SUPREME COURT NO. 98883-8
COURT OF APPEALS NO. 76672-4-I
(FORMER SUPREME COURT NO. 97605-8)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

NICHOLAS WINDSOR ANDERSON,

Respondent.

PETITION FOR REVIEW

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A. INTRODUCTION

The United States Supreme Court and this Court have repeatedly held that the Sixth Amendment does not require a jury finding as to facts relating to a prior conviction. This case involves such a recidivist fact. A two-year sentence enhancement applies to an offender convicted of vehicular homicide who before was previously convicted of driving under the influence (DUI) and reckless driving, if those convictions constitute "prior offenses" under RCW 46.61.5055. RCW 9.94A.520. The legislature did not make this enhancement an element of the crime of vehicular homicide and Anderson agreed at sentencing that this was a decision for the judge. The Court of Appeals held, however, that the Sixth Amendment requires a jury, not a judge, to decide whether a prior conviction is a "prior offense" under RCW 46.61.5055. The court remanded for a jury trial on that question.

This decision conflicts with Supreme Court decisions and with this Court's decisions under the Sixth Amendment. Whether a prior conviction constitutes a "prior offense" is a recidivist fact that need not be tried to a jury. The implications of the Court of Appeals decision is not limited to DUI cases. It also calls into question the process for imposing similar enhancements. Review is warranted to resolve this conflict, and

because the issue is of substantial public import that should be decided by this Court.

B. ISSUE PRESENTED FOR REVIEW

Whether a "prior offense" under RCW 46.61.5055 – a reckless driving conviction that was originally charged as driving under the influence (DUI) – is a "recidivist fact" such that it can be decided by a judge rather than a jury.

C. FACTS

On October 25, 2014, at 1:55 a.m., Auburn Police Department officers arrived on the scene of a devastating multi-victim car crash on Auburn Way South. 1RP 1450, 1452, 1456. An "obliterated" car sat in shrubbery off the roadway with a debris trail that included an uprooted tree and a utility box. 1RP 1462-63. The car was split open like a book, the "binding" being a little metal behind the driver's seat. 1RP 1402. The side panels had been pulled off and there was aerosolized blood – indicating high-speed impact – all over the car. 1RP 1473-74. Four deceased victims lay in and around the car: Caleb Graham, Rehlein Stone, Andy Tedford, and Suzanne McCay. 1RP 1473. Limbs of the deceased had been detached in the ferocity of the crash. James Vaccaro survived

but had permanent brain damage. 2RP 1044-82. Nicholas Anderson also survived with serious but non-fatal injuries. 2RP 408-17. It was clear that this had been a high-speed collision. 1RP 1474. The speed limit on Auburn Road South was 35 miles per hour, but it was estimated that the car was likely traveling close to 100 miles per hour. 1RP 1474, 1484.

Further investigation, including DNA evidence from saliva deposited on the driver's air bag, and admissions from Nicholas Anderson, proved that Anderson had been the driver of the car. 2RP 774, 778, 1219-23 (DNA); 1RP 1479, 2RP 239 (admissions). The ethanol level in Anderson's blood was .19 grams per 100 milliliters of blood. 2RP 425. He also had a THC level of 2.0 nanograms per milliliter in his blood and carboxy THC of 17 nanograms per milliliter in his blood. 2RP 425. This level of marijuana was consistent with inhalation within the previous 3-5 hours. 2RP 426. State toxicologist Asa Louis testified that the alcohol and marijuana would affect Anderson's ability to safely operate the car and to perceive space and time properly. 2RP 425.

Anderson was convicted at trial of four counts of vehicular homicide (under the impairment prong), a count of vehicular assault (under the impairment prong), and a count of reckless driving. CP 139-43. The jury found a special aggravating factor applied to the vehicular assault count because James Vaccaro's injuries were "substantially exceeding the

level of bodily harm necessary to satisfy the elements of the crime." CP 144.

At sentencing, the Honorable Cheryl Carey imposed concurrent 280-month sentences on the four homicide counts. 1RP 1403-04; CP 159. The court also imposed two 24-month enhancements because, under RCW 9.94A.553, "an additional two years is added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug . . . for each *prior offense as defined in RCW 46.61.5055."* (emphasis added). Pursuant to RCW 9.94A.525(11) this criminal history is not included in the offender score, but is instead an enhancement to the standard range of vehicular homicide (under the impairment-prong). RCW 46.61.5055 defines a "prior offense" as, among other crimes, "a conviction for violation of RCW . . . 46.61.500 [reckless driving] . . . that was originally filed as a violation of RCW 46.61.500 [DUI]." Anderson had two such prior offenses. He had previously been convicted of DUI (1998) and reckless driving (amended DUI – 2005) and these crimes constituted "prior offenses" as defined under RCW 46.61.5055(14)(a).

Defense counsel conceded at sentencing determining the "prior offenses" was a decision for the court. RP 1369 ("And should the Court find by (sic) preponderance of the evidence that the State's proven those

enhancements, then we defer to the Court as to the Court imposes those."). He merely asked that the enhancements run concurrently, not consecutively. CP 153 (Defense Presentence Recommendation). The sentencing court, not a jury, determined that these two previous crimes constituted "prior offenses" under the statute. 1RP 1404; CP 159 (Judgment and Sentence, Sec. 4.4). Nobody ever suggested that a jury trial was required.

Anderson argued for the first time on appeal that the State was statutorily required to prove that the "prior offenses" involved drugs or alcohol. Br. of Appellant 27-30. His argument was mainly premised on the "drugs or alcohol" component of RCW 46.61.5055. Br. of Appellant at 30-44. The State responded that there was neither a statutory nor a constitutional requirement to submit the question to a jury. Br. of Respondent at 31-42.

In a published opinion, the Court of Appeals held as a constitutional matter that the State had to prove the "prior offense" to the jury. It then held that the State was statutorily required to prove the offense involved drugs or alcohol. State v. Anderson, 9 Wn. App. 2d 430, 446-47, 462-63, 447 P.3d 176 (2019). The court divided, however, on what precise factual question must be decided by the jury. Judge Leach would have ruled that the jury need simply decide that the conviction

existed and had originally been charged as a DUI. Anderson, at 447. Two judges, however, held that the jury had to decide whether the original charge was alcohol-related. Anderson, at 462-63.

The State petitioned this Court for review on both the constitutional question and the statutory question. The State argued that there was no constitutional imperative to submit any question about the prior offense to a jury. Petition for Review at 7-9. The State also argued, however, that the relevant statutory question (for the judge) was simply whether the prior offense had originally been charged as a DUI. Petition for Review at 9-14. State v. Wu was pending before this Court at that time, and it appeared to raise the same *statutory* issue, so the State recommended staying consideration of Anderson until after Wu was decided.

> This Court might resolve that issue in the pending review of Wu. However, because Wu involved a felony DUI, and thus one of the elements the State is required to prove is four prior offenses, this Court could decide that in felony DUI cases a "prior offense" must be proved to a jury without answering the question of whether for purposes of a sentencing enhancement, as in the case below, a "prior offense" must be proved to a jury. If that issue is not resolved by Wu, this case would serve as a vehicle to decide the issue.

Petition for Review at 8-9 and 14-15 (warning that Wu might clarify the scope of review but would not resolve the underlying constitutional issue in this case).

After this Court issued its decision in State v. Wu, 194 Wn.2d 880, 453 P.3d 975 (2019), it granted the State's petition for review in Anderson and remanded the case to the Court of Appeals for reconsideration in light of Wu. Anderson, 195 Wn.2d 1001 (2020). Wu held that a jury must decide only whether there existed prior convictions that had originally been charged as DUI; the jury need not decide that the offenses were alcohol-related. Wu, 194 Wn.2d at 891-93.

The Court of Appeals never called for additional briefing after the remand. Instead, it simply issued a new but unpublished decision. State v. Anderson, No. 76672-4-I, slip op., 2020 WL 3047426 (Court of Appeals, filed June 8, 2020) (Appendix A). The new opinion did not address the State's arguments – contained in its original briefing and in the petition for review that had been granted – that there was no constitutional reason to hold a jury trial as to the existence or nature of his prior criminal history when it was an enhancement rather than a legislatively designated element of the offense. The court simply noted in passing that the case must be remanded so a *jury* could find beyond a reasonable doubt that Anderson had a 2005 reckless driving conviction that was originally charged as a DUI. Anderson, slip op. at 3. The Court of Appeals did reverse its original holding as the relevant statutory question. Based on Wu, it held that the State had to prove Anderson's prior 2005 reckless

driving conviction was originally charged as a DUI, not that the crime involved alcohol or drugs. Id. at 3.

The State asked the court to reconsider, pointing out that the fact of a "prior offense" was a recidivist fact that need not be pled and proved to a jury, unless the legislature had made that question an element of the crime. Motion to Reconsider at 4-7. Anderson answered that a "prior offense" was not a recidivist fact because it includes a finding that the conviction was originally charged as a DUI. Answer at 2-10. The Court of Appeals denied reconsideration without comment. Appendix B (Order Denying Motion for Reconsideration).

D. REASONS TO GRANT REVEW

A petition for review will be accepted by this Court "(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or … (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(1), (3), (4). Because the lower court's opinion conflicts with decisions of this Court and the Supreme Court, and because these are

issues of substantial public interest, review is appropriate under RAP 13.4(b)(1), (3), and (4).

1. WHETHER A PRIOR CONVICTION IS A "PRIOR OFFENSE" IS A RECIDIVIST FACT THAT MAY BE DETERMINED BY THE COURT AT SENTENCING.

The Court of Appeals decision in this case narrowly interpreted the recidivist facts exception to the jury trial right and based its decision on inapposite cases. Review is warranted to correct the conflicts created by this decision.

a. The Recidivist Facts Exception To The Jury Trial Requirement Permits Judges Rather Than Juries To Decide Facts Surrounding Prior Convictions That Authorize Increased Punishment.

It is beyond dispute that aggravating facts that relate to the crime of conviction and that will increase punishment must be pled and proved to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). However, there is a well-established exception to that rule: facts relating to a prior conviction which increases punishment are "recidivist facts" that may be decided by a judge. Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (recognizing a long tradition of treating

recidivism as going to the punishment only). Even recidivist facts must, however, be pled and proved to a jury if the legislature chooses to make such facts an element of a crime. State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008).

More than 14 years ago this Court squarely embraced these principles and held that recidivist facts – including the fact whether a person was on community custody when he committed the instant crime – can be decided by the court at sentencing, without a jury.

> [T]he United States Constitution does not require a jury to examine the record associated with a prior criminal conviction to determine the defendant's community placement status. In our view, the nature of the inquiry that must be conducted for the community placement determination—an examination strictly limited to a review and interpretation of documents (such as the prior judgment and sentence) that are part of the judicial record created by a prior conviction—is an issue of law that is properly entrusted to the sentencing court and falls within the prior conviction exception.

State v. Jones, 159 Wn.2d 231, 239, 149 P.3d 636 (2006), cert. denied, 549 U.S. 1354 (2007). This conclusion flowed from a careful analysis of multiple Supreme Court decisions on the nature and scope of the recidivist facts exception. See Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (facts of the crime justifying an exceptional sentence must be pled and proved to a jury); United States v. Booker, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (federal sentencing guidelines must be deemed permissive rather than

mandatory to be constitutional under Blakely); Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (a sentencing court cannot look to police reports in making "generic burglary" decision under Armed Career Criminal Act). This Court also noted multiple decisions from state courts of last resort that were in accord and that certiorari was denied in several of those cases. Jones, at 242-44.

The defense in Jones argued that a jury was required because there were too many variables as to when a person starts or completes community placement. Jones, at 244-46. The Court rejected the argument. Id.

This Court also rejected the argument that a recidivist fact must be limited to nothing more than the fact of conviction. Jones, 159 Wn.2d at 238. It held that a sentencing court could determine facts surrounding the prior conviction and could rely on court documents to do so.

> … sentencing courts may consider documents beyond the prior judgment and sentence to support prior-offense-based sentencing determinations. Specifically, the Court [in Shepard] held that the sentencing court may make the relevant prior conviction determination by looking to the jury instructions, the charging documents, the plea agreement, the transcript of plea colloquy, any explicit factual finding by the trial judge to which the defendant assented, and any "comparable judicial record." … It did say that police reports and complaint applications run afoul of Apprendi because disputed facts in those types of reports are "too much like the findings subject to ... Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute." …

Jones, 159 Wn.2d at 246 (internal citations omitted). This Court held that police reports and complaint applications contain facts about the nature of the underlying crime. A bare charging document which names the crime originally charged, however, does not require any assessment of facts. It is purely a matter of reading the relevant court record.

This Court also rejected arguments that the recidivist exception had been silently overruled.

> We are not convinced that the Supreme Court is inclined to disavow its decision in that case given that it has been presented with several opportunities to do so, including the recent decisions in Booker and Shepard. Accord statement of Justice John Paul Stevens respecting the denial of the petitions for writ of certiorari in Banegas-Hernandez v. United States, —— U.S. ——, 126 S. Ct. 2951, 165 L.Ed.2d 974 (2006) and Rangel-Reyes v. United States, —— U.S. ——, 126 S. Ct. 2873, 165 L.Ed.2d 910 (2006) (There is no special justification for overruling Almendarez-Torres and countless judges in countless cases have relied on that case in making sentencing determinations.). Even if we were inclined to agree with the dissent's unstated assertion that it is only a matter of time before that case is overruled, we are certainly not free to overrule or ignore established Supreme Court precedent. See State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L.Ed.2d 199 (1997) ("it is [the Supreme] Court's prerogative alone to overrule one of its precedents"). Almendarez-Torres remains the law of the land, and a number of jurisdictions have construed that case to allow for the result we have reached herein.

Jones, 159 Wn.2d at 239 n.7.

A year after Jones, this Court again upheld the recidivist facts exception in the face of a challenge to the Persistent Offender Act.

> This court has repeatedly rejected similar arguments and held that Apprendi and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt. See, e.g., Lavery, 154 Wn.2d at 256-57, 111 P.3d 837; State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909, 124 S. Ct. 1616, 158 L.Ed.2d 256 (2004); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 122 S. Ct. 1559, 152 L.Ed.2d 482 (2002); see also Ortega, 120 Wn. App. 165, 84 P.3d 935; accord Almendarez-Torres v. United States, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998) (holding that the State need not prove the fact of a prior conviction to a jury).

State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). Thus, it is clear that the recidivist facts exception is well-established in Washington law and that the exception is not limited to the mere existence of a prior conviction.

b. The Court Of Appeals Misapprehended The Recidivist Facts Exception And Relied On Inapposite And Reversed Cases.

The Court of Appeals in this case seems to have originally concluded that a jury trial on recidivist facts was required based on a narrow interpretation of Almendarez-Torres and Blakely, and based also on the case of State v. Mullen, 186 Wn. App. 321, 324, 345 P.3d 26 (2015) and a dissenting opinion in State v. Wu, 6 Wn. App. 2d 679, 431 P.3d 1070 (2018), review granted, 193 Wn.2d 1002 (2019). Anderson, 9 Wn. App. 2d at 443-47. It did not alter those conclusions in its short

opinion following this court's order to reconsider the case in light of State v. Wu, 194 Wn.2d 880, 453 P.3d 975 (2019). Anderson, slip op. at 2-3. It did not alter its holding based on the State's motion to reconsider. Appendix B.

The conceptional underpinnings of the Anderson court's rationale are no longer valid. The analysis from Mullen was overruled in this Court's Wu decision, and the dissenting opinion from the Court of Appeals decision in Wu was disavowed, too. Wu, at 885-88. The lower court's failure to apply precedent in its second opinion in this case warrants review.

Moreover, the Court of Appeals failed to consider this Court's interpretation of the Almendarez-Torres exception in light of Jones. The Jones court expressly rejected a narrow reading of the recidivist facts exception. Jones, at 243 (rejecting "Jones's and Thomas's narrow reading of the prior conviction exception"). The Court of Appeals' narrow construction of that exception as applied here conflicts with the broader interpretation provided in Jones.

Additionally, it appears that the Court of Appeals failed to recognize that Wu was different from this case in a critical way. The crime at issue in Wu was felony DUI, where the legislature has decided – even though it was not constitutionally compelled to do so – that prior convictions should be elements of the crime and elevate that crime to a felony. Wu, 194 Wn.2d at 890-91 (discussing what the state is required to prove under RCW 46.61.5055). Not so here, where the prior conviction functions simply as a sentencing enhancement and the legislature has removed it from the offender score. Thus, the prior conviction in this context is a pure recidivist fact, not an element of the crime, so it need not be proved to a jury.

For all these reasons, the decision of the Court of Appeals conflicts with binding precedent making review appropriate.

2. WHETHER A "PRIOR OFFENSE" IS A RECIDIVIST FACT THAT CAN BE DETERMINED BY THE COURT IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORT.

Numerous felony traffic offenses currently authorize enhanced penalties following a judicial finding based on a prior conviction. A vehicular homicide offense (under the impairment prong) may be enhanced, as in this case, based on a finding of "prior offenses." RCW 46.61.520 ("Vehicular homicide is a class A felony punishable under

chapter 9A.20 RCW, except that, for a conviction under subsection (1)(a) of this section, *an additional two years shall be added to the sentence for each prior offense as defined in RCW 46.61.5055*).

The finding determines whether certain impairment-related convictions count in the offender score. RCW 9.94A.525(2)(e). Also, a person convicted of reckless or negligent driving (amended from an alcohol-DUI) must use an interlock device and the length of time required is determined on whether or not the person has "prior offenses." RCW 46.61.500(3)(a) (reckless driving); RCW 46.61.5249(4) (negligent driving). The judicial determination of "prior offenses" also determines the mandatory minimum sentence for all driving under the influence and physical control under the influence convictions. RCW 46.61.5055. Finally, a person charged with an alcohol-related driving offense is required to install an ignition interlock device as a condition of release if that person has any "prior offenses." RCW 10.21.055.

Thus, whether a jury must find "prior offenses" has broad implications for sentencing in impaired driving and boating laws.

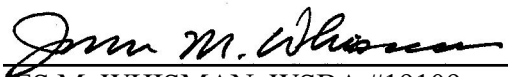
E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to grant review of the Court of Appeals decision in order to resolve conflicts with precedents in an area of substantial public import.

DATED this 11th day of August, 2020.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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APPENDIX A

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CASE #: 76672-4-I
State of Washington, Respondent v. Nicholas Windsor Anderson, Appellant

King County, Cause No. 14-1-06506-6 KNT

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We remand for further proceedings consistent with this opinion."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: The Honorable Cheryl Carey
Nicholas Anderson

FILED
6/8/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS WINDSOR ANDERSON, Appellant.	No. 76672-4-I (Consolidated with No. 78070-1-I) DIVISION ONE UNPUBLISHED OPINION

LEACH, J. - The Washington Supreme Court granted the State's petition for review in this case and remanded it to this court[1] to reconsider our previous opinion[2] in light of the court's opinion in State v. Wu.[3] We reconsider our opinion and now hold that the State must prove to a jury that Anderson's prior reckless driving conviction was originally charged as driving under the influence but does not have to prove that drugs or alcohol were involved in that case. We remand for further proceedings consistent with this opinion.

HISTORY

Anderson appealed his convictions for four counts of vehicular homicide, one count of vehicular assault, and one count of reckless driving. Pertinent to

[1] State v. Anderson, 195 Wn.2d 1001, 458 P.3d 786 (2020).
[2] State v. Anderson, 9 Wn.App.2d 430, 447 P.3d 176 (2019).
[3] State v. Wu, 194 Wn.2d 880, 453 P.3d 975 (2019).

this opinion, he challenged two 24-month sentence enhancements the trial court imposed to run consecutively to each of the vehicular homicide convictions and to each other, 192 months total, because Anderson had two prior convictions for driving under the influence (DUI) and reckless driving. This challenge raised two issues.

First, Anderson challenged the trial court judge's decision that his 2005 reckless driving conviction was a "prior offense" under RCW 46.61.5055. He contended that whether his reckless driving conviction qualified as a "prior offense" presented a question of fact that a jury must resolve, while the State asserted that it was a threshold question of law for the judge. We agreed with Anderson.[4]

Second, he contended the State had to prove to a jury that his reckless driving conviction involved use of intoxicating liquor or drugs to establish it as a prior offense. In a split decision, a majority of this court agreed with Anderson.[5]

The State petitioned the Supreme Court for discretionary review on these two issues. The Supreme Court accepted review and remanded the case to this court to reconsider our previous opinion in light of the court's opinion in State v. Wu.

ANALYSIS

In State v. Wu, our Supreme Court clarified the required elements for felony DUI, and whether a judge or a jury must determine whether the State has proved the required elements. Pertinent here, the court considered who decides

[4] 9 Wn.App.2d at 446-47.
[5] 9 Wn.App.2d at 462-63.

whether an earlier reckless driving conviction qualifies as a prior offense that elevates a DUI from a gross misdemeanor to a felony, and whether the State had to prove that conviction involved use of intoxicating liquor or drugs.

To qualify as a prior offense, a reckless driving conviction must result from a charge originally filed as a DUI offense.[6] The court held in Wu that a jury must decide whether an earlier reckless driving conviction satisfies this requirement.[7] We reached the same conclusion in our earlier opinion. So, we do not need to reconsider our earlier resolution of this issue.

The court in Wu considered and rejected the claim that the State must prove to the jury that the earlier reckless driving conviction involved alcohol or drugs to qualify as a prior offense. It held that the State need prove only a reckless driving conviction that resulted from a charge filed as a DUI offense. Because a majority of our court reached the opposite conclusion in our earlier opinion, we reconsider and reverse that part of our decision. On remand, the State must prove beyond a reasonable doubt only that Anderson was convicted of reckless driving on a charge originally filed as a DUI offense.

In our earlier opinion, we also held the trial court should not have imposed a DNA fee. Nothing in Wu requires us to reconsider that part of our decision.

CONCLUSION

Whether Anderson's prior reckless driving conviction qualifies as a "prior offense" for purposes of enhancing his term of imprisonment for vehicular homicide involves a question of fact that a jury must decide. We remand for the

[6] RCW 46.61.5055.
[7] 194 Wn.2d at 889.

superior court to empanel a jury to decide this question and for the court to strike the DNA fee.

Leach, J.

WE CONCUR:

Chun, J.

Andrus, A.C.J.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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July 14, 2020

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CASE #: 76672-4-I
State of Washington, Respondent v. Nicholas Windsor Anderson, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

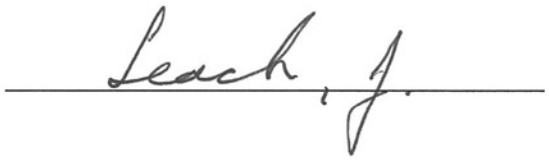
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. NICHOLAS WINDSOR ANDERSON, Appellant.	)	No. 76672-4-I (Consolidated with No. 78070-1-I) ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, State of Washington, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

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