NO. 31699-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JASON GILES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

At 34 years old, Jason Giles has been sentenced to life without the possibility of parole for shoplifting less than $400 worth of goods, all but $84.99 of which was recovered. His supporters at sentencing were so numerous, the court requested remarks from just three representatives. Mr. Giles's convictions and sentence are unjust and erroneous on the several grounds enumerated below.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Giles's constitutional right to a public trial when it conducted for-cause challenges at sidebar and peremptory strikes on paper.

2. The trial court violated the public's right to open proceedings when it conducted for-cause challenges at sidebar and peremptory strikes on paper.

3. In the absence of sufficient evidence to establish the elements of assault in the first degree beyond a reasonable doubt, the conviction violates due process.

4. The State failed to prove the elements of robbery in the first degree, as instructed to the jury, beyond a reasonable doubt.

5. The State failed to prove an element of robbery in the second degree, as instructed to the jury, beyond a reasonable doubt.

6. In both trials, the court's instructions misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

7. The imposition of a life sentence without the possibility of parole violates article I, section 14 of the Washington Constitution.

8. The imposition of a life sentence without the possibility of parole violates the Eighth Amendment to the federal constitution.

9. 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. Giles 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.

10. 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. Giles had two prior convictions that qualify as "most serious offenses" violated his right to equal protection of the law.

11. The trial court erred in imposing discretionary court costs with a payment plan set to begin promptly without finding Mr. Giles had or likely will have the ability to pay.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal

proceedings, including jury selection, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted in written form and for-cause challenges at sidebar, both removed from public scrutiny, without considering the *Bone-Club* factors, was Mr. Giles's and the public's right to an open trial violated, requiring reversal?

2. To prove assault in the first degree, the State must show the accused acted with intent to inflict great bodily harm when assaulting another with a deadly weapon. Where the evidence, even in the light most favorable to the State, fails to show either intent to inflict great bodily harm or the use of a deadly weapon, must the assault conviction be reversed and the charge dismissed with prejudice?

3. The State is required to prove the elements as alleged in the to-convict instruction unless objected to. The State did not object to the robbery in the first degree instruction that provided the jury must find beyond a reasonable doubt that the taking itself was accomplished by the use or threatened use of force, violence or fear of injury and, separately, that actual force or actual fear was used to obtain or retain possession. Must the robbery conviction be reversed where the State presented

insufficient evidence that Mr. Giles used or threatened force, fear, or violence in taking the shoes out of the Champs store, as well as insufficient evidence that Mr. Giles used actual force or actual fear to obtain or retain possession of the shoes from the Champs store?

4. Must the second-degree robbery conviction also be reversed where the unobjected-to to-convict instruction required proof of a taking by the use or threatened use of force, violence or fear of injury, but the taking was accomplished prior to any use or threatened use of force, fear or violence, even viewing the facts in the light most favorable to the State?

5. The jury must decide whether the prosecution met its burden of proof, not search for the truth. In both trials, the court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." Did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

6. The Washington Constitution prohibits cruel sentences, and the federal constitution prohibits sentences that are cruel and unusual. Does the imposition of a life without parole term to the 34-year-old Mr. Giles violate these constitutional provisions where the instant third strike crimes do not render Mr. Giles among the most dangerous of repeat offenders, where his prior strike offenses are the only violent felonies in his criminal

history, and where the facts of the instant crimes show no one was seriously injured or endangered and public outrage would be minimal?

7. 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. Giles'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. Giles had twice before been convicted of most serious offenses?

8. Was Mr. Giles's right to procedural due process under the state constitution violated when the court made a finding by a preponderance of the evidence that Mr. Giles had twice before been convicted of most serious offenses?

9. 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. However, 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 (POAA)—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 POAA violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

10. Courts may not impose discretionary costs unless the defendant has a present or likely future ability to pay. Though the trial court found Mr. Giles indigent and no evidence of his ability to pay discretionary costs was presented, the court imposed $200 in discretionary costs with payment to begin in January 2014. Did the sentencing court err in ordering Mr. Giles to pay discretionary fees and costs?

D. STATEMENT OF THE CASE

Jason Giles is caring, sensitive and a hard worker. RP 638-44. He is also an excellent artist. RP 639. Around 2010, he and his girlfriend of 12 years lost their jobs within months of each other. RP 641-43. Mr. Giles had never used drugs until, a short time later, his girlfriend suffered a traumatic miscarriage that also almost took her life. RP 641-43. He became depressed, apparently started using controlled substances, and the following events occurred. RP 641-43.

1. Champs incident – December 6, 2011.

On the evening of December 6, 2011, as Mr. Giles approached the parking garage of the NorthTown Mall in Spokane, the vehicle ran out of

gas. RP 108, 117, 200-01. An employee at Champs Sports store, Christian Riding, happened to be pulling into the garage at the same time and offered to help Mr. Giles push the vehicle into a parking spot. RP 112-14, 117. Mr. Giles then asked Mr. Riding for gas money. RP 117.

While waiting for his friend, Mr. Giles went into the Champs store and, with the assistance of a couple clerks, started trying on shoes. RP 117, 147-48, 160-61, 201-02. Christian Riding recognized Mr. Giles from the parking garage and was concerned because he had the impression from the request for gas money that Mr. Giles did not have any money. RP 120. Mr. Riding informed his co-workers to keep an eye on Mr. Giles because he thought he might not have money to pay for the shoes. RP 113, 120, 145, 146, 162. In Mr. Riding's experience, it is also common that people who eventually shoplift shoes first ask to try on multiple pairs. RP 121; *see* RP 146, 161-62 (coworkers trained that trying on more than three or four pairs of shoes is common precursor to shoplifting).

After about 25 minutes in the store, Mr. Giles said he was going to buy the pair of shoes he had on and proceeded towards the counter at the front of the store. RP 122, 148, 187. He then turned and made his way towards the exit. RP 122, 148. Mr. Riding and his co-worker were waiting by the exit and asked whether Mr. Giles was going to pay for the shoes, at which point Mr. Giles ran out the store, dropping an empty

shoebox on his way. RP 122, 139, 148, 157-58, 164, 209-10; Exhibit 6 (part one) (surveillance video) (Dec. 2012 trial).[1] Both employees started chasing Mr. Giles but Mr. Riding's associate quickly tripped. RP 122, 125, 148, 153-54; Exhibit 6 (part two). According to Mr. Riding, Mr. Giles at one point turned around, pulled out a short-bladed, folding knife, and, without making any further movement, stated "I will gut you." RP 126-28, 131, 137-38, 141, 184, 193; *see* RP 154, 168 (co-workers did not see Giles stop or say anything to Riding). Mr. Riding was some distance from Mr. Giles at this time. RP 128.[2]

Mr. Riding stopped chasing Mr. Giles, who exited the mall in the stolen shoes. RP 128, 130; Exhibit 6 (part three). Mr. Riding returned to the Champs store a little winded and panicked, but otherwise fine. RP 150, 187. He then spoke to mall security and the police. RP 132.

The $84.99 shoes were not recovered. RP 196.

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[1] The surveillance video at Exhibit 6 is the only exhibit from the Champs trial cited herein. The remaining exhibits cited derive from the Costco trial in April 2013; there was no exhibit 6 offered in that trial.

[2] Mr. Giles testified that he walked out of the store with the shoes on because he was made to feel paranoid and uncomfortable by the clerks keeping watch over him and he was not thinking very well. RP 202-06. It was wrong, but he never turned back towards, threatened or pulled a knife on Mr. Riding. RP 206, 211, 213. In fact, he did not obtain a knife until the next day. RP 206-07, 213.

2. Costco incident – December 7, 2011.

The next day, a plain-clothes loss prevention specialist at Costco, Troy Humphrey, noticed Mr. Giles and an unidentified female pushing a cart through the store with a security system that Mr. Humphrey considered a high-theft item. RP 452, 455, 484-85. He kept watch over them. RP 455-56. Mr. Humphrey watched the two use pillows to cover up the security system and appeared to be removing the packaging and then placing the parts in different pieces of Mr. Giles's clothing. RP 456, 459. Mr. Humphrey continued to watch while Mr. Giles secreted another couple items in his clothing. RP 459-60. Mr. Humphrey watched the couple for about 25 minutes. RP 485-86. In total, Mr. Giles had the security system, a pair of gloves, and a video game secreted in his clothing. RP 456, 460, 461, 509.

Mr. Humphrey alerted Richard Wolfe, a colleague standing by the exit to the store but without a visible badge, and asked him to detain Mr. Giles after he went through the checkout area without paying. RP 462, 498. As Mr. Giles crossed the exit, Mr. Wolfe said he needed to speak with Mr. Giles, who ran toward the parking lot. RP 499-500, 523-24. Mr. Wolfe grabbed him by the coat. RP 500-01. In trying to break free, Mr. Giles knocked Mr. Wolfe to the ground, who in turn grabbed Mr. Giles by his legs. RP 500-01. As Mr. Humphrey got to the exit area, he saw a

scuffle between Mr. Giles and Mr. Wolfe. RP 464. Also nearby were another Costco employee, Virgil Wear, and several customers. RP 464, 488-89, 506, 514-15, 535.

Mr. Humphrey testified that Mr. Giles turned and punched the side of Mr. Humphrey's face before Mr. Humphrey and Mr. Wolfe collectively brought Mr. Giles to the ground. RP 467-68, 515. Mr. Wear jumped in to help and held Mr. Giles's head down. RP 518. Mr. Giles told them he could not breathe with their weight on him—he was face down on the ground—but they did not let up. RP 491-92, 506, 558, 567. They each held one of Mr. Giles's arms, and Mr. Wolfe's head was buried in Mr. Giles's back. RP 501-02. In the process of restraining Mr. Giles, he bit Mr. Wolfe's sleeve. RP 471, 503-04; RP 569 (Giles bit because his airflow was being cut off). Mr. Humphrey asked Mr. Wear to remove the handcuffs from Mr. Humphrey's "back area" and place them on Mr. Giles. RP 472. As Mr. Humphrey was pulling Mr. Giles's hand out from underneath him, a folding knife came out. RP 472-73, 539-40, 558. Mr. Humphrey immediately pinned Mr. Giles's wrist to the ground. RP 473. Mr. Humphrey struck Mr. Giles twice in the face. RP 474-75. The knife came free—the evidence was unclear as to whether Mr. Giles released the knife or it was forced out of his hand—and a bystander, Thomas Walters,

took possession of it. RP 474, 510, 518-20, 536-38, 558. The handle of the knife hit one of Mr. Wear's knee. RP 518-19, 558.

Mr. Giles was placed in restraints and taken into the business office. RP 477. The police were contacted. RP 478. At trial, Mr. Giles admitted he attempted to steal the items, saying he wanted to sell them quickly in order to purchase drugs. RP 574. He denied removing the knife from his pocket or trying to hurt anyone. RP 566-67, 572, 569-70.

Troy Humphrey sustained a small bruise, but declined any medical attention. RP 468, 546; Exhibits 8, 9; *see* RP 511 (colleague does not recall any marks on Humphrey's face). The scar from the bite to Mr. Wolfe's arm had healed by the time of trial. RP 503-05; Exhibits 12, 13. Mr. Wear only sustained a small mark on his knee that did not require medical attention. RP 520-22; Exhibits 10, 11. Mr. Giles received a moderate abrasion on his head, and later complained of other injuries. RP 545, 568-69; Exhibit 7. The goods were recovered and valued for a total between $264.97 and $288.89. RP 482-84, 548.

3. Procedural Background.

The State charged Mr. Giles with robbery in the first degree under the armed with a deadly weapon alternative for the Champs incident. CP 7. With regard to the Costco incident, the State charged robbery in the first degree under the armed with a deadly weapon alternative and naming

Troy Humphrey, assault in the first degree against Virgil Wear and alleging a deadly weapon, and assault in the third degree against Richard Wolfe. CP 7-8.[3] The State filed a notice of most serious offense, based on a 2009 second-degree assault conviction and a 1999 first-degree robbery conviction. CP 9, 116-29.[4]

Separate jury trials were held for each of the incidents.[5] At each trial, for-cause challenges were conducted at a private bench conference and peremptory strikes were handled on paper at the unilateral direction of the court and without any on-the-record analysis. RP 86-91, 429-33. The State elected to proceed with only a second-degree robbery lesser included for the Costco incident. RP 562-63. The juries were also provided with instructions on lesser-included offenses for the robbery in the first degree (Champs), the robbery in the second degree (Costco) and first-degree assault charges. However, they ultimately convicted Mr. Giles of robbery in the first degree (Champs), robbery in the second degree (Costco-Troy Humphrey), assault in the first degree (Costco-Virgil Wear) and assault in

[3] The information also alleged one count possession of a controlled substance, methamphetamine. CP 8. This charge was eventually dismissed. CP 143; RP 360.

[4] Mr. Giles pled guilty to both prior offenses; the facts underlying the charges and pleas are not in the record. *See* CP 116-36.

[5] An amended information was filed in conjunction with a guilty plea on the Costco-related charges that Mr. Giles withdrew before sentencing. A second trial was subsequently held and the resulting convictions rest on the original information. CP 46-47, 55-64; RP 346-47.

the third degree (Costco-Richard Wolfe). *Compare* CP 33-36 (lesser included offense instructions for Champs trial), 43-44 (verdict forms not used for Champs trial), 86, 95 (lesser included instructions for Costco trial), 108, 110 (verdict forms not used for Costco trial) *with* CP 42 (verdict form for Champs trial), 107, 109, 111 (verdict forms for Costco trial).[6]

At the sentencing hearing, Mr. Giles had numerous supporters who asked for leniency and spoke on his behalf despite understanding the mandatory sentencing scheme. RP 353, 638 (court notes receipt of letters in support of Giles); RP 638-43 (Giles's father, his girlfriend of 12 years, and a family friend speak on behalf of him at sentencing). The trial court also expressed its difficulty imposing the sentence required. RP 645. It stated,

> Well, you know, I've heard the word "leniency" used here a couple times. And this is one of those situations where it's very difficult to – you know, it's a very difficult sentence for me to give. And I want you to understand that.
>
> I truly do understand what drugs can do to someone. . . .
>
> The legislature has written rules, however.

RP 645. Under the Persistent Offender Accountability Act, Mr. Giles was sentenced to a lifetime of incarceration without parole on counts I, II and

[6] For each count, the jury also found that Mr. Giles was armed with a deadly weapon. CP 45, 112, 113, 115.

III—the two robbery and the first-degree assault charges. CP 138-51. He was sentenced to 55 months on the third-degree assault charge CP 143. Jason Giles was 34 years old at the time of sentencing. CP 137.

E. ARGUMENT

1. This matter must be remanded for new trials because the process of exercising for-cause challenges at sidebar and peremptory challenges by secret ballot excluded the public, and the court did not first conduct an analysis of the public trial right.

a. To comply with the constitutional right to a public trial, jury selection must be presumptively open to the public.

Our state constitution requires that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22. Two provisions guarantee this right. First, article I, section 10 requires that "Justice in all cases shall be administered openly." Additionally, article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures "that the public may see [the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press-Enterprise I*).

Open public access provides a check on the judicial process, which is both necessary for a healthy democracy and promotes public

understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). Openness deters perjury and other misconduct; it tempers biases and undue partiality. *Wise*, 176 Wn.2d at 5. With regard to jury selection in particular, closed proceedings "harm[] the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *E.g.*, *Wise*, 176 Wn.2d at 12; *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher

values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

This Court reviews violations of the public trial right de novo, and a defendant does not waive his public trial right by failing to object to a closure during trial. *Paumier*, 176 Wn.2d at 34, 36-37; *E.g.*, *Wise*, 176 Wn.2d at 15-16.

b. The right to public access extends to jury selection; yet, the public was excluded from the for-cause and peremptory challenge process at Mr. Giles's trials because the challenges were made out of view of the public without considering the *Bone-Club* factors.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804.[7] "The process of juror selection is itself a matter of

[7] Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id*. at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied). In *State v. Love*, this Court applied the experience and logic test to evaluate that appellant's claim that similarly closed proceedings violated his public trial right. 176 Wn. App. 911, 309 P.3d 1209, 1212-14 (2013). The Court

importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505.

The process of excusing prospective jurors is a critical part of voir dire that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *State v. Beskurt*, 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013) ("[T]he attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. . . . Importantly, everything that was required to be done in open court was done."); *State v. Wilson*, 174 Wn. App. 328, 342, 298 P.3d 148 (2013) (noting peremptory and for-cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). The

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did not explain why the experience and logic test must be applied to the for-cause and peremptory challenge portion of jury selection but not to other parts of that process. However, even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *State v. Jones*, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013) (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court); *State v. Beskurt*, 176 Wn.2d 441, 446-48, 293 P.3d 1159 (2013) (no public trial violation where juror questionnaires were sealed after voir dire and for cause challenges were conducted in open court within public's purview); *see infra* (discussing importance of public scrutiny during peremptory challenges).

"interplay of challenges for cause and peremptory challenges" are an essential part of criminal trial proceedings. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

Public scrutiny is essential because there are important limits on both parties' exercise of peremptory and for-cause challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenges, and critical role of public scrutiny). For example, neither may be exercised in a racially discriminatory fashion. *Id.*; *see State v. Sadler*, 147 Wn. App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge conducted in private).[8] "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *State v. Saintcalle*, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (discussing important public interest in proper exercise of juror challenges:); *id.*, at 44 ("peremptory challenges have become a cloak for race discrimination"). Beyond the potential for discrimination, for-cause excusals require the

[8] In *Sublett*, our Supreme Court declined to follow *Sadler* to the extent it relied on a legal/ministerial distinction. The Court did not discuss, or call into question, *Sadler*'s substantive holding. *Sublett*, 176 Wn.2d at 71 (lead opinion).

court to determine whether a prospective juror is "disqualified." Criminal Rule (CrR) 6.4(c); RCW 4.44.150. A party may except to an adverse party's for-cause challenge, requiring the court to "try the issue and determine the law and the facts." CrR 6.4(d); *see* RCW 4.44.190 (governing trial on challenge for actual bias). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See State v. Jones*, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013) (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6), as requiring peremptory challenges to be held in open court).

In *Wilson*, this Court recently distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and the for-cause and peremptory challenge process, which is part and parcel of voir dire. 174 Wn. App. at 343-44. This Court observed that unlike hardship strikes made by a clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for-cause and peremptory challenges. *Id*. at 343. While a clerk may excuse

jurors on limited, administrative bases, such excusals cannot interfere with the court's and parties' rights to excuse jurors based on cause and peremptory challenges. *Id*. at 343-44.

This approach is consistent with other jurisdictions. California has long held that peremptory challenges must be exercised in open court. *People v. Harris*, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (1992). In *Harris*, the right to a public trial was violated where peremptory challenges were exercised in chambers based on the trial court's unilateral determination. *Id*. at 677. The violation required reversal even though the court tracked the challenges on paper, announced in open court the names of the stricken prospective jurors, and the proceedings were reported. *Id*. at 684-85, 688-89.

Our courts consider proceedings held outside the view of the public, including at the bench or at sidebar, to be closed proceedings even if not held in the judge's chambers. For example, in *State v. Slert*, Division Two reasoned that because the public cannot scrutinize the dismissal of jurors that occur during sidebar proceedings, such proceedings violate the constitutional public trial right. *State v. Slert*, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012), *review granted* 176 Wn.2d 1031, 299 P.3d 20 (2013) (oral argument heard Oct. 17, 2013). Likewise, an interview of a panel member in the hallway outside the courtroom

while both the hallway and the courtroom at least arguably remained "open" and the conversation was recorded violates the accused and the public's open trial right. *State v. Leyerle*, 158 Wn. App. 474, 483-84 & n.9, 242 P.3d 921 (2010).

The trial court's use of a secret ballot and a private bench conference during Mr. Giles's trials closed proceedings to at least the same extent as in these cases. Here, the trial court unilaterally directed that for-cause challenges would be handled at the bench and peremptory strikes would be exercised silently on paper. RP 86-91, 432-33. At the conclusion of the parties' rounds of interviewing the venire, the court instructed, "Counsel, will you approach the bench?" and a "bench conference [was] held outside the hearing of the jury" and, therefore, the public. RP 86.

At the conclusion of the for-cause bench conference, the courtroom was silent while the attorneys conducted peremptory strikes amongst themselves. *See* RP 89-91. The record reflects the following:

> (Peremptory challenge process being conducted.)
>
> [a procedural question regarding conducting peremptory challenges was then settled at a bench conference, recorded but "outside hearing of the jury"]
>
> (Peremptory challenge process continuing.)
>
> Juror No. 23: (Hand raised.)

> The COURT: Yes, sir?
>
> Juror No. 23: May I be excused for a moment?
>
> The COURT: Yes. Come right back, though, because we're almost done.
>
> (Juror No. 23 left the courtroom momentarily.)
>
> The COURT: I promise we're almost done.
>
> UNIDENTIFIED JUROR: I'll hold you to that.
>
> The COURT: Hold them to that (indicating counsel).
>
> Juror No. 7: There are 14 of us.
>
> (Juror No. 23 is not back yet.)
>
> (Pause in proceedings.)
>
> The COURT: All right. Looks like we do have our jury selected. Listen carefully. The clerk will give you your instructions.

RP 89-90.

The clerk then indicated which jurors were excused (but not by which party or why) and which jurors filled their seats. RP 90-91.

Although the public was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. Leyerle*, 158 Wn. App. at 483-84 & n.9 (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis

upon which to discern which jurors had been struck and which were simply excused because the panel had been selected. There was no public check on the non-discriminatory use of challenges to the venire or the court's rulings on such challenges. The procedure had the same effect as excluding the public from the courtroom. *See Lormor*, 172 Wn.2d at 92 (citing cases where closure found because public was excluded from the courtroom during voir dire or other proceedings). "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

The subsequently-available record of the challenges does not absolve the constitutional violation. *See* CP 257-59 (record of jurors filed Apr. 17, 2013) & 154-46 (record of jurors filed Dec. 12, 2012); RP 86-89, 429-31 (challenges for cause made part of record on appeal); *Paumier*, 176 Wn.2d at 32-33 (public trial violation even where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring); *Leyerle*, 158 Wn. App. at 484 n.9 (citing *Strode*, 167 Wash.2d at 223-24 & n. 1); *Harris*, 10 Cal. App. 4th at 684-85, 688-89. "[T]he mere existence of such recordings, and thus the public's potential ability to access those recordings through determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures." *Leyerle*,

158 Wn. App. at 484 n.9. Moreover, the existence of records does not dispel the likelihood that different jurors would have been stricken if the parties had to face the public scrutiny of open proceedings. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process."); *Wise*, 176 Wn.2d at 5-6 (openness deters misconduct, tempers bias, mitigates undue partiality). "[P]ublic trials embody a 'view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Strode*, 167 Wn.2d at 226 (quoting *Waller*, 467 U.S. at 46 n.4 (internal quotation omitted)).

c. Because voir dire was closed without analysis of the public trial right, Mr. Giles's convictions should be reversed and remanded for new trials.

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181. Because the trial court failed to conduct a *Bone-Club* inquiry, "a 'per se prejudicial' public trial violation has occurred 'even where the defendant failed to object at trial.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18).

Here, the court provided no compelling interest that required peremptory strikes and for-cause challenges to be conducted in secret. Further, the court failed to consider any of the *Bone-Club* factors on the record. Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Mr. Giles's convictions should be reversed and the matter remanded for new, public trials.

2. The first-degree assault conviction should be reversed and the charge dismissed because the State presented insufficient evidence of both intent to inflict great bodily harm and use of a deadly weapon.

The State charged Mr. Giles with assault in the first degree as to Costco employee Virgil Wear. But the State did not prove that Mr. Giles acted with intent to inflict great bodily harm, which is defined as a probability of death, significant serious permanent disfigurement or significant permanent loss or impairment of function of any bodily part or organ. In the light most favorable to the State, the evidence merely shows Mr. Giles removed a folding knife from his pocket, made movement with it, and an employee who was restraining Mr. Giles was hit with the handle of the knife and barely injured. Likewise, the State failed to prove Mr. Giles used a deadly weapon against the employee because the folding

knife was not used, attempted to be used or threatened to be used in a manner "readily capable of causing death or substantial bodily harm" when the handle of the knife made contact with the employee's knee.

a. The State must prove each element of the charged offense beyond a reasonable doubt.

An accused may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

As charged here, assault in the first degree requires the State to prove an assault was committed with (1) intent to inflict great bodily harm and (2) a deadly weapon. RCW 9A.36.011; CP 90 (to-convict instruction). As discussed below, the State's evidence on those two elements was insufficient.

b. The State failed to prove Mr. Giles acted with intent to inflict great bodily harm.

As the State charged Mr. Giles, it was required to show beyond a reasonable doubt that his assault of Virgil Wear was committed with intent to inflict great bodily harm. RCW 9A.36.011; CP 90 (to-convict instruction); CP 8 (information). Showing "great bodily harm" is not a simple matter. It requires a showing of probability of death, significant serious permanent disfigurement or significant permanent loss or impairment of function of any bodily part or organ. RCW 9A.04.110(4)(c). Thus, the State was required to show Mr. Giles acted with intent (i) to kill Virgil Wear or (ii) to cause permanent disfigurement that is both significant and serious or (iii) to cause significant and permanent loss or impairment of the function of any bodily part of organ. *Id.*

The testimony regarding Mr. Giles's contact with Virgil Wear, in the light most favorable to the State, shows while held to the ground Mr. Giles somehow removed and waved the knife while he was attempting to get away from the employees holding him against his will. After some struggle, the knife was removed from him and the handle hit Mr. Wear's knee. The evidence is summarized as follows:

- Virgil Wear testified the other employees tried to handcuff Mr. Giles "And I just kind of was holding his head down. And then the

next thing I know, you know, I was -- a knife came shooting across right under my knee." . . . I believe by the look of the way it went, he actually shot them [the knife] away from us . . . . He actually let it go." But Mr. Wear did not know if Mr. Giles threw the knife away from them or if one of the other employees (Mr. Humphrey) got it out of his hand. Mr. Wear found it scary because he thought his knee had been "taken out" but it turned out "the handle had taken [him] pretty good." RP 518-20.

- Mr. Humphrey testified that as he was pulling Mr. Giles's right hand out from underneath him, Mr. Giles produced a folding knife that was open and Mr. Humphrey heard others exclaim "knife." Mr. Humphrey immediately grabbed Mr. Giles's right wrist and pinned it down to the concrete. "Mr. Giles was able to get his hand free a number of times and move the weapon about[,]" but Mr. Humphrey struck Mr. Giles twice in his face and Mr. Giles "eventually let go of the weapon." RP 472-75.

- The third employee involved, Mr. Wolfe did not see the knife, but testified "The way I perceived it, [Mr. Giles] was doing anything he could to get away from being contained." He further testified that at one point Mr. Giles went to put his arm out and all Mr. Wolfe heard was somebody say "knife." He testified the knife "got kicked out" or "got released" from Mr. Giles's hand. RP 502-11.

- A bystander, Thomas Walters testified Mr. Giles "kept fighting and struggling and reached in his pocket and pulled out a knife and opened it and tried to swing at one of the guys who was trying to subdue him. And when he hit the guys with the handle of the knife and the – the man who was hit caught his hand and hit the knife out of his hand. And it slid." RP 558.

- The other bystander, Leonard Oakland "Never saw the young man holding the knife or swing it at anyone." RP 539-40.

- Mr. Wear's injuries were demonstrated through Exhibits 10 and 11. He testified the photographs are accurate depictions of the condition of his knee area where the knife hit, admitting you cannot "really see [the bruise] in the photo very well." His knee

did not require medical attention; he simply applied ice to it. RP 520-22.

Specific intent to inflict great bodily harm "cannot be presumed but it can be inferred as a logical probability from all the facts and circumstances[,]" such as the manner and act of inflicting the wound, the nature of the prior relationship, and any previous threats. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994); *see State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). For example, in *State v. Pierre*, an inference of intent to cause great bodily harm was based on evidence indicating repeated blows to the victim's head. 108 Wn. App. 378, 386, 31 P.3d 1207 (2001). In *State v. Pedro*, evidence was sufficient to infer intent to inflict great bodily harm arose from prior serious physical altercations between the accused and the victim, and testimony that the accused exited a bus after the victim, pulled out a handgun and started shooting at the victim as he ran. 148 Wn. App. 932, 940, 951, 201 P.3d 398 (2009). Such purposeful, volitional acts support a finding of specific intent to inflict great bodily harm. *See Mitchell*, 65 Wn.2d at 374.

Similarly, despite the minor long-term injuries resulting from an assault, this Court held in *State v. Anderson* that evidence of intent to inflict great bodily harm was sufficient where the accused removed his handcuffs, belly chain and leg shackles, slammed a corrections officer into

a car doorjamb, fought with the officer in an attempt to take away his gun, tried to push the officer's gun against his head, bit the officer's ear, and hit the officer six to eight times with a pair of handcuffs. 72 Wn. App. 453, 457-59, 864 P.2d 1001, *review denied*, 124 Wn.2d 1013 (1994). Considering all the circumstances, Division One found sufficient evidence because

> This case involved a violent altercation initiated by Anderson, a jail inmate, against Bergman, a guard transporting him. The attack and attempted escape were obviously planned in advance by Anderson. Anderson secretly freed himself from his restraints while being transported in the police car and "slammed" Bergman into the doorjamb of the car when the opportunity arose. Anderson immediately began a vigorous and prolonged attempt to take Bergman's weapon by force, during which he bit Bergman and tried to restrain him with his own handcuffs. When Bergman drew his gun in the course of the struggle, Anderson used both hands to push the weapon toward Bergman's head. The struggle ended only after Bergman fired his weapon and kicked Anderson out of the car.

Id. at 459.

The case at bar is distinct from *Anderson*. Aside from having a knife (which equally supports removing packaging from the shoplifted items), Mr. Giles's conduct demonstrated no preplanning of a great bodily injury. He tried to exit Costco peaceably and a knife was presented only after a struggle in which he was knocked to the ground and surrounded by three employees. Although one witness testified Mr. Giles waved the

knife, he was restrained and never got close to hitting any of the employees. It was only the handle of the knife that eventually came into contact with Mr. Wear's knee, and only after it was forcibly released from Mr. Giles's hand. The contact from the handle of the knife caused only a small bruise.

Mr. Giles sought to steal items from a store, was physically restrained by three store employees, and removed a folding knife from his pocket during the struggle. The State failed to show that Mr. Giles had the specific intent to inflict great bodily injury, as opposed to the intent to secure his release by instilling fear or inflicting a lesser degree of bodily injury. *See Wilson*, 125 Wn.2d at 219 (once mens rea is established, it can support first-degree assault against any victim; but the specific intent must be proved).

c. The State failed to prove the deadly weapon element of assault in the first degree, the only charged alternative.

The State charged Mr. Giles with assault in the first degree under the alternative that the assault was committed with a deadly weapon. RCW 9A.36.011; CP 90 (to-convict instruction); CP 8 (information). Proof of a deadly weapon beyond a reasonable doubt was also lacking.

In the absence of an explosive or firearm, deadly weapon means "any other weapon, device, instrument, article, or substance, . . . which,

under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.36.110(6); CP 94 (definitional instruction); *see In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364-65, 256 P.3d 277 (2011) (explaining distinction between deadly weapon per se and other weapons, such as a knife, upon which the circumstances of use must be regarded). In turn, "substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." RCW 9A.36.110(4)(a). The jury was provided with a definition of "bodily harm," but not of substantial bodily harm. CP 92; *see generally* CP 74-106.

Mere possession is insufficient to prove a deadly weapon element. *Martinez*, 171 Wn.2d at 366. The manner and circumstance of the use are critical to the State's case. *E.g., id*. at 366-68. "Circumstances" include "the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted." *State v. Shilling*, 77 Wn. App. 166, 889 P.2d 948 (1995) (citing *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972)).

In *State v. Skenandore*, Division Two examined whether the State presented sufficient evidence that a homemade spear aimed at a corrections officer by an inmate was a deadly weapon for purposes of assault in the second degree. 99 Wn. App. 494, 498-501, 994 P.2d 291 (2000). A prison inmate fashioned a spear several feet long from paper, dental floss, and a golf pencil. *Id*. at 496. He attacked an officer through a portal and hit him with "'pretty good' force" on the chest and then the arm. *Id*. at 496-97. In examining the sufficiency of the State's evidence, the Court found "the surrounding circumstances inhibited the spear's otherwise potential, but unproven, ready capability to inflict substantial bodily harm." *Id*. at 500. The degree of injury actually caused was also relevant: "The spear did not tear Jones' shirt or break his skin; and the non-abraded red indentations on Jones' chest faded within hours of the assault." *Id*. The Court held "no rational trier of fact could have found that [the] spear was readily capable of causing death or substantial bodily harm under the circumstances in which it was used." *Id*. at 501.

As in *Skenandore*, the evidence here was insufficient to show the folding knife was used or attempted to be used in a manner readily capable of inflicting death or substantial bodily harm. Mr. Giles's actual use of the folding knife was limited to possible waving and releasing it unwillingly while being restrained on the ground by three employees. *E.g.*, RP 471-

75, 487-89, 491-92, 558. Mr. Giles was held to the ground by the body weight of the other employees and both his arms were being held. RP 491-92, 500-02, 506, 515, 518; *see* RP 535 (describing "a pile-up of Costco employees on top of a young man"). The State presented no evidence that Mr. Giles aimed the knife at any particular person or body part or that he could have reached such person or body part while restrained. Moreover, no witness testified that the manner in which Mr. Giles held the knife indicated it was readily capable of substantial disfigurement, substantial loss or impairment of the function of an organ, or a fracture. In fact, Virgil Wear received only a bruised knee and only the handle of the knife came in contact with him.

In short, the State failed to prove the deadly weapon element of assault as charged beyond a reasonable doubt.

d. Because the evidence was insufficient, the assault conviction should be reversed and the charge dismissed with prejudice.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *E.g.*, *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). If there is sufficient evidence

of a lesser included or inferior degree crime as to which the jury was instructed, this Court can direct the entry of that verdict on remand. Here the jury only was instructed on the lesser included offense of assault in the second degree, which depends upon use of a deadly weapon. RCW 9A.36.021 (assault in the second degree); CP 96 (instructing jury only on deadly weapon alternative of assault two). Because that evidence was insufficient, a second degree assault conviction cannot stand and the proper remedy is to reverse the conviction and dismiss the assault charge with prejudice.

3. Mr. Giles's robbery in the first degree conviction violates due process because the State failed to prove that the taking was by the use or threatened use of force and that he used actual force or fear to obtain or retain possession of the shoes, as required by the law of the case.

a. The State was required to prove the elements as set forth in the to-convict instruction.

As stated, the State must prove each element of an offense beyond a reasonable doubt to comport with an accused's constitutional due process rights. Section E.2.a, *supra*.

Jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). Where the State fails to object to an instruction limiting an element, the State must submit sufficient evidence to prove that element as delineated by the instructions.

See, e.g., *id*. at 105; *City of Spokane v. White*, 102 Wn. App. 955, 964-65, 10 P.3d 1095 (2000); *State v. Nam*, 136 Wn. App. 698, 706-07, 150 P.3d 617 (2007); *State v. Price*, 33 Wn. App. 472, 474-75, 655 P.2d 1191 (1982). This holds true because regardless of whether the instruction was rightfully given, once given it became binding and conclusive upon the jury. *Hickman*, 135 Wn.2d at 101 n.2.

Moreover, a to-convict instruction like that used here serves as a yardstick by which the jury measures the evidence to determine guilt or innocence. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. *Id*. at 262-63. Further, jury instructions must make the law "'manifestly apparent to the average juror.'" *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)). For example, in *Allery*, the court disapproved a jury instruction that adequately conveyed the reasonableness standard for self-defense but, by omitting a direction to consider all surrounding circumstances, failed to make that standard manifestly clear. 101 Wn.2d at 593, 595. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." *Smith*, 131 Wn.2d at 263.

In evaluating the sufficiency of the evidence under a law of the case instruction, this Court engages in the same sufficiency analysis set forth above, and reversal and dismissal are required if the evidence is insufficient to support the verdict. *Hickman*, 135 Wn.2d at 103; Section E.2.a, d, *supra*.

b. The State failed to prove beyond a reasonable doubt that the taking was by Mr. Giles's use or threatened use of immediate force, violence or fear of injury, where Mr. Giles simply walked out of the store with the shoes.

Washington follows a transactional approach to robbery. *State v. Johnson*, 155 Wn.2d 609, 610-11, 121 P.3d 91 (2005) (discussing *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992)). Accordingly, the actual or threatened use of force may occur during the taking, escape or retention of the property so long as it is not too attenuated from the taking. *Id*.; *see* RCW 9A.56.190. At the Champs-related trial, however, the State assumed a higher burden. The to-convict instruction provided the following element: "(3) That the taking was against the person's will by the defendant's use of immediate force, violence or fear of injury to that person or to the person or property of another." CP 28.[9] The State did not object to this language. RP 215-18. In fact, the State proposed the

[9] A complete copy of instruction 7, the to-convict on robbery in the first degree, is attached as Appendix A.

language, which derives from the pattern instruction. CP 172 (State's proposed instructions (citing WPIC 37.02)).

Thus, the law of this case required the State to prove that Mr. Giles used or threatened to use immediate force, violence or fear of injury in the taking of the shoes from Champs. *See Hickman*, 135 Wn.2d at 101-02, 105. The State may argue that the jury was provided with a definitional instruction for robbery that the "force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 26 (instruction 5) (emphasis added). But the to-convict instruction obliterated this distinction by setting forth two distinct elements, each of which had to be proved beyond a reasonable doubt. First, that the taking was by the defendant's use or threatened use of force, violence or fear of injury. And additionally and separately, that force or fear was used to obtain or retain possession of the property. CP 28 (elements 3 and 4). The to-convict instruction set forth each element that the jury had to find beyond a reasonable doubt and limited the manner in which the State could prove robbery. *Smith*, 131 Wn.2d at 262-63. The jury is presumed to have followed the court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Looking at all the evidence in the light most favorable to the State, there is no support for this element. Mr. Giles was handed the shoes he

eventually stole by store clerks who were willingly allowing him to try on shoes, as they would any customer. RP 117, 120, 122, 147-48, 160-62. With the shoes on, Mr. Giles then walked out of the store—past several clerks but without making contact with them. Exhibit 6 (part one) (surveillance video showing Giles exiting store); RP 122, 139, 148, 157-58, 164. The taking was then complete. *See Johnson*, 155 Wn.2d at 610-11 (taking complete when accused removed property from store into parking lot and then abandoned it before using force). He did not physically remove the shoes from any person. He did not use force or threaten to use force. Nor did Mr. Giles threaten the use of force, violence or fear in the taking of the shoes. It was only after Mr. Giles and the shoes were well out of the Champs store that he allegedly threatened Mr. Riding with a knife. *See* RP 126-28.

The State failed to prove beyond a reasonable doubt that Mr. Giles took the property by use or threatened use of force, violence or fear of injury, an element assumed in the to-convict instruction.

c. The State failed to prove beyond a reasonable doubt that Mr. Giles used actual force or actual fear to obtain or retain possession of the shoes, as required by the to-convict instruction.

The to-convict instruction on the Champs-related robbery in the first degree count also provided the following element: "(4) That force or

fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking." CP 28 (instruction #7). Again, the State proposed this language and did not object to its use. RP 215-18; CP 172 (State's proposed instructions (citing WPIC 37.02)). The instructed-element removed the arguable alternatives of threatened use of fear or force as well as violence and fear of injury from this element of the offense. RCW 9A.56.190 (definition of robbery refers to "such force or fear," arguably referring back to "the use or threatened use of immediate force, violence, or fear of injury"); RCW 9A.56.200 (first-degree robbery). Accordingly, the question on appeal is whether the State proved Mr. Giles used "force or fear . . . to obtain or retain possession of the [shoes] or to prevent or overcome resistance to the taking."

The evidence presented, even when viewed in the light most favorable to the State, failed to show Mr. Giles used force or fear to obtain, retain, or prevent resistance to the taking of the shoes. It is abundantly apparent that Mr. Giles did not use actual force. Mr. Giles ran out of the store; he did not use force to get out of the store with the shoes, and he did not make contact with anyone. RP 122, 139, 148, 153, 157-58, 164; Exhibit 6 (part one). The store clerk who chased Mr. Giles after he left the store, Christian Riding, testified that Mr. Giles made no gesture or

movement toward Mr. Riding when, in the mall hallway, Mr. Giles pulled out a knife and threatened to gut him. RP 126-28, 141-42. Mr. Riding's impression was that if he continued to pursue Mr. Giles, Mr. Giles would have stabbed Mr. Riding. RP 141. Consequently, Mr. Riding did not continue to pursue Mr. Giles and Mr. Giles did not exert any force against him.

Fear was also not demonstrated. Mr. Riding testified that he was "concerned" when Mr. Giles brandished the knife, not that he was fearful. RP 130. Similarly, fellow employees testified that Mr. Riding appeared nervous, panicked, and "kind of shocked" when he returned to the store; they did not describe him as fearful. RP 150, 165. A police officer who interviewed Mr. Riding testified he was "a little bit winded and, you know, kind of adrenaline pumping, kind of seemed like." RP 187.

The State assumed the element as instructed, but failed to prove the use of force or fear. In *State v. Witherspoon*, Division Two held the State sufficiently proved the fear alternative of this element of robbery where the to-convict instruction was similarly constructed. 171 Wn. App. 271, 298-99, 286 P.3d 996 (2012). The Court reasoned that "actual fear" did not need to be "specifically proven, for the law will presume fear." *Id*. at 299. But the Court's analysis ignored that, in *Witherspoon* like here, the jury was not instructed that fear could be presumed. Rather, as Mr.

Witherspoon argued on appeal, the State assumed proof of actual fear by failing to object to the to-convict instruction. *Witherspoon* is currently on review before the Washington Supreme Court on this issue, among others. *State v. Witherspoon*, 177 Wn.2d 1007, 300 P.3d 416 (2013); *see* Order, No. 88118-9 (May 6, 2013) (limiting issues for review to include sufficiency of robbery conviction).

Because the State failed to prove beyond a reasonable doubt that Mr. Giles used force or fear to obtain, retain, or prevent taking of the shoes, the conviction should be reversed and the charge dismissed with prejudice. *See Hickman*, 135 Wn.2d at 103.

4. The State also failed to prove that force, fear or violence was used or threatened in the taking of items from Costco, as required by the to-convict instruction, necessitating reversal of the second-degree robbery conviction.

a. Because the element of taking by the use or threatened use of force, fear or violence was included in the to-convict instruction for the second-degree robbery count without objection, the State was required to prove it.

As discussed, the State is required to prove the elements of the offense as set forth in the to-convict instruction, absent objection. Section E.3.a, *supra*. With regard to the second-degree robbery count for the Costco incident, the to-convict instruction provided the following element, identical to that used in the Champs-related trial: "(3) That the taking was

against the person's will by the defendant's use of immediate force, violence or fear of injury to that person or to the person or property of another." CP 84.[10] Again, the State proposed and did not object to this language. RP 579-80; CP 226 (State's proposed instructions). Thus, the law of this case required the State to prove that Mr. Giles used or threatened to use immediate force, violence or fear of injury in the taking of the security system, game and gloves from Costco. *See Hickman*, 135 Wn.2d at 101-02, 105.

b. The State failed to prove beyond a reasonable doubt that the taking was by Mr. Giles's use or threatened use of immediate force, violence or fear of injury, where Mr. Giles walked past the cash registers to the store exit before any confrontation occurred.

Examining the evidence in the light most favorable to the State, the State failed to demonstrate Mr. Giles took the Costco property by the use or threatened use of force, fear or violence.

The taking was complete by the time Mr. Giles crossed the point-of-sale without paying for the property secreted in his clothing. *E.g.*, *State v. Jones*, 63 Wn. App. 703, 704, 707- 821 P.2d 543 (1992) (sufficient evidence of theft where defendant moved within 10 feet of exit to store with shopping cart full of concealed cartons of cigarettes and immediately

[10] A complete copy of instruction 8, the to-convict instruction on robbery in the second degree, is attached as Appendix B.

attempted to exit store when stopped by employees); *State v. Manchester*, 57 Wn. App. 765, 766, 768-70, 790 P.2d 217 (1990) (taking complete when defendant exited store without paying for property); *State v. Britten*, 46 Wn. App. 571, 572-74, 731 P.2d 508 (1986) (theft complete when, in dressing room, defendant removed price tags from jeans and concealed them under his clothes). In fact, Mr. Giles conceded at trial that he was liable for theft. RP 449-50, 615-16. The evidence plainly showed Mr. Giles did not use or threaten to use force, fear or violence at any time prior to passing the cash registers without paying. RP 452-53, 455-59, 462, 463, 485-86 (Humphrey observed Giles for approximately 25 minutes while he secreted items and instructed colleague to detain him only once he crossed through to exit). By all accounts, the violence or force occurred in the immediate vicinity of the exit after Mr. Giles passed through the payment area without stopping. RP 464, 488-89, 499-501, 515, 523-24, 537; Exhibit 2 (photograph of entrance/exit area). Consequently, the State presented no evidence to support this element.

The second-degree robbery conviction should be reversed and the charge dismissed with prejudice. *See Hickman*, 135 Wn.2d at 103.

5. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge and the prosecutor's argument in closing diluted the State's burden of proof in violation of Mr. Giles's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id*. "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an

abiding belief in the truth of the charge." CP 80 (instruction # 4 in second trial); CP 24 (instruction # 3 in first trial). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741. It is of no moment that Mr. Giles did not object at trial to the use of the instructions. *See Emery*, 174 Wn.2d at 757. Notably, however, he also did not propose the erroneous language. *See* CP 12-18, 66-73.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d t 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id*. at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.

> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id*. at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id*. at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d

245 (1995). However, in *Pirtle* the issue before the court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

The erroneous instruction diluted the burden of proof. *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Mr. Giles was denied his constitutional right to fair trials. His convictions should be reversed and the matter remanded.

6. Mr. Giles's life without the possibility of parole sentence at the age of 34 based on offenses that caused little harm to persons or property violates the Eighth Amendment and article I, section 14.

If the Court affirms Mr. Giles's convictions, despite the errors set forth above, his sentence should be vacated on the bases set forth herein and in the following sections.

a. The federal and state constitutions prohibit the imposition of punishment that is disproportionate to the crime.

The Washington and federal constitutions prohibit the imposition of disproportionate sentences, but our State's protection reaches more broadly. U.S. Const. Amend. VIII; Const. art. I, § 14; *State v. Roberts*, 142 Wn.2d 471,506, 14 P.3d 713 (2000); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980). Article I, section 14 prohibits cruel sentences, whereas the federal constitution prohibits punishments only if they are both cruel and unusual. *Id*. The principle that punishment must be proportionate to the crime is "deeply rooted and frequently repeated in common law jurisprudence" dating back to the Magna Carta. *Solem v. Helm*, 463 U.S. 277, 284-86, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).

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). The POAA was

designed to punish serious, violent repeat offenders. Whenever the sentencing court concludes an offender is a persistent offender, the court must impose the sentence of life, and the offender is not eligible for parole or any form of early release. RCW 9.94A.570. Our Supreme Court recognizes that "there may be cases in which application of the Act's sentencing provision runs afoul of the constitutional prohibition against cruel punishment." *State v. Thorne*, 129 Wn.2d 736, 773 n. 11, 921 P.2d 514 (1996).

b. Mr. Giles's sentence violates article I, section 14.

To analyze whether the sentence is disproportionate to the crime and therefore violates article I, section 14, Washington courts examine four factors. *Fain*, 94 Wn.2d 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. An analysis of these factors demonstrates Mr. Giles's life without parole sentence is disproportionate in violation of article I, section 14.

i. The nature of the offenses are disproportionate to the sentence imposed.

A broad range of conduct can support the offenses of robbery in the first and second degree. *E.g.*, *State v. Gonzalez*, 168 Wn.2d 256, 259-60, 226 P.3d 131 (2010) (first-degree robbery where accused struck victim in the face, causing injuries requiring extensive reconstructive surgery and causing loss of most vision in one eye, and robbed him of his truck); *State v. Berg*, __ Wn. App. __, 310 P.3d 866 (2013) (first-degree robbery where defendant broke into medical marijuana user's home, pinned him to ground, threatened to shoot, and stole items from him); *State v. Knight*, 176 Wn. App. 936, 309 P.3d 776, 780-82 & n.13 (2013) (171-month sentence for robbery from home of sellers who listed a wedding ring on Craigslist where wedding ring removed from finger while victim was restrained with zip ties, and house was ransacked while kids were forced to the ground at gun point); *State v. Ralph*, 175 Wn. App. 814, 818-19, 308 P.3d 729 (2013) (second-degree robbery for threatening to beat face in and then punching victim in face and driving away in victim's truck). Without minimizing the seriousness of Mr. Giles's acts, he attempted to shoplift less than $400 in goods, and all but one pair of shoes was returned. *See Fain*, 94 Wn.2d at 397-98 (life sentence grossly disproportionate where offender used fraud to obtain funds adding up to

less than $470). In the first-degree robbery incident at Champs, Mr. Giles inflicted no injuries, and the Costco employees who wrestled with him as he exited the store sustained only one bite and two bruises. RP 126-28, 141, 468-69, 471, 503-04, 511, 518, 520-21; Exhibits 6, 8-11, 13. Even for an assault in the first degree, an inherently violent crime, Mr. Giles's conduct towards Mr. Wear—hitting him in the knee with the handle of a knife—hardly rises to the level of a "most serious" offense. The robberies and assaults here were not the sort of offenses that create public outrage or calls out for harsh punishment. *See Solem*, 463 U.S. 277 (overturning life sentence as grossly disproportionate for nonviolent offense); 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, 938 & n.35 (2011) (Gary Ridgway pled guilty to 49 counts of murder and received the same sentence as Giles.).

Yet the sentence Mr. Giles received is "the second most severe penalty permitted by law." *Graham v. Florida*, 560 U.S. 48, 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (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*, 560 U.S. at 69-70 (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. 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.

ii. The purpose behind the POAA does not justify the most severe sentence short of death here.

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 intended to require life without the possibility of parole for offenders 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; *see* RCW 9.94A.555 (stating purposes as improving safety, reducing number of serious repeat offenders, setting

proper and simplified sentencing for offender and victim, and restoring public trust by directly involving public in sentencing process). 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. *Id.*

Although Mr. Giles was punished for multiple offenses in his most recent judgment and sentence, the crimes arose from two shoplifting incidents in 48 hours in which two people received only the most minor of injuries. His offenses hardly qualify as most serious or violent. *See, e.g.*, Ex. 6 (parts one and two). Moreover, his supporters at sentencing made clear that Mr. Giles is caring, sensitive and a hard worker and an artist. RP 638-44. Even the judge thought the sentence did not befit him. RP 645.[11]

iii. The life without parole sentence is disproportionate to other jurisdictions.

Mr. Giles's lifetime sentence is disproportionate to sentences imposed in other jurisdictions. For example, federally, the mean prison

[11] In some cases, our Supreme Court has looked at a persistent offender's prior offenses in determining if the current sentence is constitutional. *Compare Fain*, 94 Wn.2d at 397-98; *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996) *with Thorne*, 129 Wn.2d at 773-74; *State v. Rivers*, 129 Wn.2d 697, 713, 921 P.2d 495 (1996). Here, Mr. Giles's criminal history also does not support imposition of the most severe sentence short of death. The two prior strike offenses that qualified him for a lifetime sentence were a second-degree assault from 2009 and a first-degree robbery from 15 years ago. Otherwise, Mr. Giles has only nonviolent and misdemeanor offenses. CP 142.

term for a most serious robbery offense is 101 months, which would cause Mr. Giles to be released when he is 42 years old. U.S. Department of Justice-Bureau of Justice Statistics, Felony Sentences in State Courts, 2006-Statistical Tables at Table 1.3 (2009).[12] In state courts around our country, the mean sentence is even shorter, at 83 months. *Id*. at Table 2.4.

Further showing the disproportionality, many states do not include second degree robbery as a third strike offense or subject it to a lesser sentence than life even as a third strike. *E.g.*, Shapiro, *Life in Prison for Stealing $48?*, 34 Sea. U. L. Rev. at 943 & n.80.

Mr. Giles's sentence is also disproportionate in comparison to international norms and sentences. *See generally* Anne Goldin, *The California Three Strikes Law: A Violation of Int'l Law and a Possible Impediment to Extradition*, 15 Sw. J. Int'l L. 327 (2009) (noting foreign recidivist laws are more lenient than similar legislation in U.S. and U.S. sentences likely violate international law and norms).

iv. Similar offenses receive a much more lenient sentence in Washington.

Without the POAA, Mr. Giles would have received a drastically reduced sentence in Washington. The average sentence for first-degree assault in Washington in 2012 was less than 20 years and the average for

[12] *Available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

robbery was 7.5 years. Table 2, Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing (2012).[13]

Moreover, many offenders who commit a second-degree robbery as their third strike are prosecuted so as to avoid the mandatory lifetime sentence imposed here. Shapiro, *Life in Prison for Stealing $48?*, 34 Sea. U. L. Rev. at 953-94 (noting King County often charge theft instead of robbery to avoid a three strikes sentence).

If Mr. Giles had received a standard range sentence, he would have received less than 30 years on the assault charge and less than 17 years on the robbery convictions. CP 142. These sentences are far lower than a life without parole sentence at 34 years old.

While no one factor is dispositive, where all four *Fain* factors show that a sentence is "entirely disproportionate to the seriousness of [the] crime[]" it cannot stand under the Washington constitution. *Fain*, 94 Wn.2d at 402.

c. <u>The sentence also violates the Eighth Amendment.</u>

A punishment is excessive in violation of the Eighth Amendment if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless

[13] Available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2012.pdf.

imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 98 (1977). The analysis should stay in line with the "evolving standards of decency that mark the progress of a maturing society," which in turn is determined by "an assessment of contemporary values concerning the infliction of a challenged sanction." *State v. Campbell*, 103 Wn.2d 1, 31, 691 P.2d 929 (1984) (quoting *Trop v. Dulles*, 356 U.S. 89, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958); *Gregg v. Georgia*, 428 U.S. 153, 172-73, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)). A proportionality analysis looks directly to a comparison between the seriousness of the crime and the severity of the punishment. *See Campbell*, 103 Wn.2d at 31.

As discussed, the three strikes law in this state is meant to be reserved for the most serious offenders. Mr. Giles's offenses do not fit in that category. A term of life imprisonment without even the possibility of parole for a 34-year-old person who imposed no lasting or serious injuries while committing ill-planned shopliftings does not comport with modern notions of decency.

Applying a direct proportionality analysis, the U.S. Supreme Court compares the harm to the victim from the offense to the impact on the defendant from the sentence. *See Enmund v. Florida*, 458 U.S. 782, 798-

801, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); *Coker*, 433 U.S. at 597-600. Mr. Giles stole less than $400 worth of property, of which all but $84.99 (a single pair of shoes) was recovered. RP 482-84. There was no property or other damage. In regard to personal injuries, Mr. Giles did not come in contact with the store clerk at Champs, who received no injuries. *E.g.*, RP 126-28, 141. Moreover, the Costco employees who restrained Mr. Giles received minor injuries (a bruised knee and cheek) that could hardly be seen on evidentiary photographs and which required no medical attention. RP 468-69, 471, 503-04, 511, 518, 520-21; Exhibits 8-11, 13. By comparison, Mr. Giles was sentenced to life without parole—the most severe punishment short of death. The sentence is grossly disproportionate.

d. The life without parole sentence should be stricken.

Because Mr. Giles's sentence is significantly disproportionate to his crimes and is cruel under *Fain*, it violates the Eighth Amendment and article I, section 14. The sentence should be stricken and the matter remanded for a constitutional sentence. *See Graham*, 560 U.S. at 82.

7. The sentencing court violated Mr. Giles'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. Giles 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 and right to a jury trial together 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." U.S. Const. amends.VI, XIV; *Blakely*, 542 U.S. at 298; *Apprendi*, 530 U.S. at 490; *Winship*, 397 U.S. at 364. It violates the constitution "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." *Apprendi*, 530 U.S. at 490. The government must submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. *Descamps v. United States*, __ U.S. __, 133 S. Ct 2276, 2285-86, 186 L. Ed. 2d 438 (2013); *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, __ L. Ed. 2d __ (2013).

> [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. Giles'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. *Alleyne*, 133 S. Ct. at 2155.

b. Because two prior 'strike' offenses were used to increase Mr. Giles's maximum sentence to life without parole, the constitution entitles him to have a jury determine beyond a reasonable doubt that he committed two 'strike' offenses.

Absent the court's finding, by a preponderance of the evidence, that Mr. Giles committed "strike" offenses on two prior occasions, he would not have been subject to a sentence of life without the possibility of parole. The jury verdicts reached in the below trials do not support a life sentence standing alone. *See* CP 142 (setting forth standard range sentences based on jury verdict). Because the facts used to impose the life sentence were not found by a jury beyond a reasonable doubt, Mr. Giles's Sixth and Fourteenth Amendment rights were violated.

Any argument that there is a "prior conviction exception" to the rule overlooks important distinctions and developments in United States Supreme Court jurisprudence. *See Apprendi*, 530 U.S. at 489.

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).[14] In *Apprendi*, the Court recognized that there was no need to explicitly overrule *Almendarez-Torres* in order to resolve the issue before it. However, the Court reasoned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and 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.

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[14] Mr. Giles recognizes 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, 34 P.3d 799 (2001). Mr. Giles 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). Moreover, the Washington Supreme Court accepted review of this issue in *Witherspoon*, 177 Wn.2d 1007 (oral argument heard Oct. 22, 2013).

A member of the 5-justice majority in *Almendarez-Torres*, Justice Thomas has since retreated from the majority holding. His *Apprendi* concurrence noted extensively 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). Moreover, although the continuing validity of *Almendarez-Torres* was not before the Court in *Alleyne*, Justice Thomas further emphasized his retreat from the holding in authoring *Alleyne*. *Alleyne*, 133 S. Ct. at 2155, 2160 n.1.

Even if *Almendarez-Torres* has precedential value, it is distinguishable on several grounds. First, in *Almendarez-Torres*, the defendant had admitted the prior convictions. *Apprendi*, 530 U.S. at 488. Mr. Giles 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. Here, the simple "fact" of the prior convictions did not increase Mr.

Giles's punishment; rather, it was the "types" of prior convictions that mattered. 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. Thus, the constitutional concern here resembles *Alleyne*, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element, more than *Almandarez-Torres*. *Alleyne*, 133 S. Ct. at 2155. Accordingly, even if *Almendarez-Torres* were still good law, it would not apply here.

Judge Quinn-Brintnall of this Court has recognized that Supreme Court precedent requires the State to prove prior "strike" offenses to a jury beyond a reasonable doubt. *Witherspoon*, 171 Wn. App. at 308-15; *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part), *aff'd on other grounds*, 172

Wn.2d 802 (2011). Although the Washington Supreme Court previously rejected the argument Mr. Giles makes here, Judge Quinn-Brintnall has noted that subsequent United States Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in *Apprendi* and invalidated intervening decisions. *McKague*, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting) (citing *Blakely*, 542 U.S. at 303-04; *Cunningham v. California*, 549 U.S. 270, 281-88, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)). Under recent United States 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 United States Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. In the alternative, under the traditional *Mathews* procedural due process analysis, proof to a jury beyond a reasonable doubt is required to confine an accused to life without parole under our State constitution.

In the alternative, this Court should hold that a procedural due process analysis under *Mathews v. Eldridge* requires that a POAA sentence be imposed only if the prior serious offenses are found by a jury beyond a reasonable doubt. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct.

893, 47 L. Ed. 2d 18 (1976). The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. A procedural due process claim requires the court to balance three factors. *Mathews*, 424 U.S. 319. First, the court must consider the private interest at stake. *Id*. Second, the court looks to the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures. *Id*. Third, the court regards the government's interest in maintaining the existing procedure. *Id*.

Under the first factor, the accused has a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest at stake is the most elemental of liberty interests—liberty. This interest is "almost uniquely compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The unparalleled importance of this interest is demonstrated by the significant procedural safeguards required when a person's freedom is at issue. For example, a court may not impose confinement for failure to pay in a civil contempt case absent (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) an opportunity to respond to questions about financial status; and (4) an

express judicial finding regarding that the defendant has the ability to pay. *Turner v. Rogers*, __ U.S. __, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011). Similarly, a person may not be subject to involuntary civil commitment absent proof by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

The private interest in avoiding a term of life without parole—the harshest punishment except for death—is greater than in most situations involving loss of freedom. Thus, the punishment at issue here weighs heavily in favor of additional procedural safeguards.

Nonetheless, the current procedure—judicial factfinding by a preponderance of the evidence—creates a significant risk of error. A preponderance of the evidence is a mere more likely than not finding. A heftier standard is required when significant interests are at stake. *E.g.*, *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-92 (9th Cir. 2010) (requiring a clear and convincing standard to protect the "significant liberty interests" implicated by an involuntary medication order); *Addington*, 441 U.S. at 433. Furthermore, "it is presumed, that juries are the best judges of facts." *Georgia v. Brailsford*, 3 U.S. 1, 4, 3 Dall. 1, 1 L. Ed. 483 (1794). Juries are well-equipped to evaluate documentary evidence, witness testimony, and expert opinion. The possibility of even

occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury.

Such additional procedures would also benefit the government. The State has two significant interests in ensuring the accuracy of persistent offender sentencing proceedings. First, prosecutors have a duty to act in the interest of justice, and thus cannot seek the wrongful imposition of life without parole. Second, the State's scarce resources should not be wasted incarcerating people for life if they do not qualify as persistent offenders.

In sum, the balancing test in *Mathews* shows that prior strike offenses must be proved to a jury beyond a reasonable doubt in POAA cases to comport with article I, section 3. *Mathews*, 424 U.S. at 333.

d. Because the life sentence was not authorized by the juries's verdicts, the case should be remanded for resentencing within the standard range.

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). The juries below did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the

possibility of parole imposed upon Mr. Giles. His sentence should be reversed and remanded for the imposition of a standard-range sentence.

8. 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. Strict scrutiny applies to the classification at issue because a fundamental liberty interest is at stake.

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 requires the classification at issue be necessary to serve a compelling State 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*, 542 U.S. at 529. Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541; *cf. In re Det. 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 any standard of 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. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). 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). Likewise, 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 that increase the maximum sentence available are classified by judicial construct 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).

But where, as here, prior convictions that increase the maximum sentence available are classified judicially as "sentencing factors," our state only requires they be proved to the judge by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143 (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). 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").[15]

[15] For 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.

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, while it might be reasonable for the Legislature to determine that the greatest procedural protections apply in the three strikes context but not in others, it makes no sense to say that the greater procedural protections apply only where the necessary facts only marginally increase punishment.

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. Giles of this basic liberty based on proof by only a preponderance of the evidence, to a judge and not a jury.

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. "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.

9. The court's finding that Mr. Giles had the ability to pay discretionary costs is without support and should be vacated along with the imposed legal financial obligation.

If the convictions are affirmed, this Court should strike the erroneous imposition of $200 in discretionary court costs because the evidence did not show Mr. Giles has or likely will have the ability to pay, the court did not enter such a finding, and yet the court ordered a payment schedule to begin in January 2014. CP 142, 144-45; RP 646.

A sentencing court can only impose discretionary costs and fees if the evidence clearly supports a finding that the defendant has the ability to pay or likely will have the future ability to pay. *State v. Curry,* 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). This requirement is both constitutional and statutory. *Id*.; *State v. Brockob,* 159 Wn.2d 311, 343, 150 P.3d 59 (2006).

"[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford,* 137 Wn.2d 472, 477, 973 P.2d 452 (1999). "This rule applies likewise to a challenge to the sentencing court's authority to impose a sentence." *State v. Hunter,* 102 Wn. App. 630, 633, 9 P.3d 872 (2000) (reviewing challenge to imposition of financial contribution to drug fund raised for the first time on appeal). This Court has previously reviewed this type of sentencing

issue for the first time on appeal, and should do so here. *See*, *e.g.*, *State v. Calvin*, No. 67627–0–I, __ Wn. App. __, 2013 WL 6332944, *11-12 (May 28, 2013); *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511 (2011); *State v. Curry*, 62 Wn. App. 676, 678-79, 814 P.2d 1252 (1991); *State v. Baldwin*, 63 Wn. App. 303, 308-12, 818 P.2d 1116 (1991).

The sentencing court erred in imposing a $200 discretionary fee for court costs, with payment set to begin on a date certain, without specifically finding Mr. Giles had the ability to pay. CP 142, 144; RCW 9.94A.760; RCW 10.01.160.[16] The lack of finding is unsurprising as the State presented no evidence at sentencing that Mr. Giles had the present or likely future ability to pay these discretionary financial obligations. *See* RP 633-37. The clear implication is to the contrary, as Mr. Giles was convicted for stealing items valuing less than $400. Moreover, the court found Mr. Giles indigent, appointed counsel on appeal, and sentenced him to life without parole. *See* CP 139-51.

This Court should strike the discretionary costs imposed.

F. CONCLUSION

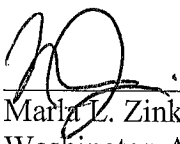
The proceedings below were fraught with error. Three of the resulting convictions—assault in the first degree, robbery in the first

[16] The remaining fees were mandatory and are not disputed here. CP 144; *see, e.g.*, *Curry*, 118 Wn.2d at 917 (victim assessment mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

degree and robbery in the second degree—should be reversed and the charges dismissed with prejudice because the State failed to present sufficient evidence of one or more elements supporting each offense. The third-degree assault conviction should be remanded for a new trial because the public was excluded from portions of jury selection. In the alternative, this Court should vacate the life without parole sentence and imposition of discretionary costs.

DATED this 28th day of January, 2014.

Respectfully submitted,



Marla L. Zink – WSBA 39042
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Attorney for Appellant

APPENDIX A

INSTRUCTION NO. 7

To convict the defendant of the crime of robbery in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 6, 2011, the defendant unlawfully took personal property from the person or in the presence of another;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking:

(5) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX B

INSTRUCTION NO. 8

To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about December 7, 2011, the defendant unlawfully took personal property from the person, or in the presence, of another – Troy Humphrey;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against that person's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to the person or property of another;

(4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and

(5) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31699-8-III
	)	
JASON GILES,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MARK LINDSEY SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JASON GILES 793670 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JANUARY, 2014.

X_____

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