No. 44351-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joel Alexander,

Appellant.

Grays Harbor County Superior Court Cause No. 12-1-00189-1

The Honorable Judge F. Mark McCauley

Appellant's Corrected Opening Brief

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2. Mr. Alexander was convicted and sentenced to life without possibility of release through the operation of an unconstitutional statute.

> **ISSUE 1:** Washington's constitution requires that bills enacted into law embrace a single subject. The bill defining and classifying criminal attempts also created the "determinate plus" sentencing scheme for certain sex offenders, set forth a 60-month mandatory minimum for people convicted of sexually violent predator escape, changed the definition of that offense, elevated indecent liberties by forcible compulsion and second-degree assault with sexual motivation to class A felonies, created new alternate means of committing sexual misconduct with a minor in the first and second degrees, changed the qualifications for sex offender treatment providers treating sexually violent predators released to the community, and created qualified immunity and reporting duties for sex offender treatment providers treating certain sex offenders living in community settings. Is the criminal attempt statute unconstitutional because it was enacted in violation of art. II, § 19's single subject rule?
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> **ISSUE 2:** Art. II, § 19 requires that the subject of a bill be expressed in its title. The statute defining and classifying criminal attempts was part of a bill captioned "AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems… [and] prescribing penalties." Was the criminal attempt statute enacted as part of a bill that violated the subject-in-title rule because the title contained no reference to many of the different subjects contained in the bill?

3. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted rape of a child in the first degree.

4. The court's instructions on attempted rape of a child failed to make the relevant legal standard manifestly clear to the average juror.

> **ISSUE 3:** A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose…" Did the instruction relieve the prosecution of its burden to prove the elements of attempted rape of a child beyond a reasonable doubt, in violation of Mr. Alexander's Fourteenth Amendment right to due process?

5. The trial court erred by sentencing Mr. Alexander to life in prison without possibility of parole.

6. Mr. Alexander's life sentence was imposed in violation of his Fourteenth Amendment right to equal protection.

7. Mr. Alexander's life sentence was imposed in violation of his state constitutional right to equal protection.

8. Mr. Alexander's life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to a jury trial.

9. Mr. Alexander's life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to proof beyond a reasonable doubt.

10. Mr. Alexander's life sentence was imposed in violation of his state constitutional right to due process.

11. The trial court erred by entering Finding of Fact No. 2.1 in the Judgment and Sentence.

12. The trial court erred by entering Finding of Fact No. 2.2 in the Judgment and Sentence.

> **ISSUE 4:** An accused person is guaranteed the right to a jury determination beyond a reasonable doubt of any fact that elevates a crime from one tier to a higher category. The trial

judge, using a preponderance standard, found that Mr. Alexander had a prior "strike" offense, elevating his sentence to life without possibility of parole. Does sentence imposed violate Mr. Alexander's state and federal constitutional rights due process and to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joel Alexander met a police officer at a public bathroom in Elma. The police officer had previously had a long exchange of electronic communication with a person he believed to be Mr. Alexander. The officer posed as a boy of eleven. RP 16-156. Based on this electronic correspondence and the items Mr. Alexander brought with him, the state filed a charge of Attempted Rape of a Child in the First Degree. CP 1.

At trial, the court instructed the jury on the law of criminal attempt. The court defined the phrase "substantial step" as follows: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 39. Defense counsel did not object.

Mr. Alexander was convicted. CP 3. At sentencing, the state alleged that Mr. Alexander had prior convictions that qualified him for sentencing as a persistent offender.[1] RP 192-193. Mr. Alexander did not stipulate to his criminal history. Defense attorney stated on the record that the defense did not agree that the prior convictions related to the person before the court. Counsel also objected on the grounds that the evidence was insufficient to prove the prior convictions. RP 192.

[1] The prior conviction was for two counts of Rape of a Child in the Second Degree. CP 4.

The court admitted Exhibit 2, which contained documents relating to the alleged prior sex offenses. RP 193; Ex. 2 (12/10/12). The court found both prior convictions related to Mr. Alexander, and sentenced him to life without the possibility of parole. RP 198-199; CP 3-11.

Mr. Alexander timely appealed. CP 14-15.

ARGUMENT

I. MR. ALEXANDER WAS CONVICTED AND SENTENCED THROUGH OPERATION OF A STATUTE ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Statutes are presumed constitutional; the party challenging a statute's constitutionality "bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) *opinion corrected,* 27 P.3d 608 (2001). This standard is met when

"argument and research show that there is no reasonable doubt that the statute violates the constitution." *Id.*

B. The Washington Constitution requires that all bills embrace a single subject, which must be expressed in the bill's title.

Under Wash. Const. art. II, § 19, "No bill shall embrace more than one subject, and that shall be expressed in the title." The provision is intended (a) to prevent "logrolling" (where a law is pushed through by attaching it to other legislation), and (b) "to notify members of the Legislature and the public of the subject matter of the measure." *Amalgamated Transit Union,* 142 Wn.2d at 207.

1. The single-subject rule.

The legislature must "be given the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits." *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). The relevant inquiry is whether "the body of the act contain[s] more than one general subject…" *Id,* at 523. Part of the analysis turns on whether either subject is necessary to implement the other. *Amalgamated Transit Union,* 142 Wn.2d at 217. A statute passed in violation of the single subject rule is unconstitutional and therefore void. *Id,* at 216; *Toll Bridge,* 49 Wn2d at 525.

For example, in *Toll Bridge,* the Supreme Court invalidated an act because it embraced two subjects: "(1) To provide legislation, permanent in character, empowering a state agency to establish and operate all toll roads, and (2) to provide for the construction of a specific toll road linking Tacoma, Seattle, and Everett." *Toll Bridge,* 49 Wn.2d at 523. Similarly, in *Amalgamated Transit Union,* the Court found that in I-695 embraced two different purposes: "to specifically set license tab fees at $30 and to provide a continuing method of approving all future tax increases." *Amalgamated Transit Union,* 142 Wn.2d at 217.

2. Subject-in-title rule.

For purposes of the subject-in-title rule, courts consider only the substantive language describing the bill. A title's "mere reference to a section... does not state a subject." *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted). This is so even if the numerical reference follows words such as "amending," "adding new sections to," or "repealing." *Id.; see also Fray v. Spokane Cnty.*, 134 Wn.2d 637, 651-555, 952 P.2d 601 (1998). This is so because bare numeric references do not give adequate notice: "To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse, it seems to us, is not sustained by the ordinary

understanding of those terms." *State v. Superior Court of King Cnty.*, 28 Wash. 317, 325, 68 P. 957 (1902).

The title of a bill may be general or restrictive. *Amalgamated Transit Union,* 142 Wn.2d at 207-208. Restrictive titles are "narrow, as opposed to broad;" the label applies whenever "'a particular part or branch of a subject is carved out and selected as the subject of the legislation.'" *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n,* 35 Wn.2d 1, 23, 211 P.2d 651 (1949)), *overruled on other grounds by State ex rel. Washington State Finance Commission v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)).

Restrictive titles will not be regarded as liberally as general titles; any provision not fairly within a restrictive title will not be given force. *Amalgamated Transit Union,* 142 Wn.2d at 210. Violations of art. II, § 19 "are more readily found where a restrictive title is used." *Id, at* 211. Examples of restrictive titles include "An act relating to the acquisition of property by public agencies," "An act relating to local improvements in cities and towns," "An act relating to increasing penalties for armed crime." *Id.*

General titles, on the other hand, are "broad rather than narrow." *Amalgamated Transit Union,* 142 Wn.2d at 207-208. They "may be comprehensive and generic rather than specific." *Id.* A statute enacted

under a general title is invalid unless there is "rational unity between the general subject and the incidental subjects." *Id,* at 209. Examples of general titles include "An Act relating to violence prevention," "An Act relating to tort actions." *Id,* at 208 (providing examples).

C. The criminal attempt statute was enacted as part of a bill that violated both the single-subject rule and the subject-in-title rule.

RCW 9A.28.020 criminalizes attempt. The current version of the statute was enacted in 2001. Laws of 2001, 2nd sp. s. ch. 12, § 354. The title of the enacting bill was "AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems... [and] prescribing penalties." Laws of 2001, 2nd sp. s. ch. 12.

1. The bill addressed many different subjects.

In addition to reenacting and amending the criminal attempt statute, the bill addressed a variety of subjects. First, a large portion of the bill addressed transitional facilities for sexually violent predators released to less restrictive alternatives. Laws of 2001, 2nd sp. s. ch. 12, §§ 201-226. Among other things, these provisions authorized DSHS to set up a transitional facility on McNeil Island, provided incentives for localities to construct other such facilities, and placed restrictions on the location of potential transitional facilities.

The majority of the bill fell under the heading "sentencing structure." This portion of the bill addressed provisions of the SRA and RCW 9.95. It included §354, which set forth amendments to the criminal attempt statute. These amendments added certain sex crimes (including first-degree child rape) to the list of attempts that are class A felonies.[2] Laws of 2001, 2nd sp. s. ch. 12, § 354.

The section captioned "sentencing structure" embraced other subjects as well. It set up the determinate-plus sentencing scheme.[3] Laws of 2001, 2nd sp. s. ch. 12, §§ 303-304. It set a mandatory minimum of 60 months for sexually violent predator escape, and changed the definition of that offense. Laws of 2001, 2nd sp. s. ch. 12, §§ 315, 360. It created a new means of committing sexual misconduct, criminalizing sexual contact between school employees and students. Laws of 2001, 2nd sp. s. ch. 12, §§ 357-358. It elevated assault with sexual motivation and indecent liberties by forcible compulsion to class A felony status. Laws of 2001, 2nd sp. s. ch. 12, §§ 355, 359.

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[2] Previously, an attempt to commit one of these crimes had been a class B felony. *See* former RCW 9A.28.020 (2000).

[3] The determinate plus system applies to certain sex offenders who are not persistent offenders. It requires imposition of the statutory maximum and a parole date. Laws of 2001, 2nd sp. s. ch. 12, §§ 303-304.

Another part of the bill was captioned "sex offender treatment providers." Among other things, it established qualifications for providers who treat sexually violent predators in transitional facilities. 2001 Wash. Legis. Serv. 2nd Sp. Sess. Ch. 12, § 402. It also created limited immunity for such providers, and for providers who treat level III sex offenders on community custody. 2001 Wash. Legis. Serv. 2nd Sp. Sess. Ch. 12, § 403.

As this summary shows, the bill embraced numerous subjects. The statute criminalizing attempt bears no relationship to transitional facilities for civil detainees committed under RCW 71.09. Nor does it relate to the definition of sexually violent predator escape, or the mandatory minimum for that offense. It does not relate to sex between school employees and students, the classification of assault with sexual motivation or indecent liberties by forcible compulsion, the qualifications of sex offender treatment providers, or limitations on civil liability for such providers.

The statute criminalizing attempt was enacted in a bill that embraced multiple subjects. Accordingly it is void under Wash. Const. art. II, § 19. *Amalgamated Transit Union,* 142 Wn.2d at 216; *Toll Bridge,* 49 Wn.2d at 525. It has not been resuscitated by reenactment or amendment since 2001. *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007) (a proper "amendment or reenactment cures the art. II, § 19 defect.") Accordingly, the law is unconstitutional. Because he was

found guilty of violating an unconstitutional statute, Mr. Alexander's conviction must be vacated and the charge dismissed with prejudice. *Amalgamated Transit Union,* 142 Wn.2d at 207.

2. The subjects addressed by the bill are not encompassed by the bill's title.

The bill enacting the current incarnation of the criminal attempt statute was titled "AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems… [and] prescribing penalties." As noted above, the bill embraced more than one subject. In addition, the subjects addressed by the bill did not fall within its title.

The title here is restrictive. *Amalgamated Transit Union,* 142 Wn.2d at 207-208. The title has "carved out and selected" "a particular part or branch of a subject." *Broadaway*, 133 Wn.2d at 127 (citations and internal quotation marks omitted).

The phrase "the management of sex offenders in the civil commitment and criminal justice systems" is akin to the examples of restrictive titles given in *Amalgamated Transit Union*: "the acquisition of property by public agencies," "local improvements in cities and towns," "increasing penalties for armed crime." *Amalgamated Transit Union,* 142 Wn.2d at 211. It is not akin to the examples of general titles listed in that

case: "violence prevention," "tort actions." *Amalgamated Transit Union,* 142 Wn.2d at 208.[4]

Because the title is restrictive, provisions that are not fairly within it have no force. *Amalgamated Transit Union,* 142 Wn.2d at 210. The criminal attempt statute is not fairly within the title.[5] Criminal attempt has nothing to do with the management of sex offenders.[6]

The criminal attempt statute was enacted as part of a bill that violates the subject-in-title rule. Accordingly it is unconstitutional. *Amalgamated Transit Union,* 142 Wn.2d at 210. Because he was found guilty of violating an unconstitutional statute, Mr. Alexander's conviction must be vacated and the charge dismissed with prejudice.

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[4] Had the bill been titled "An Act relating to sex offenders," it might have qualified as a general title.

[5] Many of the bill's other provisions do not relate to the management of sex offenders in either the criminal or the civil commitment systems.

[6] The amendments to the criminal attempt statute would arguably fall within an act limited to "prescribing penalties" (the second part of the bill's title). But there is no authority that permits a court to ignore the main part of a bill's title. Of course, the problem does not arise in bills that actually follow the constitution's single-subject rule.

II. MR. ALEXANDER'S CONVICTION FOR FIRST-DEGREE ATTEMPTED RAPE OF A CHILD VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Jury instructions are also reviewed *de novo*. *State v. McCreven*, 170 Wn. App. 444, 461, 284 P.3d 793 (2012) *review denied,* 176 Wn.2d 1015, 297 P.3d 708 (2013). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court's failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Haberman*, 105 Wn. App. 926, 935, 22 P.3d 264 (2001). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970

(2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Alexander engaged in conduct corroborating the intent to commit the specific crime of rape of a child in the first-degree.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978); *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995).

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." CP 39. (emphasis added). This instruction is erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with *other* evidence; [to] make *more* certain." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company) (emphasis added). The *Workman* court's choice of the word

"corroborative" requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused's conduct. Instruction No. 10 removed this requirement by employing the word "indicate" instead of "corroborate;" under Instruction No. 10 there is no requirement that intent be established by independent proof and corroborated by the accused's conduct. CP 39.

Second, Instruction No. 10 requires only that the conduct indicate *a criminal purpose,* rather than *the* criminal purpose. This is analogous to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts,* 142 Wn.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in "a crime," even if he was unaware that the principal intended "the crime" charged); *see also State v. Cronin,* 142 Wn.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 10 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted rape of a child.[7] Under the instructions as given, the prosecution was not

[7] This creates a manifest error affecting Mr. Alexander's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5.

required to provide independent corroboration of Mr. Alexander's alleged criminal intent; nor was it required to show that his conduct strongly corroborated his intent to commit the particular crime of first degree rape of a child.

Division II has recently rejected this argument. *State v. Davis*, 174 Wn. App. 623, 635-38, 300 P.3d 465 (2013) *review denied,* 88878-7, 2013 WL 5493682 (Wash. Oct. 2, 2013). The *Davis* court found that the definition of "substantial step" adopted in *Workman* was not mandatory. This is both right and wrong. *Workman* did not hold that a trial court *must* define the phrase "substantial step" for the jury. However, under *Workman,* if the court's instructions did include a definition, the definition should be as set forth in *Workman:*

> We find it appropriate to adopt the Model Penal Code approach to the definition of a substantial step… This approach does not conflict with the doctrine already developed in this state regarding the crime of attempt….It does, however, give full recognition to the changes in the statute adopted by the legislature. We therefore hold it would be proper for a trial court to include in its instruction to a jury on the crime of attempt the qualifying statement that in order for conduct to be a substantial step it must be strongly corroborative of the actor's criminal purpose.

Workman, 90 Wn.2d at 452.

See State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

A trial court has broad discretion when asked to define words of common understanding. *State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006). However, once the decision is made to give a definition, that definition must be correct. Here, *Workman* provides the proper definition. *Davis* was decided incorrectly, and should be reconsidered.

Mr. Alexander's conviction must be reversed and the case remanded for a new trial. *Brown,* 147 Wn.2d 330.

III. MR. ALEXANDER'S PRIOR STRIKE SHOULD HAVE BEEN PROVED TO A JURY BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013).

B. A prior conviction is an element of a crime when it makes otherwise lawful conduct criminal, or when it aggravates an offense from one category of crime to another.

Any fact that increases the penalty for a crime must be proved to a jury beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, § 21 and § 22.; *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Prior convictions are generally exempt from the rule set forth in *Apprendi* and *Blakely*. However, a prior conviction that is an element must be proved to a jury beyond a reasonable doubt. *See, e.g., State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008).

A prior conviction is an element under two circumstances. First, some conduct is not criminal in the absence of a prior conviction. For example, unlawful possession of a firearm requires proof of a prior felony conviction. RCW 9.41.040; *State v. Summers*, 120 Wn.2d 801, 846 P.2d 490 (1993).

Second, a prior conviction is an element when it elevates a crime from one category of offense to another. *Roswell,* 165 Wn.2d at 192. For example, conviction for felony DUI requires proof of multiple prior DUI convictions. RCW 46.61.502(6); *State v. Cochrane*, 160 Wn. App. 18, 20, 253 P.3d 95 (2011). Conviction of a prior sex offense elevates indecent exposure from a misdemeanor to a felony. RCW 9A.88.010(2)(c); *State v. Benitez*, 175 Wn. App. 116, 122, 302 P.3d 877 (2013). Felony violation of a no contact order requires proof of two prior convictions. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). In each case, the prior conviction is an element of the more serious crime, because the prior elevates the offense to a higher tier of crime.

The law recognizes different categories of offenses. For example, the U.S. Supreme Court has distinguished between "petty" and "serious" offenses. Petty offenses carry a penalty of less than six months and do not

require a jury trial under the Sixth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Three factors aid in categorizing offenses: the penalty authorized, historical practice, and any legislative characterization or label.

The primary factor used to determine the category of a crime is the penalty imposed. *Id.* The penalty reflects society's judgment as to the seriousness of the charge. *Id.; Lewis v. United States*, 518 U.S. 322, 325-26, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

The second factor, historical practice, includes an examination of the common law. *See Cheff v. Schnackenberg*, 384 U.S. 373, 379, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The significance of this factor has decreased over time, "because many statutory offenses lack common-law antecedents." *Lewis,* 518 U.S. at 325.

The third factor encompasses "legislative declaration[s]" characterizing an offense. *Muniz v. Hoffman*, 422 U.S. 454, 475-76, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975).

Washington law has traditionally recognized four categories of offenses: infractions, misdemeanors,[8] felonies,[9] and capital crimes. To this

[8] Separated into misdemeanor s and gross misdemeanors.

[9] Separated into class A, B, and C felonies.

list must be added another tier of offenses more serious than class A felonies, but ineligible for the death penalty.[10]

First, the penalty for this category differentiates it from the other lower categories. Ordinary class A felonies have a maximum penalty of life in prison (with the possibility of parole). RCW 9A.20.021. Life without parole is authorized only when the offender is convicted of aggravated first-degree murder or a third-strike. RCW 9.94A.570; RCW 10.95.030. The difference between life with and without parole is constitutionally significant. *Thomas*, 150 Wn.2d at 848; *see also Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (Graham I); *Miller v. Alabama*, --- U.S. ---, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Second, history shows that such crimes are not in the same category as ordinary felonies. There is no long-standing historical practice of sentencing ordinary felons to life in prison without parole. In the U.S., some early life without parole sentences arose when persons sentenced to death were granted pardons conditioned on serving life in prison. *See, e.g., Ex parte Wells*, 59 U.S. 307, 15 L.Ed. 421 (1855); *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974). A large number of murder

[10] This category could be a separate category of crimes, or it could be a part of the category now referred to as "capital offenses."

defendants were sentenced to life without parole following the U.S. Supreme Court's decision invalidating most capital sentencing laws in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Other LWOP sentences were imposed following habitual offender proceedings. In such cases, a jury determined that the offender was the same person who had previously been convicted of the qualifying offenses. *See, e.g., Graham v. State of W. Virginia*, 224 U.S. 616, 621, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (Graham II) ("A jury was called, and after hearing evidence for the prosecutor the defendant offering none, returned a verdict identifying him as the person previously convicted.") Following this jury determination, the offender was sentenced to prison for "for life." *Id.*

Third, the legislature has made clear that this tier encompasses only the very worst offenses. Other than two-strike/three-strike cases, life without parole applies only to aggravated first-degree murder. Furthermore, the two-strike/three-strike designation applies only to people who have committed multiple offenses characterized by the legislature as "most serious." RCW 9.94A.030(37).

Persistent offenders belong in a category more serious than people convicted of ordinary class A or class B felonies. The penalty imposed, the lack of such onerous sentences for ordinary felons, and the legislative

declaration that the penalty applies only to the worst offenders all make clear that third strike crimes are not ordinary felonies.

C. Prior strikes are an element of a second-strike sex crime, because proof of the prior strike elevates an ordinary felony to a more serious tier of offense.

Attempted rape of a child in the first degree carries a maximum penalty of life in prison. When the prosecution proves a prior sex crime that is a strike the offense is elevated to a more serious category. RCW 9.94A.570. This more serious category carries a penalty of life without parole. RCW 9.94A.570. The penalty is not available in ordinary felony cases. The legislature has applied it only to first-degree aggravated murder and to "most serious" offenders. RCW 9.94A.030(37).

Instead of facing the penalty for a class A felony, Mr. Alexander was given a punishment otherwise reserved for capital offenses. Accordingly, his prior strikes elevated his offense from a class A felony to something more serious. His prior strike was an element of his second-strike sex offense. The prosecution should have been required to prove the prior strike to a jury beyond a reasonable doubt.

D. The *Alleyne* decision requires that prior strikes be proved to a jury beyond a reasonable doubt in two-strike sex cases.

The U.S. Supreme Cout's *Alleyne* decision does away with any distinction between elements and "sentencing factors." At common law,

conviction of a particular crime led to imposition of a particular punishment. *Alleyne v. United States*, --- U.S. ---, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). By definition, the elements of a crime were those facts required to impose the punishment. *Id.* Each offense carried a specified sanction. *Id.* A person charged with a crime knew what punishment to expect upon conviction. *Id.*

The concept of a sentencing factor was foreign to this regime. Any fact that resulted in a higher penalty was necessarily an element of a greater offense. *Id.*

Apprendi and *Blakely* are consistent with the historic practice outlined in *Alleyne.* The *Alleyne* court did not note any exceptions to the rule. *See Alleyne,* --- U.S. at ___. Any fact necessary to a particular punishment is an element of the crime associated with that punishment. *Alleyne's* logic does not leave room for any exceptions. This includes an exception for the fact of a prior conviction.

Mr. Alexander was charged with a second-strike sex offense. CP 1-2. This offense carried a penalty of life without parole. The elements of the offense are those facts required to impose this particular punishment. The state was required to prove that Mr. Alexander committed attempted rape of a child in the first degree, and that he'd been convicted of one of

the enumerated offenses prior to the commission of the current offense. RCW 9.94A.030(37)(b).

If the prosecution failed to prove any of these facts, the requested penalty could not be imposed. Accordingly, under *Alleyne,* each of these facts is an element of the offense. Mr. Alexander should have been provided a jury trial at sentencing. His sentence must be vacated and the case remanded for a new sentencing hearing.

E. Mr. Alexander does not ask the court to anticipate a U.S. Supreme Court decision overruling *Almendarez-Torres*.[11]

1. The court should adopt *Alleyne's* reasoning as a matter of state constitutional law.

Alleyne is a federal case based on due process and the Sixth Amendment right to a jury trial. *Alleyne* foreshadows the end of the so-called *Almendarez-Torres* exception. However, it is not necessary for this court to anticipate the U.S. Supreme Court decision that will overrule *Almendarez-Torres.* Instead, this court should adopt *Alleyne's* reasoning as a matter of state constitutional law.[12] *See, e.g., State v. Kjorsvik*, 117

[11] In *Almendarez-Torres,* the U.S. Supreme Court refused to limit a sentence based on the state's failure to allege prior convictions in the charging document. *Almendarez–Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

[12] Because Mr.Alexander urges the court to adopt the federal standard, no *Gunwall* analysis is necessary. *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

Wn.2d 93, 105, 812 P.2d 86 (1991) (adopting the federal standard requiring liberal construction of charging documents challenged after verdict). This approach sidesteps any problems regarding the continuing validity of *Almendarez-Torres*.

2. *Almendarez-Torres* does not actually control the issues in this case.

Even without adopting the federal standard as a matter of state constitutional law, this court should invalidate Mr. Alexander's sentence through application of federal law. Doing so would not require the court to anticipate a new U.S. Supreme Court decision clearing the way.

The *Almendarez-Torres* holding did not address the right to a jury trial or the right to proof beyond a reasonable doubt (although it discussed those matters in *dicta*). The issue in *Almendarez-Torres* was whether the punishment that could be imposed on the defendant was circumscribed by the language of the indictment. *Almendarez-Torres,* 523 U.S. at 227-228. The court held that prior convictions could be used to increase the penalty for an offense even if not mentioned in the indictment.[13] *Almendarez–Torres,* 523 U.S. at 239-248.

[13]The continuing validity of this holding is in doubt. The *Alleyne* court's reasoning makes clear that *Almendarez-Torres* rests on a crumbling foundation.

The defendant in *Almendarez-Torres* pled guilty to the offense. He admitted he had the requisite prior convictions at his plea hearing. *Id.,* at 227. He did not request a jury trial on his prior convictions. He did not argue that the state was required to prove his priors beyond a reasonable doubt. *Id.,* at 248. Although the *Almendarez-Torres* court discussed the right to a jury determination of elements and the right to proof beyond a reasonable doubt, neither discussion was essential to the holding. *Id.,* at 239-248. The court's remarks on these subjects were therefore *dicta.* They are not binding. *See Tyler v. Cain*, 533 U.S. 656, 663 n. 4, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). In fact, the *Almendarez-Torres* court explicitly reserved ruling on the standard of proof when prior convictions are used to increase the penalty. *Id.,* at 248.

Under *Almendarez-Torres*, the prosecution need not plead prior convictions in the charging document, even if they are used to increase the penalty. The decision does not relieve the state of its obligation to prove prior convictions to a jury beyond a reasonable doubt. The court's holding related only to the charging document.

Furthermore, the enhancement in *Almendarez-Torres* did not change the category of crime the defendant faced. Instead, it increased the defendant's standard range from something less than 24 months to 77 to 96 months. *Almendarez-Torres* 523 U.S. at 227. Here, by contrast, Mr.

Alexander's standard range for attempted first-degree child rape was 121.5-162 months. The penalty for a second-strike sex crime is life in prison without possibility of parole. The second-strike sex crime cannot be described as a class A felony. Instead, it is more akin to a capital offense: the only other charge that merits this punishment is first-degree aggravated murder. This change in category distinguishes Mr. Alexander's case from *Almendarez-Torres.*

For all these reasons, *Almendarez-Torres* does not prohibit this court from applying federal law to invalidate Mr. Alexander's sentence.[14] Mr. Alexander does not allege a lack of notice, or any defect in the charging document. Instead, he argues that he was entitled to proof of his prior strike to a jury beyond a reasonable doubt. The prior strike changed his crime from a class A felony to a second-strike sex crime, which is not a class A felony but rather belongs in a higher tier of offense. *Almendarez-Torres* does not control these issues. The court should vacate Mr. Alexander's sentence, and remand the case for a new sentencing hearing.

3. *Almendarez-Torres* is no longer good law.

Almendarez-Torres rested on five erroneous bases that the U.S. Supreme Court has since disavowed.

[14] In addition, *Almendarez-Torres* involved an increase in the defendant's determinate sentence. It did not involve a change from a determinate sentence to life without parole. The defendant's prior convictions did not change the category of offense.

First, the court asserted that recidivism is a traditional basis allowing a sentencing court to increase the penalty for an offense. *Almendarez-Torres,* 523 U.S. at 243. This is incorrect, as the *Alleyne* court points out. The longer historical tradition is for conviction of a particular crime to carry a fixed penalty. Traditionally, judges lacked authority to increase the penalty, because the facts found by the jury established the crime and hence the sentence. *Alleyne,* --- U.S. at ___.

Second, the court found a significant difference between increases in the mandatory minimum and the statutory maximum penalty to be imposed. *Almendarez-Torres*, 523 U.S. at 244. The U.S. Supreme Court has since recognized that *any* increase in the penalty implicates the Sixth Amendment and the right to due process. *See Apprendi,* 530 U.S. at 490 (increase in the statutory maximum), *Blakely* 542 U.S. at 303 (sentence above the standard range), *Alleyne,* --- U.S. at ___ (increase in the mandatory minimum).

Third, the court presumed that sentencing factors are not elements of the offense. *Almendarez-Torres,* 523 U.S. at 246. The court has since held that such labels are not dispositive, and that "sentencing factors" implicate the jury right and the right to proof beyond a reasonable doubt. *Blakely,* 542 U.S. at 305-314; *Apprendi,* 530 U.S. at 478.

Fourth, the court believed the issue could be impacted by the nature of the offense or the intent of the legislative body. *Almendarez-Torres,* 523 U.S. at 246. These factors are irrelevant under *Apprendi* and its progeny.

Finally, the court noted that the death penalty could be imposed based on aggravating factors found by a judge. *Almendarez-Torres,* 523 U.S. at 247 (citing, *inter alia, Walton v. Arizona,* 497 U.S. 639, 647, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). This is no longer true. *Walton* was overruled by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The death penalty cannot be imposed absent a jury determination of aggravating factors. *Id.,* at 589.

Almendarez-Torres is a building whose entire foundation has been removed. It is not necessary to wait for someone to announce that the building is unsafe: the building has already collapsed.

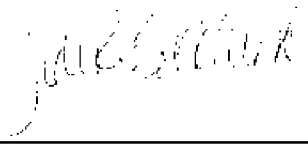
CONCLUSION

Mr. Alexander's conviction must be vacated because he was convicted under a statute that was enacted in violation of art. II § 19. He must be given a new trial, because the court's instruction defining the phrase "substantial step" relieved the state of its burden to prove the elements of criminal attempt.

In the alternative, Mr. Alexander's persistent offender sentence must be vacated, and his case remanded for a new sentencing hearing.

Respectfully submitted on November 4, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Corrected Opening Brief, postage prepaid, to:

Joel Alexander, DOC #787787
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

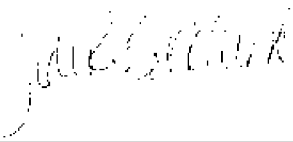
and

Grays Harbor County Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

I filed the Appellant's Corrected Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 4, 2013.



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November 04, 2013 - 9:14 AM

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