bodily harm, nor must the defendant act in willful or wanton disregard for the safety of others or in reckless disregard of a danger of death or bodily injury. Instead, the jury only found Mr. Rook acted in a "rash or heedless manner, indifferent to the consequences." CP 206; Roggenkamp, 153 Wn.2d at 630. Thus, the nature of Mr. Rook's crime does not warrant the imposition of the highest punishment possible short of the death penalty.

ii. Factor Two - The Legislative Purpose Behind the Habitual Criminal Statute. Recidivist offender legislation, such as Washington's POAA, is generally designed to provide long sentences to career criminals in hopes of reducing crime and protecting the public. Ewing v. California, 538 U.S. 11, 24, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); Thorne, 129 Wn.2d at 777-75. Modern recidivist legislation has been driven by the public's fear and outrage concerning violent crime. Thorne, 129 Wn.2d at 748-49 (and authorities cited therein). Washington's POAA was the result of an initiative by the people intended to require life without the possibility of parole for people who commit "most serious" offenses and have two prior convictions for "most serious" offenses. Id. at 746, 766-67. The law's "statement of intent" mentions community protection, the need for simplified sentencing procedures, and the need for punishment "proportionate both to the seriousness of the

crime and the prior criminal history." RCW 9.94A.392. The voter's pamphlet statement in favor of the initiative stated it would require anyone convicted of a "third violent felony" to be "locked up for life" with "no loopholes." Thorne, 129 Wn.2d at 766 (quoting 1993 Official Voters Pamphlet at 4 (2nd ed.)).

When the voters passed the "Three Strikes" Initiative and it was adopted by the Legislature, the vehicular assault statute required that the defendant's reckless driving more serious bodily injury than the current statute. At that time the crime required "serious bodily injury," which is defined as "a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any body part or organ." Former RCW 46.61.522 (2000); RCW 9A.04.110(4)(c); see State v. Cardenas, 129 Wn.2d 1, 6, 914 P.2d 57 (1996). In addition, the law formerly required that the reckless driving be the proximate cause of the serious bodily injury. Former RCW 46.61.522. These requirements were eliminated when the statute was amended in 2001, but committing vehicular assault by reckless driving or while under the influence of alcohol remained on the list of "most serious offenses." 2001 Laws of Washington ch. 300, §§ 1, 2.

Washington's "three strikes" legislation was designed to put only the most serious offenders in prison for the rest of their lives. The crime

of vehicular assault, however, no longer requires that the defendant's operation of a motor vehicle be the proximate cause of serious bodily injury, and the mental element is only driving in a rash or heedless manner.[8]

The power of the legislature to set penalties is always subject to the constitutional prohibition against cruel punishment. Thorne, 129 Wn.2d at 769; Fain, 94 Wn.2d at 402. Given the nature of Mr. Rook's offense, the voters' desire to punish only the most violent repeat offenders was not served by the sentence in this case. See Jennifer Cox Shapiro, Life in Prison for Stealing $48?: Rethinking Second-Degree Robbery as a Strike Offense in Washington, 34 Sea. U. L. Rev. 935, 941-42 (2011) (Polly Klaas's murder and her father's advocacy sparked California's "three strike" legislation, but her father is shocked at the breadth of the statute,

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[8] In some cases, the Washington Supreme Court has looked at a persistent offender's prior offenses in determining if the current sentence is constitutional. Fain, 94 Wn.2d at 397-98; Manussier, 129 Wn.2d at 677; contra Thorne, 129 Wn.2d at 773-74; Rivers, 129 Wn.2d at 713. Admittedly, Mr. Rook's prior two "strike" offenses were for more serious crimes - a 1985 conviction for robbery in the first degree and a 1994 conviction for rape of a child in the first degree. CP 491; 8/19/11RP 35-36. Mr. Rook's criminal activity, however, has lessened in severity and dangerousness since the 1994 conviction. He had only one felony between that time and the current offense, a 2006 conviction for second degree extortion. CP 491; RCW 9A.56.110, .130 (attempt to obtain property by "wrongful threat"). Nor did Mr. Rook have any violent misdemeanors. State's Presentence Report at Appendix B to Plea Agreement [sic]; Prosecutor's Understanding of Defendant's Criminal History. Thus, it appears that Mr. Rook was becoming less of a danger to society, and it is not necessary to incarcerate him until he dies.

stating, "I've had my car broken into and my radio stolen and I've had my daughter murdered, and I know the difference.").

iii. Factor Three – The Punishment in Other Jurisdictions for Similar Offenses. Mr. Rook's subjection to life imprisonment without the possibility of parole resulted from the inclusion of vehicular assault as a strike crime and the statute's mandatory nature. Washington's vehicular assault statute covers significantly less serious conduct than similar statutes in other jurisdictions because it (1) does not require serious bodily injury or death and (2) is satisfied by the lower mental state of driving in a rash and heedless manner. Washington's "three strikes" statute is also one of the few in the country to mandate life without the possibility of parole for all offenders who fall within its purview. Appellant reviewed the criminal and sentencing laws of all 49 sister states and determined that Mr. Rook would not have received this onerous sentence in any jurisdiction except Washington.

The analysis of what sentence Mr. Rook would receive in other states begins with comparing the elements found by the jury with the elements of crimes in other states. While most states criminalize serious driving offenses, such as vehicular homicide, no state has a statute that makes conduct identical to Washington's vehicular assault statue a felony. Instead, most jurisdictions require serious bodily injury and/or driving

while under the influence of alcohol when criminalizing injury resulting from automobile accidents.

Only seven states have crimes somewhat similar to Washington's vehicular assault statute, and in only one of those states, Minnesota, is the offense a felony subject to recidivist sentencing. In Minnesota it is a crime to inflict injury or death by driving a motor vehicle in a "grossly negligent manner." Minn.Stat. § 609.21(1); see State v. Brehmer, 281 Minn. 156, 160 N.W.2d 669, 673 (1968) ("gross negligence" is a "very high degree of negligence" that is less than recklessness). If accident results in substantial bodily harm, the person may be sentenced to up to three years in prison. Minn.Stat. § 609.21(1a)(c).

This offense is a violent crime for purposes of Minnesota's repeat offender sentencing, and could result in an upward departure from the sentencing guidelines or a sentence up to the maximum term. Minn.Stat. § 609.1095. No sentencing provision permits sentencing above the maximum term, however, and life without release is reserved for first degree murder convictions in Minnesota. Minn.Stat. § 609.106. Thus, Mr. Rook faced the possibility of a three-year prison term had the accident occurred in Minnesota.

The other six states with statutes that criminalize conduct analogous to that covered by Washington's vehicular assault statute do not

even punish the conduct as a felony. Four states, Arkansas, Missouri and North Dakota, and New Jersey have statutes that criminalize the reckless infliction of bodily harm. In Arkansas and North Dakota, reckless driving is punished more severely if physical injury results, but the maximum term remains one year. Ark.Code § 27-50-0308(b)(1)(A); N.Dak.Cen.Code § 39-08-03. Missouri's third degree assault statute criminalizes the reckless infliction of physical injury on another person, but the crime is not a felony unless "serious physical injury" results. Mo.Stat. §§ 656.060; 656.070; 565.002(6). In New Jersey, the crime of assault by an automobile or vessel is a misdemeanor with a maximum penalty of six months in the absence of serious bodily injury, driving under the influence of alcohol, or refusing to take a chemical test. N.J.Stat. §§ 2C:12(c); 2C:43-8.

The negligent infliction of physical injury as the result of reckless driving is a misdemeanor offense in Hawaii and Delaware. Del.Code § 628; Haw.Rev.Stat. § 707-706. Moreover, in Hawaii, the negligent operation of a motor vehicle must cause "substantial bodily harm." Haw.Rev.Stat. § 707-706. Thus, six sister states have statutes that criminalize the conduct that is criminalized by RCW 46.61.522, but an offender would not face life without the possibility of parole in any of those jurisdictions.

The remaining 42 states have statutes that criminalize various forms of assault or vehicular assault, but in each state the statute requires greater injury or a higher mental state than that found by the jury in Mr. Rook's case. In those states with assault statutes specific to motor vehicle accidents, the statutes require (1) serious bodily injury, (2) that the driver is under the influence of alcohol or drugs, or (3) both. In states without a statute specific to motor vehicle accidents, the general assault statute requires a higher mental element than recklessness.[9] A list of the comparable statutes of these and other states is attached as an appendix.

Thus, in no other state in the Union would an offender who recklessly operated a motor vehicle and, as a result, caused substantial bodily harm be sentenced to life without the possibility of parole.

iv. *Factor 4 – The punishment for similar offenses in Washington*. A comparison of Mr. Rook's sentence with that he would have received for comparable Washington offenses also demonstrates his sentence violates article I, section 14.

The Washington felony that most closely mirrors vehicular assault is the crime of assault by watercraft, RCW 79A.60.060, but that crime is not a "most serious offense" for purposes of the POAA. A person is guilty of this offense if he operates any vessel "[i]n a reckless manner, and this

[9] Mississippi is an exception, as its assault statute includes recklessness, but requires serious bodily injury. Miss.Code § 97-3-7

conduct is the proximate cause of serious bodily injury to another person." RCW 79A.60.060(2)(a). Reckless manner is defined as "acting carelessly and heedlessly in a willful and wanton disregard for the rights, safety, or property of another" and is thus similar but not identical to the definition used for vehicular assault prosecutions. RCW 79A.60.010(25); Roggenkamp, 153 Wn.2d at 631 ("driving in a rash or heedless manner, indifferent to the consequences."). Like vehicular assault, the crime is also committed if the defendant operates a vessel under the influence of alcohol or drugs and causes serious bodily injury. RCW 79A.60.060(2)(b).

The defendant's reckless driving must be the proximate cause of the injury for assault by watercraft, but not for vehicular assault. In addition, the level of injury required by the assault by watercraft statute is higher than that required for vehicular assault. The assault by watercraft statute defines "serious bodily injury" as "bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." RCW 79A.60.060(1). In contrast, the State need only prove "substantial bodily harm" for a vehicular assault conviction. RCW 46.61.522 (1). Substantial bodily harm may be temporary and need not involve the risk of

death, serious disfigurement, or protracted loss or impairment of a body part or organ. RCW 9A.04.110(4)(b).

Both vehicular assault and assault by watercraft are Class B felonies; they have the same SRA seriousness level and offenders would likely be subject to the same standard range for either offense. RCW 79A.60.060(4); RCW 9.94A.515(Table 2). Yet vehicular assault is a crime for which a defendant may be sentenced to life without the possibility of parole and assault by watercraft is not. RCW 9.94A.030(32).

Another comparable Washington felony is second degree assault, which is a "most serious offense" for purposes of the POAA. RCW 9.94A.030(32). Like vehicular assault, second degree assault has an SRA seriousness level of 4, and the standard sentence range for the two crimes is thus identical. RCW 9.94A.510 (Table 1); RCW 9.94A.515 (Table 2).

Assault in the second degree, however, requires both greater injury and a higher mental state than vehicular assault. To commit second degree assault, a defendant must "intentionally assault another person and thereby recklessly inflict great bodily harm." RCW 9A.36.021(1)(a). Intent is a higher mental state than recklessness, and great bodily injury requires more serious injuries than substantial bodily harm. RCW 9A.04.110(4)(b), (c); RCW 9A.08.010(1); State v. Allen, 101 Wn.2d 355,

359-60, 678 P.2d 798 (1984) (statute creates hierarchy of mental states with increased culpability). It is similarly a higher mental state than the "rash or heedless, indifferent to the consequences," required for vehicular assault. Roggenkamp, 153 Wn.2d at 631.

The sentence of life without the possibility of parole for vehicular assault is disproportionate to the most comparable Washington felonies. A defendant cannot receive this sentence, or any sentence greater than 10 years, for committing the same actions in a boat rather than a car, even if the actions result in serious bodily injury. And, while a defendant is subject to the POAA for committing second degree assault, that statute requires both a higher mental state and greater injury than the vehicular assault statute. This factor thus demonstrates that Mr. Rook's sentence was disproportionate to his offense.

c. Mr. Rook's sentence must be vacated and his case remanded for a sentence within the SRA standard sentence range. A careful review of the Fain factors demonstrates that life without the possibility of parole for an automobile accident resulting in bodily harm was a disproportionate sentence. Mr. Rook did not intentionally hurt anyone, and his crime caused substantial rather than great bodily injury. While Mr. Rook has serious offenses in his prior record, his criminal behavior was deescalating, as the vehicular assault was not an intentional act. In no

other state in the Union would Mr. Rook have been subject to life without the possibility of parole for this conduct. Moreover, the most comparable Washington felony, assault by watercraft, is not subject to the POAA and a similar crime that is subject to the POAA, second degree assault, requires both a higher mental state and more serious bodily injury.

Mr. Rook's sentence of life without the possibility of parole is cruel in violation of article I, section 14. This Court must therefore vacate his sentence and remand for a sentence within the standard sentence range. Fain, 94 Wn.2d at 402-03.

3. **Mr. Rook's sentence of life without the possibility of parole violates the Eighth Amendment's prohibition of punishment that his cruel and unusual.**

a. The Eighth Amendment prohibits punishment that is disproportionate to the crime. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[10] The Amendment protects citizens from punishment that is barbaric or disproportionate to the crime. Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 2021, 176 L.Ed.2d 825 (2010); Solem v. Helm, 463 U.S. 277, 284, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The principle that punishment must be proportionate to the crime

[10] The Eighth Amendment's protection against cruel and unusual punishment applies to the States by virtue of the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

is "deeply rooted and frequently repeated in common law jurisprudence" dating back to the Magna Carta. Solem, 463 U.S. at 284-86. But it requires the court to look "beyond historical concepts to 'the evolving standards of decency that mark the progress of a maturing society.'" Graham, 130 S.Ct. at 2121 (quoting Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

b. Mr. Rook's sentence violates the Eighth Amendment. In reviewing challenges to a term-of-years sentence, the Court considers "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." Graham, 130 S.Ct. at 2021. The process begins by "comparing the gravity of the offense and the severity of the sentence." Id. at 2022 (citing Harmelin v. Michigan, 501 U.S. 957, 1005, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J. concurring in part). If this comparison "leads to an inference of gross disproportionality," the court then compares the defendant's sentence with sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. Id.

i. *Mr. Rook's sentence of life without the possibility of parole is grossly disproportionate to the crime of vehicular assault.* The elements of vehicular assault found by the jury in Mr. Rook's case are that he (1) drove a motor vehicle in a reckless manner and (2) caused

substantial bodily harm to another person. RCW 46.61.522(1)(a); CP 181-82. Thus, the jury did not find that Mr. Rook intentionally or knowingly inflicted bodily harm, that he acted in willful or wanton disregard for the safety of others or in reckless disregard of the danger to death or bodily injury, or that his actions were the proximate cause of the injury. Instead, the jury only found Mr. Rook acted in a "rash or heedless manner, indifferent to the consequences." CP 206; Roggenkamp, 153 Wn.2d at 630. In addition, the vehicular assault statute does not require the infliction of death or even serious bodily harm. Instead, the jury only found the automobile accident caused "substantial bodily harm." CP 192; RCW 46.61.520(1)(a); RCW 9A.04.110(4).

Moreover, vehicular assault is only a Class B felony with a maximum term of 10 years in prison and/or a $20,000 fine. RCW 46.61.522(2); RCW 9A.20.021(1)(b). Mr. Rook's standard sentence range would have been 53 to 70 months if the POAA had not applied to his case. RCW 9.94A.510, .515.

The sentence Mr. Rook received, however, is "the second most severe penalty permitted by law." Graham, 130 S.Ct. at 2027 (quoting Harmelin, 501 U.S. at 1001 (Kennedy, J. concurring in part). Like a death sentence, a sentence of life without the possibility of parole irrevocably alters the defendant's life. It "deprives the convict of the most basic

liberties without giving hope of restoration, expect perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence." Graham, 130 U.S. at 2027 (quoting Solem, 463 U.S. at 300-03). Thus, a sentence of life without the possibility of parole is "far more severe" than a life sentence. Solem, 463 U.S. at 297. Mr. Rook's sentence is far more severe that the California "three-strikes" sentence of 25 years to life upheld in Ewing, 538 U.S. at 14.

Incarceration for life in prison is very difficult. As a prisoner who has no chance of release, Mr. Rook will probably not be eligible for the limited rehabilitative and other programs available in Washington prisons. See, Graham, 130 S.Ct. at 2033 (many prisons withhold counseling, education, and rehabilitation programs from prisoners ineligible for release). Commentators note that prison life has become significantly harsher in recent years, with many prisoners being deprived of human contact or at risk for victimization. John "Evan" Gibbs, Jurisprudential Juxtaposition: Application of Florida v. Graham to Adult Sentences, 38 Fla.St.U. L. Rev. 957, 969 (2011) (citing Eva S. Nilsen, Decency, Dignity, and Dessert: Restoring Ideas of Humane Punishment to Constitutional Discourse, 41 U.C. Davis L. Rev. 111 (2007) and James E. Robertson, A Punk's Song About Prison Reform, 24 Pace L.Rev. 527 (2004)). Current prison practices also damage inmates physically and mentally. Id. (citing

Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash.U J.L.& Pol'y 325, 328-29 (2006)). Overcrowding of prisons can also cause problems with sanitation, access to basic necessities and health care, leading to increased suicide, mental problems, and disciplinary problems among prisoners. Id. (citing Carla I. Barrett, Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?, 39 New Eng. L. Rev. 391, 392-92 (2005); Susanna Y. Chung, Note, Prison Overcrowding: Standards in Determining Eighth Amendment Violations, 68 Fordham L. Rev. 2351 (2000); Peter J. Duitsman, Comment, The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding, 76 N.C. L. Rev. 2209, 2211 (1998); Mark Andres Sherman, Indirect Incorporation of Human Rights Treaty Provisions in Criminal Cases in United States Courts, 3 Int'l L. Students Assn. J. Intl & Comp. L. 719, 730 (1997); Barrett, Prison Rape Elimination Act, 39 New Eng. L. Rev. at 392-93, 400).

Apart from a POAA sentence, the sentence of life without the possibility of parole is reserved only for defendants convicted of aggravated first degree murder for whom the death penalty is not imposed. RCW 9.94A.030(37); RCW 9.94A.570; RCW 10.95.030. Moreover, POAA sentences are reserved for those who commit "most serious

offenses," usually crimes involving intentional, knowing, or malicious conduct. RCW 9.94A.030(32), (37).

While Mr. Rook's prior felony record is relevant in this determination, it is not controlling. Three-strike legislation like the POAA is designed to protect citizens from individuals "who have repeatedly engaged in serious or violent criminal behavior, and whose conduct has not been deterred by more conventional approaches to punishment." Ewing, 538 U.S. at 24. Mr. Rook's current offense is not serious or violent criminal behavior, but the result of reckless driving. In addition, Mr. Rook's criminal history shows that the seriousness of his crimes was decreasing, rather than increasing. Presentence Report (Appendix A at 1-2). Incarcerating Mr. Rook without the possibility of parole thus cannot be justified by his prior record.

Mr. Rook received the penultimate sentence, life without the possibility of parole, for an automobile accident that resulted in substantial but not serious bodily harm. His sentence is grossly disproportionate to his crime, and this Court must thus engage in further review by comparing his sentence to sentences received by other offenders in Washington and in other jurisdictions. Graham, 130 S.Ct. at 2022.

ii. *Mr. Rook's sentence is disproportionate to sentences received by similar offenders in Washington as well as to sentences for the same crime in other jurisdictions*. In Argument 2(b)(iii) and (iv), Mr. Rook demonstrated that his sentence of life without the possibility of parole is disproportionate to the sentences received by Washington offenders for similar crimes and significantly higher than the sentence he would receive for the same conduct in every other state.

iii. *Mr. Rook's sentence violates the Eighth Amendment*. Mr. Rook received the penultimate sentence for a crime where the mental element was driving a motor vehicle rashly based upon his prior record. The Eighth Amendment does not prohibit punishment based in part upon the offender's prior criminal record. Ewing, 538 U.S. at 29-30. In Ewing, however, the defendant was sentenced to 25 years to life, not life without the possibility of parole. Id. at 20; see Rummel v. Estelle, 445 U.S. 263, 280, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (Texas defendant with life sentence would be eligible for parole in as little as 12 years); Ewing, 538 U.S. at 37-40 (Breyer, J., dissenting) (discussing the difference in length of "real time" prison term as "critical" distinction between Rummel, where habeas relief was denied, and Solem, where it was granted). The sentence violated the Eighth's Amendments prohibition against cruel and unusual punishment.

c. Mr. Rook's sentence must be vacated and his case remanded for a constitutional sentence. Mr. Rook received the penultimate sentence for a crime that did not require intent and or even serious bodily harm. His sentence was greater that that he would have received in Washington for similar offenses, and it was also greater than that he would have received in any other jurisdiction. Because his sentence is significantly disproportionate to his crime, it violates the Eighth Amendment and must be stricken. This Court must vacate Mr. Rook's sentence and remand for a constitutional sentence. Graham, 130 S.Ct. at 2034.

4. The court violated Mr. Rook's Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the court's finding, by a preponderance of the evidence, that Mr. Rook had twice previously been convicted of "strike" offenses.

a. Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence. The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S.Ct.

2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment – whether or not the fact is labeled an "element." Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

> It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id.

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Here, the prior convictions found by the court increased Mr. Rook's sentence to life without the possibility of parole and were thus elements of the offense which were required to be proved to a jury beyond a reasonable doubt.

b. Mr. Rook had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior "strike"

offenses because they increased his maximum sentence. Absent the court's finding, by a preponderance of the evidence, that he committed "strike" offenses on two prior occasions, Mr. Rook would not have been subject to a sentence of life without the possibility of parole. The jury verdict alone does not support a life sentence. Because the facts used to impose the sentence were not found by a jury beyond a reasonable doubt, Mr. Rook's Sixth and Fourteenth Amendment rights were violated.

The State may argue that the facts that increased Mr. Rook's sentence fall within a "prior conviction exception." See Apprendi, 530 U.S. at 489. This argument overlooks important distinctions and developments in United States Supreme Court jurisprudence.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).[11] In Apprendi, the Court recognized that there was no need to explicitly overrule Almendarez-Torres in order to resolve the issue before it, but stated, "it is arguable that Almendarez-Torres was incorrectly decided, and

[11] Mr. Rook understands that the Washington Supreme Court has declined to apply Apprendi in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules Almendarez-Torres. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); State v. Wheeler, 145 Wn.2d 116, 117, 34 P.3d 799 (2001). Mr. Rook respectfully contends the time to do so has arrived and urges this Court to take the first step. See, e.g., State v. Anderson, 112 Wn.App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions).

that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489. The Apprendi Court described Almendarez-Torres as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. Apprendi, 530 U.S. at 487.

Justice Thomas, a member of the 5-justice majority in Almendarez-Torres, later changed his mind. His Apprendi concurrence was a dissertation on the historical practice of requiring the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, "a majority of the Court now recognizes that Almendarez-Torres was wrongly decided." Shepard v. United States, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring).

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. First, in Almendarez-Torres, the defendant had admitted the prior convictions. 530 U.S. at 488. Mr. Rook did not admit his prior convictions. Second, the issue in Almendarez-Torres was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at

488; Almendarez-Torres, 523 U.S. at 247-48. Third, Almendarez-Torres dealt with the "fact of a prior conviction." Apprendi, 530 U.S. at 490. But it was not the simple "fact" of the prior convictions that increased Mr. Rook's punishment; it was the "types" of prior convictions that mattered. In order to impose a life sentence under the POAA, the State must prove the defendant has been convicted of "most serious" offenses on two prior occasions. RCW 9.94A.030 (37); RCW 9.94A.570. Fourth, the Almendarez-Torres court noted the fact of prior convictions triggered an increase in the maximum permissive sentence: "[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Accordingly, even if Almendarez-Torres were still good law, it would not apply here.

In a recent Division Two case Judge Quinn-Brintnall recognized that U.S. Supreme Court precedent requires the State to prove prior "strike" offenses to a jury beyond a reasonable doubt. State v. McKague, 159 Wn.App. 489, 525-35, 246 P.3d 558 (Quinn-Brintnall, J., concurring in part and dissenting in part) review granted and affirmed on other

grounds, 172 Wn.2d 802 (2011). Although the Washington Supreme Court has rejected the argument Mr. Rook makes here, Judge Quinn-Brintnall noted that subsequent U.S. Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in Apprendi and invalidated our State's intervening caselaw. McKague, 159 Wn.App. at 530 (Quinn-Brintnall, J., dissenting) (citing Blakely, 542 U.S. at 303-04, and Cunningham v. California, 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)). Under recent U.S. Supreme Court cases, the "prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." Id. at 535. This Court, like Judge Quinn-Brintnall, should follow U.S. Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range. The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Mr. Rook. The imposition of a sentence not authorized by the jury's verdict requires reversal. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not

asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). Mr. Rook's sentence must be reversed and remanded for the imposition of a standard-range sentence.

5. The classification of the persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue. The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. amend. XIV; Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).

Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541; Cf. In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of due process challenge, because civil commitment constitutes "a massive curtailment of liberty").

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause. Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-time

offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors."

Where prior convictions which increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a

felony. State v. Chambers, 157 Wn.App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

But where, as here, prior convictions which increase the maximum sentence available are classified as "sentencing factors," they need only be proved to the judge by a preponderance of the evidence. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike), cert. denied, 541 U.S. 909 (2004). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers "elements," the legislature has never labeled the fact at issue here a "sentencing factor." Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A"); Thorne, 129 Wn.2d at 772 (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context but not in other contexts, because the punishment in the "three strikes" context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030 (37)(b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite

the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for precisely the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offense of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

> We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for

> the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprived Mr. Rook of this basic liberty; it subjected him to life in prison without the possibility of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Skinner, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding of the necessary facts by a preponderance of the

evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

6. **This Court must remand the case to correct the Judgment and Sentence which incorrectly state the jury verdict.**

Mr. Rook was charged with vehicular assault under two prongs of the statute – that he drove recklessly and that he drove while under the influence of alcohol or controlled substances. CP 52; RCW 46.61.522(1)(a), (b). The jury found Mr. Rook guilty on a general verdict form, but in a special verdict form reported that it had not found that Mr. Rook was operating a motor vehicle while under the influence of intoxicating liquor or drugs. CP 191, 192 (RCW 46.61.522(1)(b)). Instead, the jury convicted Mr. Rook of vehicular assault for "operating a motor vehicle in a reckless manner." CP 191-92 (RCW 46.61.522(1)(b)).

The Judgment and Sentence, however, states that Mr. Rook was convicted under both subsections (a) and (b) of RCW 46.61.522(1) and thus misrepresents the jury verdict. CP 486. This Court should remand Mr. Rook's case to correct the Judgment and Sentence to conform to the jury verdict and show Mr. Rook was convicted only under RCW 46.61.522(1)(a). See, Williams-Walker, 167 Wn.2d at 899-900 (trial court bound by jury's special verdict).

E. CONCLUSION

Mr. Rook's vehicular assault conviction must be reversed and remanded for a new trial because he was unconstitutionally restrained during his jury trial.

Mr. Rook's sentence of life without the possibility of parole is unconstitutional because it (1) violates the article I, section 14 prohibition against cruel punishment, (2) violates the Eighth Amendment prohibition against cruel and unusual punishment, (3) is based upon prior convictions found by the trial court by a preponderance of the evidence in violation of the Fourteenth Amendment's due process protections, and (4) is based upon prior convictions found by the trial court by a preponderance of the evidence in violation of the Fourteenth Amendment requirement of equal protection. Mr. Rook's sentence must be vacated and the case remanded for a sentence within the standard range.

In the alternative, this Court must remand for correction of the Judgment and Sentence because it incorrectly states the jury verdict.

DATED this 7th day of June, 2012.

Respectfully submitted,

Elaine L. Winters – WSBA #7780
Washington Appellate Project
Attorneys for Appellant

APPENDIX

A. Seven States with statutes comparable to RCW 46.61.522

1. **Arkansas** – Ark.Code § 27-50-308(b)(1)(A)

   A person driving in manner indicating "a wanton disregard for the safety of persons or property" is guilty of reckless driving. If "physical injury to a person" results, the crime is punished by imprisonment between 60 to 365 days

2. **Delaware** – Del.Code § 628

   "A person is guilty of vehicular assault in the third degree when, while in the course of driving or operating a motor vehicle, the person's criminally negligent driving or operation of said vehicle causes physical injury to another person."

   Vehicular assault in the second degree is a Class B misdemeanor. If the crime is committed while under the influence of alcohol or drugs, it is a class A misdemeanor. Del.Code § 628A.

3. **Hawaii** – Hi.Rev.St. § 707-706

   "Negligent injury in the second degree" if person causes "substantial bodily injury" while operating a motor vehicle in a negligent manner. This crime is a misdemeanor

4 **Minnesota** – Minn.Stat. § 609.21(1), (1a)

   A person is guilty of criminal vehicle operation if he drives "in a grossly negligent manner" and inflicts injury or death. The penalty for causing "substantial bodily harm" is up to 3 years, and the penalty for causing "great bodily harm" is up to 5 years in prison.

   Violation of this statute would be a violent offense as defined in Minn.Stat. § 609.1095. If the trier of fact determines the offender

is a danger to public safety, the court would be required to sentence an offender with two prior violent felonies to a prison term within the sentencing guidelines.

5. **Missouri** – Mo.Stat. § 656.070(1)(1), (2)

Assault in the third degree is committed if the defendant "recklessly causes physical injury to another person." This crime is a misdemeanor.

To be guilty of second degree assault, a class C felony, the defendant must "recklessly cause serious physical injury to another person." Mo. Stat. §§ 656.060(1)(3), (3); 565.002(6)

6. **New Jersey** - N.J.Stat. § 2C:12-1(c); 2C:11-1(b)

Under New Jersey's assault statute, a person is guilty of assault by auto or vessel when he recklessly drives an automobile and causes either injury or serious bodily injury. Unless "serious bodily injury" results or if the defendant was under the influence or alcohol or drugs or refused to take a chemical test, the crime is a misdemeanor with a maximum term of 6 months. N.J.Stat. § 2C:43-8.

7. **North Dakota** – N.Dak.Cen.Code § 39-08-03

The elements of aggravated reckless driving are that the defendant drive a vehicle (1) recklessly or (2) at a speed or in a manner likely to endanger others and, (3) by reason of reckless driving, the defendant inflicts injury upon another person. The crime is a class A misdemeanor.

If the defendant inflicts "serious bodily injury" as a result of reckless driving, which is based in part upon evidence that the defendant operating a motor vehicle under the influence of alcohol or drugs, the crime is a class A misdemeanor with a 90-day minimum term. N.Dak.Cen.Code §§ 39-08-01.2, 12.1-01-04(29).

B. 42 states with statutes that have more onerous requirements than RCW 46.61.522, requiring serious bodily harm and/or driving while under the influence of alcohol and/or drugs

1. **Alabama** – Ala.Code §§ 13A-6-21(3), 13A-1-2(14)

   Second degree assault can be committed by recklessly causing "serious physical injury" to another person by means of a deadly weapon or a dangerous instrument.

   A defendant commits assault in first degree if he drives under the influence of alcohol or drugs and causes "serious physical injury." Ala.Code §§ 13A-6-20(5), 13A-1-2(14)2.

2. **Alaska** – Alaska St. §§ 11.41.210(a)(3), 11.81.900(56)

   Assault in the second degree may be committed by recklessly causing "serious physical injury" to another person

3. **Arizona** – Ariz.Rev.Stat. § 28-676(A)

   The elements of the crime of "causing serious physical injury by use of a vehicle are:
   (1) the defendant is not allowed to operate a motor vehicle
   (2) the defendant causes "serious bodily injury" to another person while operating a motor vehicle, and
   (3) the defendant commits one of a list of traffic offenses

   The crime is a Class 5 felony, and is not subject to sentencing as a serious, violent, or aggravated offender under Ariz.Rev.Stat. 13-706.

4. **California** – Cal.Veh.Code § 23104(b)

   Reckless driving is punishable by 30 to 180 days in jail if the defendant (1) commits "great bodily injury," and has a prior conviction for a crime such as DUI or reckless driving.

5. **Colorado** – Colo.Rev.Stat. § 18-3-205(1)(a)

"If a person operates or drives a motor vehicle in a reckless manner, and this conduct is the proximate cause of serious bodily injury to another, such person commits vehicular assault." The crime is a Class 5 felony

An habitual offender with 3 prior felonies must be sentenced within a range of four times that of presumptive range, or 4 to 12 years. Colo.Rev.Stat. §18-1.3-801(2)(a), 18-1.3-401(1)(a)(V)(A)

6. **Connecticut** – C.G.S.A. § 53a-60d(a)

"A person is guilty of assault in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes serious physical injury to another person as a consequence of the effect of such liquor or drug." Class D felony, 1 to 5 years. Conn.Gen.Stat. § 53a-35a

7. **Florida** – Fl.Stat. § 316.192(3)I(2)

Any person who, by operating a motor vehicle in "willful or wanton disregard for the safety of persons or property" causes "serious bodily injury to another" commits a third degree felony

8. **Georgia** – Ga.Code 40-6-394

The crime of "serious injury by vehicle," is committed when the defendant drives recklessly or while under the influence of alcohol and/or drugs and causes bodily harm to another "by depriving him of a member of his body, by rendering his body useless, by seriously disfiguring his body or a member thereof, or by causing organic brain damage which render the body or any member thereof useless." This crime is a felony punishable by 1 to 15 years.

9. **Idaho** – Idaho Code § 18-8006(1)

A person commits aggravated driving while under the influence by driving under the influence of alcohol and/or drugs and "causing great bodily harm, permanent disability or permanent disfigurement to any person other than himself." The crime is a felony punishable by up to 15 years.

10. **Illinois** – 625 Ill.Code § 5/11-503

Aggravated reckless driving is a Class 4 felony if it results in "great bodily harm or permanent disability or disfigurement." Sentence range is 1 to 3 years. 730 Ill.Code § 5/5-4.5-45I.

11. **Indiana** – Ind.Code § 35-42-2.2

"Aggressive driving" that results in "serious bodily injury" is a Class D felony. This would not give the court the discretion to sentence Mr. Rook life without the possibility of parole Ind.Code § 35-50-2-2(b)(4)

12. **Iowa** – Iowa Code § 707.64(4)
A person commits a D felony if he "unintentionally causes a serious injury" when driving under the influence of alcohol or drugs, recklessly, or while eluding the police.

13. **Kansas** - Kan.Stat. § 21-5413(b)(2)(A); 21-3414(a)(2)(B)

Aggravated battery is defined as "recklessly causing great bodily harm to another person or disfigurement of another person." Recklessness is "conduct done under circumstances that show a realization of the imminence of danger to the person or another and a conscious and unjustifiable disregard of that danger." The crime is a "severity level 5 personal felony." Former Kan.Stat. § 21-3201(c).

In contrast, vehicular homicide is only a "class A person misdemeanor" and involuntary manslaughter while driving under the influence of alcohol is a "security level 4 personal felony." Kan.Stat. §§ 21-5406

Kansas repealed its habitual offenders statutes effective 7/1/11. Former Kan.Stat. §§ 4501-04. Life without parole is limited to those convicted of capital murder or premeditated murder in the first degree. Kan.Stat. § 21-6620.

14. **Kentucky** - Kent.Stat. §§ 508.020(1)(c), 500.080(15)

A defendant is guilty of assault in the second degree if, "He wantonly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument."

Assault in the second degree, a Class B felony, is classified as a violent felony if death or serious injury resulted. As a result, the offender would be ineligible for probation and not eligible for parole until he had served 85 % of his sentence. Kent.Stat. §§ 439.3401, 532.047.

15. **Louisiana** – LSA-RS § 14:39.1, 39.2

If the defendant is under the influence of drugs and/or alcohol, it is first degree" vehicular negligent injuring" if the accident causes "serious bodily injury" and the defendant is subject to up to 5 years in prison. If the accident only causes injury, the maximum sentence is 6 months.

16. **Maine** – 17-A Maine Stat. § 208(1)(A).

Aggravated assault requires intentional, knowing or reckless infliction of "serious bodily injury to another."

17. **Maryland** – Md. Code Crim. § 3-211

"Life threatening injury by motor vehicle or vessel" requires the defendant be under the influence of alcohol or drugs

18. **Massachusetts** – Mass.Gen.Laws 265 § 13A

Massachusetts' common law definition of battery includes intentional commission of a wanton or reckless act that causes physical or bodily injury to another. Commonwealth v. Correia,

50 Mass.App.Ct. 455, 737 N.E. 2d 1264, 1265-66 (2000), rev. denied, 751 N.E.2d 419 (2001).

A battery that results in "serious bodily injury," is subject to punishment for not more that 5 years in prison or not less than 2 ½ years in the house of correction. If there is not serious bodily injury, the penalty is 2 ½ years.

Conviction of battery could be a violent crime that would subject the offender to punishment under Massachusett's Armed Career Criminal Act, Mass.Gen.Law 269 § 10G, 140 § 21. If so, an offender with Mr. Rook's prior record could face a prison term of 15 to 20 years. If the current offense is not a crime of violence, a career criminal would receive the maximum term, or 2 ½ years. Mass.Gen.Law 279 § 25.

19. **Michigan** – MCLA 257.626(3); 257.58c

If a defendant's operation of a motor vehicle "in willful or wanton disregard for the safety of persons or property" causes "serious impairment of a body function," he is guilty of a felony and subject to up to 5 years imprisonment.

Under the subsequent felony statute, a defendant with at least two prior felonies would receive a minimum sentence of at least 5 years and a maximum sentence of up to life. Mich.Stat. 769.12(1)(a).

20. **Mississippi** – Miss.Code § 97-3-7

A person is guilty of "aggravated assault" if he purposely, knowingly or recklessly causes serious bodily injury to another person in circumstances that manifest "extreme indifference to the value of human life." This statute has been used where injuries are caused by an automobile. Gray v. State, 427 So.2d 1363 (1983) (defendant, driving with .20% alcohol level, crossed centerline and dove into another vehicle, seriously injuring two of its four occupants).

If Mr. Rook were prosecuted under this statute, Mississippi's habitual criminal statute conviction would result in a life sentence

with no parole if the defendant had a two prior felony convictions and at least one prior conviction is for a crime of violence. Miss.Code § 99-19-83.

21. **Montana** – Mont.Code § 45-205

A person is guilty of negligent vehicle assault if he negligently operates a motor vehicle while under the influence of alcohol and/or drugs and causes bodily injury to another. The maximum penalty is one year in jail. If the defendant caused "serious bodily injury," the penalty increases to up to 10 years. Either sentence may be suspended upon the payment of a fine and restitution

22. **Nebraska** - Neb.Rev.Stat. §60-6,198(1), (2)

It is a felony to drive a motor vehicle under the influence of alcohol or drugs and proximately cause "serious bodily injury" to another person or an unborn child.

23. **Nevada** – Nev.Rev.Stat § 484C.430

If a person driving under the influence of alcohol and/or drugs, does an act or neglects a duty and proximately causes the death of or "substantial bodily harm" to another person, he is guilty of a category B felony. "Substantial bodily harm" is "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." Nev.Rev.Stat. § 0.060; RCW 9A.04.110(4)(c). .

24. **New Hampshire** – N.H.Rev.Stat. § 265:79-a

If a person acts with criminal negligence and causes death or "serious bodily injury" while driving a motor vehicle or vessel, he is guilty of a class A misdemeanor. See State v. Rollins-Ercolino, 149 N.H. 336, 821 A.3d 953 (2003) (construing statute to require the mental state of criminal negligence and finding provision that evidence that defendant violated any rules of the road to be prima facie evidence that defendant caused or materially contributed to the collision to be unconstitutional).

An offender subject to the "extended term of imprisonment" statute due to two or more prior felonies could be sentenced to between 2 and 5 years. N.H.Rev.Stat. § 651:6(II), (III)(b).

25. **New Mexico** – N.M.Stat. 1978 § 66-8-101(B), (C); 30-1-12(A)

Great bodily harm by vehicle requires "great bodily harm" and the unlawful operation of a motor vehicle. It is a felony if the defendant drove recklessly, was under the influence of alcohol or drugs or was attempting to elude the police. "Criminal intent, a mental state of conscious wrongdoing," is a necessary element of the crime. State v. Jordan, 83 N.M. 571, 494 P.2d 984 (1972).

26. **New York** – McKinney's Penal Law §§ 120.03, 10.00(10)

A person commits vehicular assault in the second degree if he causes "serious physical injury" to another person and operates a motor vehicle while under the influence of alcohol and/or drugs. Vehicular assault in the second degree is a Class E felony.

27. **North Carolina** – N.C.Gen.Stat. § 290141.4(a3)

A person commits felony serious injury by vehicle if the defendant unintentionally causes "serious injury" to another person, drove under the influence of alcohol or drugs, and the impaired driving was the proximate cause of the serious injury

28. **Ohio** – Baldwin's Ohio Rev. Code. §§ 2903.08(A)(2)(b); 2901.01(A)(5)

A person commits vehicular assault if he recklessly operates a motor vehicle and causes "serious physical harm" to another person or another's unborn child.

29. **Oklahoma** – Okl.Stat. § 11-904

A person driving under the influence of alcohol or drugs who is involved in a personal injury accident that results in "great bodily injury" to another person is guilty of a felony. If great bodily injury is not inflicted, the crime is a misdemeanor.

30. **Oregon** – Ore.Rev.Stat. §§ 163.185(1)(d); 163.185(2)(b)

A person commits first degree assault if he intentionally, knowingly, or recklessly causes physical injury to another person while operating a motor vehicle under the influence of intoxicants and the defendant (1) has three prior convictions for driving while under the influence of alcohol in the past 10 years or (2) has a prior conviction for manslaughter, negligent homicide, or assault where the victim's death or serious physical injury was caused by the defendant's driving.

A person commits assault in the third degree if he recklessly causes serious physical injury to another person under circumstances manifesting extreme indifference to human life. It is a higher degree of felony if the assault was the result of operating a motor vehicle under the influence of intoxicants.

31. **Pennsylvania** – 75 Pa.Con.Stat.. § 37321(a), 18 Pa.Con.Stat. § 2301

A person commits aggravated assault by a vehicle if he recklessly or with gross negligence causes "serious bodily injury" to another person while operating a vehicle in violation of any state law.

32. **Rhode Island** – R.I.Gen.Laws 1956 § 31-27-1.1

"Driving so as to endanger, resulting in serious bodily injury" is committed "when the serious bodily injury of any person ensues as a proximate result of the operation of any vehicle in reckless disregard for the safety of others."

33. **South Carolina** – S.C. Code of 1976 §56-5-2945

The crime of felony driving under the influence is committed if the defendant drives while under the influence of alcohol and/or drugs, drives in a manner that is against the law or neglects a duty imposed by the law, and "the act or neglect proximately causes great bodily injury or death to a person other than himself."

34. **South Dakota** – S.D.C.L. §§ 22-18-36, 22-1-2(44A)

Vehicular battery requires the defendant drive under the influence of alcohol or drugs and negligently operate a motor vehicle, thereby causing "the serious bodily injury of another person., including an unborn child."

35. **Tennessee** – Tenn.Code §§ 39-13-106, 39-11-106(34)

A person commits vehicular assault who, as a proximate cause of the person's intoxication, recklessly causes "serious bodily injury" to another person by operation of a motor vehicle.

36. **Texas** – Vernon's Tex. Stat. §49.07

"Intoxication assault" is committed by driving in a public place while under the influence of alcohol and, by reason of intoxication, cause serious bodily injury to another person.

37. **Utah** – UtahCode 1953 §§ 41-6a-502; 41-6a-503(1), (2); 41-6a-501(g).

Driving while under the influence of alcohol or drugs is a class A misdemeanor if the defendant "inflicted bodily injury upon another as a proximate result of having operated the vehicle in a negligent manner." It is a third degree felony if the defendant inflicts "great bodily injury" on another and has two or more prior convictions for driving under the influence of alcohol or drugs.

Reckless driving and assault are also comparable offenses; both a misdemeanors. UtahCode 1983 §§ 41-6a-528; 76-5-102.

38. **Vermont** – 23 Vt.Stat. § 1091(b);13 Vt.Stat. § 1021(2)

A person commits grossly negligent operation if he operates a motor vehicle on a public highway in a grossly negligent manner. The crime is punishable by up to 15 years if "serious bodily injury" or death results.

39. **Virginia** – Va.Code § 18.2-51.4

This statute applies if, as a result of driving under the influence of alcohol that is "so gross, wanton, and culpable as to show a reckless disregard for human life, the defendant unintentionally causes the serious bodily injury of another person resulting in permanent and significant physical impairment."

40. **West Virginia** – W.Va.Code § 17C-5.3(a), (d), (e)
Reckless driving is punishable by between 10 days and 6 months in jail if the driving proximately "causes another to suffer serious bodily injury"

41. **Wisconsin** – Wis.Stat. § 346.63(2)(a)

It is a crime to operate motor vehicle while under the influence of alcohol and/or drugs and causes injury to another person. The penalty is between 30 days and one year in jail. Wis.Stat. § 356.65(3m)

42. **Wyoming** W.S.1977 § 6-2-504

Wyoming does not hve a statute like Washington's vehicular assault. A person is guilty of reckless endangerment, a misdemeanor, if he recklessly engages in conduct that places another person in danger of death or serious bodily injury

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67572-9-I
v.	)	
	)	
GUY ROOK,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GUY ROOK 293154 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326-9723	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JUNE, 2012.

X_____

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