No. 91612-8
Court of Appeals No. 44951-0-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM H. ELLISON,

Petitioner.

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

PETITION FOR REVIEW

SARAH M. HROBSKY
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

United States Supreme Court Decisions

Washington Supreme Court Decisions

Rules and Statutes

Other Authority

A. IDENTITY OF PETITIONER

William H. Ellison, petitioner here and appellant below, requests this Court grant review of the decision designated in Part B of the petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Ellison requests this Court grant review of the part published opinion of the Court of Appeals, No. 44951-0-II (March 31, 2015). A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. As an issue of first impression, is a defendant's right to allocution violated when the sentencing court abruptly and without explanation, cuts off the defendant's statement within minutes and proceeds to impose a sentence of life without the possibility of parole?

2. Must a trier of fact determine beyond a reasonable doubt that prior convictions constitute "most serious offenses" for purpose of the Persistent Offender Accountability Act (POAA), consistent with *Apprendi v. New Jersey*[1] and its progeny?

3. Does the classification of a "most serious offense" as a sentencing factor, rather than as an "element," violate equal protection of the laws?

[1] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

D. STATEMENT OF THE CASE

William H. Ellison was convicted of rape in the second degree and child molestation in the second degree. CP 68-75; 1/17/13 RP 580-82. At sentencing when Mr. Ellison was allocuting, the court cut him off without warning or explanation and sentenced him to a term of life without the possibility of parole pursuant to the POAA. CP 88-92; 5/13/13 RP 16-19. The court's oral ruling and written Findings of Fact and Conclusions of Law Supporting Persistent Offender Declaration/Sentence are devoid of any reference to the quantum of proof relied upon by the court to support its determination that Mr. Ellison had two prior convictions for a most serious offense.

On appeal, Mr. Ellison argued the sentencing court violated his statutory and constitutional right to allocution, whether his prior convictions constituted "most serious offenses" must be found by the trier of fact beyond a reasonable doubt, and the classification of prior offenses as sentencing factor rather than elements of the crime violated equal protection.

The Court of Appeals ruled his right to allocution was not violated and affirmed his sentence.

E. ARGUMENT

1. The Court of Appeals erroneously ruled Mr. Ellison's right to allocution was not violated, when the sentencing court cut off Mr. Ellison's statement after several minutes, without warning or explanation, and proceeded to sentencing.

At sentencing, the court invited Mr. Ellison to make a statement prior to imposition of sentence, but after several minutes and without warning or explanation, the court cut off Mr. Ellison and imposed a sentence of life without the possibility of parole. 5/13/13 RP 13-19. A copy of the relevant portion of the transcript is attached as Appendix B.

Allocution is defined as:

> **1.** A trial judge's formal address to a convicted defendant, asking whether the defendant wishes to make a statement or to present information in mitigation of the sentence to be imposed. ... **2.** An unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence.

Black's Law Dictionary (10th ed. 2014). Allocution is the defendant's last opportunity to make a statement on his or her behalf and to plead for mercy. *In re Pers. Restraint of Lord*, 117 Wn.2d 829, 897, 822 P.2d 177 (1991).

In Washington, a defendant has the unqualified statutory right to allocution before the court pronounces sentence. *State v. Canfield*, 154

Wn.2d 698, 704, 116 P.3d 391 (2005); *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000). "The court shall ... allow arguments from ... the offender ... as to the sentence to be imposed." RCW 9.94A.500(1). In addition to the statutory mandate, a defendant's right to due process is violated when he or she is denied allocution prior to sentencing. *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 200, 814 P.2d 635 (1991). This Court has directed trial courts to "scrupulously follow" the statutory mandate. *Echeverria*, 141 Wn.2d at 336-37.

The Court of Appeals ruled Mr. Ellison's right to allocution was not violated because he was allowed to make "lengthy remarks" and he used allocution for "improper purposes." Opinion at 5. Neither of these reasons supports the restriction on Mr. Ellison's right to allocution.

First, RCW 9.94A.500(1) does not authorize any limitations on the exercise of the right to allocution. Mr. Ellison's statement covers only four pages of the transcript.[2] The court's characterization of his remarks as "lengthy" is completely subjective and without comparison to other allocutions, much less to the allocutions of defendants similarly facing a life sentence. As Mr. Ellison stated, "I beg of your indulgence, sir, please to let me finish because I'm a condemned man, Your Honor. This is the last time you're going to hear from me." 5/13/13 RP 15.

[2] There are no minutes of the sentencing hearing, which might otherwise indicate the actual duration of his statement.

Second, the court never directed Mr. Ellison to confine his statements to a plea for mercy, and when Mr. Ellison strayed from his plea for mercy, the court did not re-direct him or otherwise promote the proper and meaningful exercise of his right. Rather, the court abruptly and without explanation, cut off his statement, thanked the victim's grandmother for appearing, and proceeded to sentencing. 5/13/13 RP 15-19. At that time, Mr. Ellison protested:

> THE DEFENDANT: I don't get to speak anymore?
> THE COURT: No.
> THE DEFENDANT: I don't get to say anything?
> [DEFENSE COUNSEL]: Apparently not.
> THE DEFENDANT: Wow. I don't get to say nothing?

5/13/13 RP 19.

The Court of Appeals erroneously stated its conclusion in the present case was consistent with *United States v. Muniz*, 1 F.3d 1018, 1024-25 (10th Cir. 1993), and asserted the trial court in *Muniz* "cut[] the defendant off after he began rearguing the case and complaining that his trial rights had been violated." Opinion at 5 n.4. This is incorrect. In *Muniz*, the trial court interrupted the defendant's statement two times, each time admonishing the defendant to not argue the facts his case. After its admonishments, the court twice asked the defendant whether he had additional statements, and it did not impose sentence until the defendant concluded his remarks. *Id.* By contrast, here, the trial court never

admonished or directed Mr. Ellison to confine his remarks to a plea for mercy and never inquired whether Mr. Ellison had additional remarks after it interrupted him. The Court of Appeals' reliance of *Muniz* is misplaced.

The violation of Mr. Ellison's right to full and meaningful allocution is a matter of first impression, raises a significant question of law under the due process clause of the Fourteenth Amendment, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(3), and (4), this Court should grant review.

2. The Court of Appeals erroneously ruled that a determination of whether a prior conviction constitutes a "most serious offense" is a question of law that need not be determined by the trier of fact beyond a reasonable doubt.

The Due Process Clause of the Fourteenth Amendment guarantees a defendant the right to proof beyond a reasonable doubt of every fact essential to punishment. *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490-92, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Based on Mr. Ellison's offender score of 9+, he faced a standard range sentence of 210-280 months for the conviction of rape in the second degree and a standard range sentence of 87-116 months for the conviction of child molestation in

the second degree. CP 433. Nonetheless, the court sentenced Mr. Ellison to a term of life without the possibility of parole based on its finding that he had two prior convictions that constituted "most serious offenses." The court's oral and written findings of fact and conclusions of law do not indicate the quantum of proof relied upon by the court for its sentence. See CP 88-92; 5/31/13 RP 16-19. Absent a finding the prior convictions constituted "most serious offenses" beyond a reasonable doubt, the life sentence was imposed in violation of Mr. Ellison's constitutional right to due process.

The Court of Appeals ruled this issue has already been decided, citing *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001), and *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888 (2014). Opinion at 7-8. This is incorrect. In *Almendarez-Torres*, the Court considered whether the fact of a prior conviction that increased the penalty was a statutory element that needed to be included in the charging document or whether it was a sentencing factor. 523 U.S. at 226, 247-48. In both *Wheeler* and *Witherspoon*, this Court considered whether the State needed to plead and prove the fact of prior convictions beyond a reasonable doubt. 145 Wn.2d at 117; 180 Wn.2d at 891-94. None of the

cases addressed whether the State must also prove the fact that the prior convictions constitute "most serious offenses" beyond a reasonable doubt.

The failure to find Mr. Ellison's prior convictions constituted "most serious offenses" beyond a reasonable doubt is in conflict with decisions of the United States Supreme Court, raises a significant question of law under the due process clause of the Fourteenth Amendment, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should grant review.

3. This Court should rule the arbitrary classification of prior convictions as "sentencing factors" in certain circumstances and the classification of prior convictions as "elements" in other circumstances violates equal protection.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated persons receive equal treatment with respect to the law. *Plyler v. Doe*, 457 U.S. 202, 212, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing a classification that implicates a fundamental liberty interest, such as physical liberty, courts apply "strict scrutiny" to determine whether the classification is necessary to serve a compelling governmental interest. *Id.* at 217; *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, any classification that unequally implicates that liberty interest is subject to

strict scrutiny. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *In re Det. Of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). Even so, this Court has applied only a "rational basis" scrutiny to equal protection challenges in the context of criminal sentencing, to determine whether the classification is rationally related to a legitimate governmental interest. *See, e.g., State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under either "strict scrutiny" or "rational basis" review, however, the classification of "most serious offenses" as a sentencing factors rather than as an element violates equal protection, because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our government has an interest in punishing repeat offenders more severely than first-time offenders. Yet, courts treat prior convictions that cause a significant increase in punishment differently simply by labeling some prior convictions "elements" and labeling other prior convictions "sentencing factors." Where prior convictions that increase the maximum sentence are classified by judicial construct as "elements" of a crime, the convictions must be proved beyond a reasonable doubt. *See, e.g., State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (communicating with a minor for immoral purposes is punished as a felony, rather than a gross misdemeanor, upon proof beyond a reasonable doubt that the defendant

had a prior conviction for a felony sex offense). But where, as here, prior convictions that increase the maximum sentence are classified by judicial construct as "sentencing factors," the convictions are proved only by a preponderance of the evidence. *See, e.g., State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (two prior convictions for a "most serious" offense need only be proved by a preponderance of evidence). Even under rational basis scrutiny, while it might be rational for the Legislature to require greater procedural protections where a person is facing life in prison without possibility of parole than a lesser sentence, it makes no sense to require greater procedural protections where the necessary facts only marginally increase punishment. Significantly, the Legislature has never labeled the prior convictions at issue in *Roswell* as "elements," nor has it labeled the prior convictions at issue here as "sentencing factors." Instead, the labels are the result of an arbitrary judicial construct, even though the government interest in each instance is exactly the same – to punish recidivists more severely. *See* RCW 9.68.090 ("penalty" for communication with a minor for immoral purposes elevated bases on prior offenses); RCW 46.61.5055 (person with four prior DUI convictions in previous ten years "shall be punished under RCW ch. 9.94A"); *State v. Thorne*, 129 Wn.2d 736, 766, 921 P.2d 514 (1996) (purpose of POAA is

to "reduce the number of serious, repeat offenders by toughening sentencing").

As the Supreme Court has explained, "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.

> [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). "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.

The Court of Appeals ruled it was bound by this Court's decisions in *Mannusier* and *Thorne*, insofar as they hold the classification of prior convictions as a "sentencing factor" is subject to rational basis review and does not violate equal protection. Opinion at 9. In accordance with the principles expressed by the United States Supreme Court, however, this Court should reconsider and their progeny, and hold that the imposition of

a sentence of life without the possibility of parole based on a finding of the necessary facts by a mere preponderance of the evidence violated Mr. Ellison's constitutional right to equal protection under the laws, and remand this matter for resentencing within the standard range.

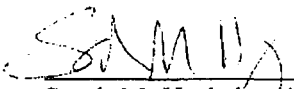
Whether the Equal Protection Clause is violated by the classification of prior convictions as a "sentencing factor" that need be proven by a preponderance of the evidence only, for purpose of the POAA, rather than as a "element" that need by proven beyond a reasonable doubt is in conflict with decisions of the United States Supreme Court regarding equal protection, raises a significant question of law under the due process clause of the Fourteenth Amendment, and involves an issue of substantial public interest that should be determined by this Court. Pursuant to RAP 13.4(b)(1), (3), and (4), this Court should grant review.

F. CONCLUSION

For the foregoing reasons, and pursuant to RAP 13.4, this Court should grant review.

DATED this 28th day of April 2015.

Respectfully submitted,



Sarah M. Hrobsky (12352)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM H. ELLISON, Appellant.	No. 44951-0-II PART PUBLISHED OPINION

BJORGEN, A.C.J. — Following a bench trial, the trial court found William H. Ellison guilty of second degree rape and second degree child molestation based on conduct against AE,[1] the minor granddaughter of Ellison's former wife. The court imposed a mandatory life sentence without the possibility of early release, based on a finding that Ellison had previously been convicted of two crimes defined in RCW 9.94A.030 as "most serious" offenses under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570. Ellison appeals, arguing that the trial court denied him the right of allocution and that increasing his punishment based on the judicial finding, not expressly made beyond a reasonable doubt, that Ellison had two prior qualifying convictions violated his rights to due process of law and to equal protection of the laws under the federal constitution.

Ellison also submits a statement of additional grounds for review (SAG) under RAP 10.10, claiming that the trial court violated his right to a speedy trial and that his attorney denied him the right to participate in his own defense, refused to present exculpatory evidence, and

[1] Consistently with our court's General Order 2011-1, we refer to minor victims by their initials to protect their privacy.

denied Ellison his right to a jury trial. Ellison further contends in his SAG that the trial judge and the prosecutor committed misconduct. We affirm Ellison's convictions and sentence.

FACTS

In January 2011, AE accused Ellison of forcing her to have sexual intercourse on one occasion and fondling her breasts on several occasions. AE alleged that the sexual abuse occurred between September 2006 and July 2008, while she lived with her grandmother and legal guardian, Joan Ellison, who was married to William Ellison at the time.[2] Based on AE's accusations, the State filed charges against Ellison in April 2011. The State subsequently notified Ellison that second degree rape qualified as a "most serious offense" under RCW 9.94A.030(37) and that, if he had previously been convicted on separate occasions of two other such offenses, he would be sentenced to a term of total confinement for life without the possibility of release under the POAA. 1 Verbatim Report of Proceedings (VRP) at 8; Clerk's Papers (CP) at 6.

Ellison remained in custody from April 2011 throughout the proceedings. On October 9, 2012, the day trial was set to begin, the prosecutor requested a continuance, informing the court that she had developed a medical problem that required surgery and rendered her unable to proceed as scheduled. Against Ellison's wishes, defense counsel did not object. The trial court found good cause and granted the continuance.

In November 2012, against his attorney's wishes, Ellison filed a pro se motion to dismiss the charges against him. Ellison based the motion on, among other grounds, violation of the

[2] The couple divorced in July 2011. For clarity, we refer to Joan Ellison by her first name. We intend no disrespect.

time-for-trial rule and his constitutional right to a speedy trial. After reviewing the scheduling orders in the case, the trial court denied the motion.

The parties completed voir dire on January 7, 2013. The next day, following an extensive colloquy, Ellison waived his right to a jury trial. The court began hearing testimony on January 9.

The State presented the testimony of Joan, AE, and David Duralde, M.D., a child abuse expert. Ellison testified on his own behalf, and the defense called no other witnesses.

The trial court found Ellison guilty of one count of second degree rape and one count of child molestation and entered written findings of fact and conclusions of law. The State presented certified copies of the judgment and sentence evidencing Ellison's history of felony convictions, as well as an affidavit from a forensic technician stating that Ellison was the same person identified in those documents.

The court concluded that Ellison was a persistent offender based on the current convictions and its findings that Ellison had two robbery convictions from 1994 and 1997. Ellison did not object to these findings, and the record does not reveal what evidentiary standard the court applied in making them.

After hearing a statement from Joan and argument from counsel, the sentencing court invited Ellison to allocute. Ellison sang a short religious song and spoke about various topics not clearly related to the sentencing proceeding. After making extensive remarks, Ellison began to protest his innocence and accuse his trial attorney of lying to the court. At that point, the court cut Ellison off, explained that the matters he related were irrelevant to the issues at hand, and pronounced the sentence. Ellison asked for permission to finish his remarks, but the court declined.

As required by RCW 9.94A.570, the sentencing court imposed a term of total confinement for life without the possibility of release. Ellison timely appeals.

ANALYSIS

Because it raises an issue of first impression in Washington, we begin by addressing in the published portion of this opinion Ellison's contention that the sentencing court denied him the right of allocution. In the unpublished portion, we turn to Ellison's constitutional challenges to the sentencing procedure and the claims raised in Ellison's SAG.

I. THE RIGHT OF ALLOCUTION

Ellison claims that the sentencing court violated his right to meaningful allocution by interrupting his remarks and refusing to allow him to finish. Ellison contends that this error requires resentencing before a different judge.[3] We hold that the sentencing court did not violate Ellison's right of allocution.

The right of allocution is guaranteed by RCW 9.94A.500(1), which states in relevant part that "[t]he court [shall] . . . allow 'arguments from . . . the offender[] . . . as to the sentence to be imposed." (Alterations in original.) Our Supreme Court has specified that "trial courts should scrupulously follow" this statutory mandate. *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000). Offenders subject to a mandatory life sentence enjoy this right even though the sentencing court has no discretion to exercise. *State v. Snow*, 110 Wn. App. 667, 669-70, 41 P.3d 1233 (2002).

[3] The State invites us to decline to consider Ellison's allocution claim, asserting that he failed to timely object. Ellison, however, repeatedly protested the court's termination of his remarks, which sufficiently apprised the trial court of the claimed error. *State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996); *see United States v. Li*, 115 F.3d 125, 132 (2d Cir. 1997) (rejecting an identical waiver argument on the ground that the defendant's protestations adequately apprised the trial court of the issue).

Here, the sentencing court invited Ellison to speak, allowing him to make lengthy remarks before interrupting and pronouncing the sentence. Thus, the issue presented involves the extent to which a court may limit the exercise of the right to allocution.

Our state Supreme Court has specified that allocution

> is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence. It is the defendant's opportunity to plead for mercy and present any information in mitigation of sentence.

State v. Canfield, 154 Wn.2d 698, 701, 116 P.3d 391 (2005). It is not, however, intended to advance or dispute facts. *State v. Lord*, 117 Wn.2d 829, 897-98, 822 P.2d 177 (1991); *see State v. Curtis*, 126 Wn. App. 459, 463, 108 P.3d 1233 (2005).

The sentencing court allowed Ellison to speak for some time, cutting him off only when he began using the opportunity to testify about the facts of the case and complain about the conduct of his trial attorney. Under *Canfield*, those were not legitimate purposes for allocution. Because the court let Ellison speak without interruption until it was clear he was using the allocution for improper purposes, we hold that the trial court did not abuse its discretion in cutting short Ellison's allocution.[4]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[4] This conclusion is consistent with *United States v. Muniz*, 1 F.3d 1018, 1024-25 (10th Cir. 1993), which held that a sentencing court did not violate the right to allocute by cutting the defendant off after he began rearguing the case and complaining that his trial rights had been violated.

II. CONSTITUTIONAL CHALLENGE TO THE PERSISTENT OFFENDER DETERMINATION

Ellison contends that the sentencing court's persistent offender determination violated his constitutional rights for two reasons. First, he argues that the use of prior convictions to impose a harsher sentence than the law would otherwise authorize violated his right to due process of law[5] because the sentencing court did not expressly find that the State had proved beyond a reasonable doubt that the convictions (1) exist and (2) qualify as most serious offenses. Ellison also argues that increasing the penalty for the charged crime on the basis of prior convictions found by a preponderance of the evidence denies defendants equal protection of the laws because in other, similar contexts the courts have made such prior convictions "elements" of a greater crime, which elements the State must prove beyond a reasonable doubt. Br. of Appellant at 8-14.

A. Due Process

Ellison's due process challenge turns on the United States Supreme Court's holding in *Apprendi v. New Jersey* that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The *Apprendi* Court based the prior-conviction exception to its general rule on *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). *Apprendi*, 530 U.S. at 488-90. Ellison argues that subsequent decisions have undermined the

[5] In his first assignment of error, Ellison challenges the sentencing court's persistent offender determination based on the due process provisions of both the Washington and federal constitutions. Ellison, however, presented no analysis under *State v. Gunwall*, 106 Wn.2d 54, 64-69, 720 P.2d 808 (1986), as to whether the state constitutional provision provides greater protection than its federal counterpart. Without that analysis or some other reason why we should interpret the state constitutional provision more broadly, we do not reach the state constitutional issue. *Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 538, 936 P.2d 1123 (1997).

validity of the relevant holding in *Almendarez-Torres*, notably *Alleyne v. United States*, --- U.S. ---, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), *on remand*, *United States v. Alleyne*, 539 Fed. Appx. 269 (4th Cir. Sept. 24, 2013). He argues also that even if the *Almendarez-Torres* exception to the *Apprendi* rule remains viable, it does not apply here because the court based Ellison's sentence not only on the fact of Ellison's prior convictions, but also on the fact that those convictions qualified as most serious offenses.

Ellison's challenge to the *Almendarez-Torres* exception founders on our state Supreme Court's opinions expressly affirming the continuing validity of that exception. *See State v. Witherspoon*, 180 Wn.2d 875, 891-94, 329 P.3d 888 (2014); *State v. McKague*, 172 Wn.2d 802, 803 n.1, 262 P.3d 1225 (2011); *State v. Wheeler*, 145 Wn.2d 116, 122-24, 34 P.3d 799 (2001). *Witherspoon* addressed *Alleyne* and held that it did not require the fact of prior offenses under the POAA to be proved beyond a reasonable doubt. *Witherspoon*, 180 Wn.2d at 891-92. Even more to the point, the *Wheeler* court rejected due process challenges to the POAA's persistent offender procedure indistinguishable from Ellison's challenges. *Wheeler*, 145 Wn.2d at 118-19, 124.

Opinions of our state Supreme Court do not bind us to the extent they conflict with applicable United States Supreme Court precedents. *See, e.g.*, *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002). The United States Supreme Court has declined to repudiate the *Almendarez-Torres* exception in light of *Apprendi*. *Alleyne*, 133 S. Ct. at 2160 n.1. Therefore, its precedents do not conflict with the holdings of our state Supreme Court that the exception remains viable. Those holdings therefore control, *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984), and compel us to reject Ellison's argument.

Ellison's attempt to distinguish *Almendarez-Torres* on the ground that his sentence rests on more than simply a finding that the prior convictions exist fails for the same reason: our

Supreme Court expressly rejected his arguments in *Wheeler*, 145 Wn.2d at 118-19, 124, and declined to reconsider its holding in *Witherspoon*, 180 Wn.2d at 891-94. *Accord McKague*, 172 Wn.2d at 803 n.1. Furthermore, because the statute explicitly defines "most serious offense," RCW 9.94A.030(32), whether a given conviction qualifies presents an issue of statutory interpretation: a question of law for the court, not a question of fact. *See State v. Ford*, 99 Wn. App. 682, 691, 995 P.2d 93 (2000). Whether the prior conviction qualifies as a "most serious offense" under RCW 9.94A.030(32) is not a question that could be submitted to the trier of fact and found beyond a reasonable doubt in the first place.

Unless our Supreme Court decides to overrule *Wheeler* and *Witherspoon*, or the United State Supreme Court expressly repudiates the *Almendarez-Torres* exception, those state decisions remain binding precedents. Ellison's due process challenge must yield to their authority.

B. Equal Protection

Ellison contends that we should apply strict scrutiny to the persistent offender determination in our equal protection analysis, because it deprives defendants of a fundamental liberty interest. Ellison further contends that the POAA's procedure for designating persistent offenders fails even rational basis review. This is so, Ellison argues, because designating prior convictions used to increase the penalty for certain crimes as "sentencing factors," requiring only a finding by preponderance of the evidence, while designating prior convictions used to increase the penalty for other crimes as "elements," requiring proof beyond a reasonable doubt, furthers no legitimate government interest. Br. of Appellant at 9-14. Stated another way, the government interest in punishing recidivists more severely is the same in both contexts, making the distinction artificial and arbitrary.

These arguments fail for the same reasons that Ellison's due process claim fails: our courts have already rejected them. Our Supreme Court held that rational basis review applies to the persistent offender determination procedure, which procedure does not offend the equal protection clause. *State v. Manussier*, 129 Wn.2d 652, 672-74, 921 P.2d 473 (1996); ; *State v. Thorne*, 129 Wn.2d 736, 770-72, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

III. SAG

In his SAG, Ellison claims that (1) his attorney denied him the right to a jury trial, (2) the judge committed misconduct, (3) the trial court violated his right to a speedy trial, (4) his attorney refused to present exculpatory evidence and denied him the right to participate in his own defense, and (5) the prosecutor committed misconduct. Except for his claims that his attorney denied him his right to a jury trial and that the trial judge committed misconduct, which claims the record squarely refutes, all of the claims depend on the truth of Ellison's allegations concerning matters outside the record. On direct appeal, we do not address claims that depend on facts not in the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A. The Right to a Jury Trial

Ellison alleges that his attorney "bullied" him into choosing a bench trial. SAG at 6. The record affirmatively refutes this allegation. After voir dire, when Ellison's attorney informed the court that Ellison had decided to opt for a bench trial, the attorney made clear that Ellison did so against the advice of counsel. Although Ellison addressed the court at length about his decision, he never disputed his attorney's statement. The court specifically asked Ellison whether anyone had pressured him, and Ellison denied it:

> The Court: Has anybody done anything to force you or coerce you or otherwise try to make you give up your right to a jury trial?

> [Ellison]: Just by what I feel. Just by what I've seen. Just by – no coercing. No one's threatened me. I just – I know I won't get a fair trial. I know it. I know I will not get a fair trial. And I'm hoping I can get one from you. But even from your standpoint, you look like you don't even want to do it. So now you might as well just convict me.

3 VRP at 45.

The record establishes that Ellison waived his jury trial rights knowingly, voluntarily, and intelligently and, contrary to the allegation in his SAG, against the advice of counsel. Ellison's claim fails.

B. Judicial Misconduct

Ellison bases his judicial misconduct claim on the allegation that the trial judge cut short Ellison's impeachment of Joan, then reminded Joan that she was under oath. The record shows that Ellison tried extensively to impeach Joan, using allegedly untruthful answers she had given on forms submitted to the state Department of Social and Health Services, and stopped cross-examining her about it after a sidebar discussion. Although the court made a record of the sidebar, the transcript shows no reminder from the court that Joan was still under oath. Ellison did not object to the trial court's termination of his attempt to impeach Joan.

ER 608(b) specifies that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." The rule, however, gives trial courts discretion whether to allow a party to cross-examine a witness about instances of conduct probative of truthfulness. ER 608(b). The trial court allowed Ellison to cross-examine Joan about her answers on the forms. Thus, to the extent that the record shows that the matters Ellison alleges occurred, nothing suggests that the trial court did anything improper. For these reasons, Ellison's judicial misconduct claim fails.

C. The Right to a Speedy Trial

The record shows that Ellison spent well over a year in custody before commencement of his trial, asserted his right to a speedy trial on at least two occasions, and was clearly not responsible for at least the final delay. Such matters bear on whether a constitutional speedy trial violation has occurred. *State v. Ollivier*, 178 Wn.2d 813, 827, 312 P.3d 1 (2013), *cert. denied*, 135 S. Ct. 72 (2014) (holding that whether a constitutional speedy trial violation has occurred depends on the length of the delay, the reasons for the delay, the defendant's assertion of his speedy trial right, and prejudice to the defendant).

Proper analysis of the claim, however, requires consideration of the reasons for each delay. *Ollivier*, 178 Wn.2d at 831-32 (citing *State v. Iniguez*, 167 Wn.2d 273, 294, 217 P.3d 768 (2009) (citing *Barker v. Wingo*, 407 U.S. 514, 531, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972))). The record does not reveal how many continuances the trial court granted. Except for the continuance to accommodate the deputy prosecutor's medical issue, the record does not disclose the reasons the court granted any continuances or whether Ellison objected in each instance. Because the record is inadequate for review of Ellison's speedy trial challenge, we decline to address the issue. *McFarland*, 127 Wn.2d at 335; *see also Stuart v. Consol. Foods Corp.*, 6 Wn. App. 841, 846, 496 P.2d 527 (1972) ("In order to evaluate a trial court's decision, the basis for the decision must be known.").

D. Ellison's Remaining SAG Claims

The remainder of the claims raised in Ellison's SAG also depend on matters outside the record. The prosecutorial misconduct claim rests on two allegations: (1) that the prosecutor removed Aaron Wilson, AE's boyfriend, from the State's witness list after discovering that his version of AE's disclosure differed from AE's, and (2) that the prosecutor coached Joan outside

the courtroom to change her testimony about Ellison's underwear. Because neither Wilson's description of AE's disclosure nor the witness lists appear in the record, we cannot evaluate the first allegation on its merits. Although the record does show that Joan gave slightly different testimony about the underwear at two different points in the trial, nothing in the record suggests that she gave the second description based on coaching by the prosecutor. Thus, the second allegation also depends on matters outside the record. We therefore decline to address Ellison's prosecutorial misconduct claim.

Ellison bases his misconduct claims against his attorney on allegations that the attorney (1) pressured Ellison into agreeing to continue the trial by threatening to quit, (2) failed to explain what rights Ellison would waive by agreeing to a continuance, (3) refused to have DNA (deoxyribonucleic acid) testing performed on the mattress where the rape allegedly occurred, and (4) failed to procure the testimony of Wilson. All of these claims depend on matters outside the record.

Nothing in the record supports Ellison's claim that his attorney failed to inform him of the consequences of agreeing to a continuance. The only aspect of the record suggesting that Ellison's attorney threatened to quit or otherwise pressured Ellison to agree to any continuance is Ellison's allegation to that effect in a letter he sent to the trial judge pro se. Given the "strong presumption [that] counsel's representation was effective," *McFarland*, 127 Wn.2d at 335, Ellison's bare allegation in the trial court does not suffice to merit review of this claim.

Similarly, nothing in the record supports Ellison's claim that his attorney refused to have AE's mattress tested. Further, neither Wilson's description of AE's disclosure of the abuse allegations, nor any evidence of defense counsel's efforts to secure Wilson's testimony appear in

the record. We decline to address these claims on this record before us. *McFarland*, 127 Wn.2d at 335.

We affirm the trial court in all respects.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Worswick, J.
WORSWICK, J.

Melnick, J.
MELNICK, J.

APPENDIX B

THE COURT: Thank you. Mr. Ellison.

THE DEFENDANT: Will you let me speak, Your Honor?

THE COURT: Yes.

THE DEFENDANT: May I stand?

THE COURT: Yes.

THE DEFENDANT: I want to sing a song. Open my eyes, Lord. I want to see Jesus. I want to reach out and touch him. Let him know that I love him, and open my heart, Lord, and help me to feel him. Open my eyes, Lord. I want to see Jesus.

You know, Your Honor, please don't consider it strange that I would sing a song, a worship song here, because, in essence, what we're asking for is the right thing to be done. That's what we're asking. We're asking that I be sentenced to life in prison, and for what you've heard, Your Honor, trust me. I would give me life too. I would have no problems giving me life with what you've heard about me, Your Honor.

Your Honor, the bible says that if you build your house on the sand, that the waves of time will come and wash it away and it won't stand. But if you build it on the rock, that house will stand. It will last. You, sir, are the second best-rated judge in Pierce County. I read the article on you, sir. The article

said that you are not a judge that's beyond reversing your own verdicts or admitting you're wrong. That's what this article said, that even Ms. Ahrens, the attorneys, they all say these things about you, that you are a fair man, that you are full of integrity, that you have character.

Your Honor, Ms. Ahrens wants you to build a house. She does. She's put you on an island and she wants to you build this house, but she doesn't want to give you concrete for a foundation. As a matter of fact, she doesn't want to give you the hammer. She doesn't want to give you the hammer to hammer. You're using a coconut just to build this house because that's what you want to do; that what you have to do. With the supplies you have, this is what you have to do. You have to build this house.

Mr. Thornton and Mr. Chin come along. They give you food, but there's no food in the bag, and they expect you to build this house. Now you're the second best-rated -- like a carpenter in Hawaii, and you're going to build this house, regardless of what they leave you or what they leave you. You're going build this house. But, Your Honor, it doesn't have a foundation. It doesn't have walls, but you're going to build. Your Honor, I want a chance because I been here

for two years. I'm a condemned man, Your Honor. You've read the PSI report, sir. You have read where I've said that the guards will put a bullet in the back of my head because I don't want to live anymore. I don't want to live. I do not want to live anymore. And I'm not saying that from a position of begging for mercy. I'm not saying that. What I'm saying, Your Honor, is that I'm a condemned man. I have condemned my -- I wished the sentence carried the death penalty. I really do. Because as Flip Wilson would say: Throw him under the jail. Throw him under the jail, because from what you've heard, Your Honor, I would have found me guilty to. You found me guilty with lustful dispcsition and a preponderance of the evidence. The lustful disposition, I've had a hard time with. I couldn't put my mind around that, but I guess it's found in close proximity of someone, I must have lust, so therefore I must want to do things with them.

I beg of your indulgence, sir, please to let me finish, because I'm a condemned man, Your Honor. This is the last time you're going to hear from me.

Your Honor, back in the 1800s, they had this law that if a man, a black man had done something to a white woman or if it was assumed they did something,

they could lynch this man and they could -- excuse my expression, castrate him, because they were in close proximity of this person.

Now, Your Honor, I don't want to bore you with my protestations of innocence. I really, really don't, because you already found me guilty, sir. You've already found me guilty, but, Your Honor, as I said with Ms. Ahrens and Mr. Thornton, what I'm telling you, sir, is you don't have the whole picture. You have -- they have given you different things. She's given Amy and Joannie the stuff to build their houses, but not you. You are making a decision, sir, on the things that they don't want you to know. They are making you just say, well, build the house with the coconut. I want to give you tools. I want to be able to understand the second best-rated judge in Pierce County. I want to be able to say, okay, this man heard my side of the story.

Your Honor, you have not heard me. You have heard what Mr. Thornton has wanted me to say. You have heard what everyone has wanted me to say. And I told you in the PSI report, sir, that they were lying. That my attorney lied to you.

THE COURT: Well, let me interrupt because -- because there are a couple of things I think

we should be clear about. One is that, you know, I'm glad Ms. Ellison came today, because she is a victim as a family member of a victim has a right to be here and to address the court. I'm bound by what I heard at trial --

THE DEFENDANT: Okay.

THE COURT: -- in terms of making a decision, and the decision has already been made about guilt, and I believe -- well, Mr. Quillian has indicated that you're going to appeal anyway. I think it was a fair trial. I think we struggled real hard to make sure it was a fair trial, and it's always difficult, but that's what we try to do. So I'm not worried about what Ms. Ellison said today. I'm not worried about what Amy said, or A.E. said in the PSI report. I'm just concerned about what happened at trial.

THE DEFENDANT: Okay. Oh, I'm sorry.

THE COURT: Hold on a second.

The second thing I need to tell you is that at this point under the Persisten Offender Act, under the Sentencing Reform Act as a Persistent Offender, I don't have -- that's what this is all about. I don't have -- there is no option here. There is no range. There is no high/low. There is no -- there is none of that.

The only issue is whether, in fact, in 1994 you committed Robbery in the Second Degree, and if Robbery in the Second Degree at the time that you committed these crimes was considered a most serious offense, and it was. And whether, in 1997, you committed and were convicted of Robbery in the First Degree, and whether that was a most serious offense, and you did, and we have fingerprints and certified copies of the Judgment and Sentence to show that, yes, in fact, it was William Ellison that committed those crimes, and it was the same fingerprints, and we've got a fingerprint analysis by the sheriff's office.

The other issues were whether you were over 18 at the time when any of those most serious offenses occurred, and they've given me your birth date, and, yes, you were over 18.

The statute requires that those two prior serious offenses not occur at the same time or be the same course of conduct, and they weren't. One was in '94, one was in '97. We also consider whether anything washes out, whether there's any 10-year period where you're like crime-free and so then the offense that came before no longer would count against you, but nothing in this case washes out, and we've analyzed, and I've analyzed very closely the prior offenses and

neither of them wash.

So at this time based on my review of the certified copies of the Judgment and Sentence -- have a seat a second. Based on my review of the certified copies of the Judgments and Sentences and the criminal history, I'm going to enter a finding at this time -- two findings: One is that the record shows that you are a persistent offender, that this was your third strike, and therefore you're now sentenced to life in prison without the possibility of release or parole, and that's the mandatory sentence. Thank you very much.

THE DEFENDANT: I don't get to speak anymore?

THE COURT: No.

THE DEFENDANT: I don't get to say anything?

MR. QUILLIAN: Apparently not.

THE DEFENDANT: Wow. I don't get to say nothing?

THE COURT: Do you have proposed Findings of Fact?

MS. AHRENS: I do, Your Honor. I provided a copy of them to Mr. Quillian. Here's the original for him to sign.

THE COURT: Was there anybody here to speak

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44951-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Thomas Roberts, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 28, 2015

WASHINGTON APPELLATE PROJECT

April 28, 2015 - 3:45 PM

Transmittal Letter

Document Uploaded: 2-449510-Petition for Review.pdf

Case Name: STATE V. WILLIAM ELLISON
Court of Appeals Case Number: 44951-0

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us