NO. 30485-0-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BILLY DAVIS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

Billy Davis is a 65-year-old man who went with an acquaintance as the other man took money from the cash register of a convenience store one night. Davis held a BB gun during the incident.

Due to Davis's disorientation, the court sent Davis to Eastern State Hospital for a mental examination. The examining psychiatrist concluded that Davis was so impaired by physical and mental deterioration that he did not know the difference between right and wrong. Even though the prosecution had stipulated that a single evaluator could examine Davis, once the prosecution received the result of the original court-ordered examination, it demanded that the court order another evaluation. A second Eastern State psychiatrist conducted an examination and found Davis sane.

The jury found Davis guilty of robbery as the principal, not as an accomplice, despite the evidence that Davis had not taken the money inside the store. The court found Davis had qualifying convictions from the 1980s and early 1990s, and sentenced him to life without the possibility of parole.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to convict Davis of first degree robbery.

2. The jury was permitted to convict Davis of an uncharged alternative means of committing robbery, contrary to his right to notice of the charged crime.

3. The court impermissibly ordered Davis to submit to a second mental examination at the prosecution's request in violation of the governing statutes and Davis's right to due process of law.

4. The court erred by entering Finding of Fact 1 when it ordered that Davis submit to a second mental examination at the State's request. CP 49 (attached as Appendix A).

5. The court erroneously found the State requested a supplemental evaluation rather than a second complete evaluation of Davis, in Finding of Fact 3 of its order requiring Davis submit the second examination. CP 49.

6. Davis was denied his due process right to be tried for the charged crime of robbery when the prosecution introduced evidence that Davis had a predisposition to commit violent robberies.

7. The court imposed a sentence of life without the possibility of parole based on unproven and unreliable allegations, contrary to the Sixth and Fourteenth Amendments and Article I, sections 3, 21, and 22.

8. The sentence of life without the possibility of parole based on prior convictions that were not proven to a jury beyond a reasonable doubt violates Davis's right to equal protection of the law.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Robbery requires the unlawful taking of property from a person or in the person's presence. Davis did not take property while inside the store, and the jury was not asked to find Davis culpable for the conduct of another person as an accomplice. As defined by the jury instructions, was there insufficient evidence that the prosecution proved the essential elements of robbery?

2. It violates the right to notice and due process of law to ask the jury to convict a person based on a means of committing an offense that was not charged in the information. Davis was charged with the single alternative means of committing robbery by taking property in the presence of another but the jury was instructed that it could convict Davis by finding he either took property from the person or in the

presence of another. Was the jury asked to convict Davis based on an uncharged alternative means of committing robbery?

3. Due to the intrusiveness of a mental examination, the court is narrowly limited in its authority to order that a person accused of a crime submit to an examination by a state psychiatrist. The parties stipulated that Davis would have a mental examination by a single state-employed and state-designated psychiatrist. Did the court lack authority to order that Davis submit to a second examination by another state psychiatrist merely because the prosecution disagreed with the result of the court-ordered examination?

4. It is highly prejudicial for the jury to hear evidence that the accused person is predisposed to committing violent acts similar to the charged crime. Over Davis's objection and without any limitation on the use of the evidence, the prosecution elicited testimony that Davis was predisposed to commit violent thefts and robberies. Did this prejudicial propensity evidence deny Davis a fair trial?

5. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available

statutory maximum. Were Davis's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had at least two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

6. The right to due process of law is strongly protected under article I, sections 3 and 22. The court imposed a sentence of life without the possibility of parole despite the absence of evidence that Davis was the person who had the prior convictions, without finding that the class B felony convictions from 1988 and 1990 had not "washed out" of Davis's offender score, and without explaining what offenses it was relying upon. Does it violate Davis's right to due process of law to impose a sentence of life without the possibility of parole based on information that was not proved reliable and accurate?

7. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, statutes authorize greater penalties for specified offenses based on recidivism.

However, in some instances the prior convictions are treated as "elements" that must be proven to a jury beyond a reasonable doubt, and in other instances, they are treated as "sentencing factors" proven to a judge by a preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and its effect is to deny some persons the protections of a jury trial and proof beyond a reasonable doubt, does it violate equal protection?

D. STATEMENT OF THE CASE.

One evening, Moses Sanders entered a convenience store at a Conoco gas station where he went frequently and was friendly with the clerk Michael Acton. 1RP 32-34.[1] Sanders told Acton "they were going to hold [him] up" and Acton noticed another person had what looked like a gun in his jacket. 1RP 38. Acton thought Sanders was kidding until he saw the person with the gun. 1RP 39. Acton opened the cash register for Sanders. 1RP 40. Sanders slowly took bills and coins from the cash drawer, then took cigarettes. 1RP 40-42. The other man

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[1] The transcripts from pretrial and trial proceedings are referred to by date of the proceeding. The three volumes of trial transcripts are referred to as:
1RP October 20, 2011;
2RP October 21, 2011;
3RP October 24, 2011.

told Sanders to "hurry up." 1RP 41. When the men left the store, the man with the gun asked Acton to "give us five minutes." 1RP 42.

Acton did not know Billy Davis, but later identified Davis as the person with the gun. 1RP 45, 51. The gun was not a firearm, but a BB gun. 1RP 59. Acton did not know much about firearms and thought it was real. 1RP 40. Police arrested Davis in a nearby park shortly after the incident. 1RP 79. He had about $289 in his pocket and Acton testified that about $200 was taken from the store. 1RP 44, 83. Sanders was found hiding in a tree near where Davis was arrested. 1RP 79, 98. The two men were not charged or tried together. CP 65.

In the weeks after his arrest for first degree robbery, Davis seemed confused and disoriented. 1RP 125, 127. Davis's lawyer and investigator questioned whether he was mentally impaired. 1RP 125; 10/19/10RP 2. At Davis's request and without objection, the court ordered Davis transferred to Eastern State Hospital for a mental examination. 10/19/10RP 2; CP 61-62. The court's order stated that "one expert shall conduct and report on the evaluation," and requested an assessment of Davis's competency, sanity, and mental state. CP 62.

Eastern State Hospital psychiatrist Avery Nelson examined Davis and concluded that he was competent to stand trial but was

insane at the time of the incident because he did not know the difference between right and wrong. 2RP 221, 225-26. Nelson diagnosed Davis with "acute psychosis" arising from several serious medical problems. 2RP 218. He had a "damaged brain," a dangerously low white blood cell count, "personality changes due to subcortical small vessel cerebrovascular disease" and psychosis caused by drinking three or four cans of Four Loko, a beverage later banned by the Federal Drug Administration. 2RP 212-13; 3RP 68.

The prosecutor disagreed with Nelson's conclusion. 1/25/11RP 7. He asked for a court order that Davis submit to another psychiatric evaluation at Eastern State Hospital. Id. The court ordered the examination over Davis's objection. 1/25/11RP 8. Davis sought discretionary review from this Court to block the second evaluation, but a Commissioner found the issue did not meet the strict criteria for discretionary review. CP 47-48. Davis submitted to the second evaluation and Dr. William Grant, a forensic psychiatrist and colleague of Nelson's, found Davis competent and sane at the time of the incident. 3RP 13-14, 17.

Davis was convicted of first degree robbery. CP 16. Based on prior sentencing documents, the court concluded that Davis had prior

convictions that required a sentence of life without the possibility of parole. 12/13/11RP 13.

Pertinent facts are addressed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. **In the absence of evidence that Davis took another person's property, the State failed to prove Davis committed robbery.**

a. The prosecution must prove that the accused person committed all essential elements of a crime.

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence that the State must establish to garner a conviction. Winship, 397 U.S. at 364.

To determine whether there is sufficient evidence for a conviction, reasonable inferences are construed in favor of the prosecution but they may not rest on speculation. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). "[E]vidence is

insufficient to support a verdict where mere speculation, rather than reasonable inference, supports the government's case." United States v. Nevils, 598 F.3d 1158, 1167 (9th Cir. 2010).

The prosecution charged Davis with committing first degree robbery. The court instructed the jury that to convict Davis of first degree robbery, the prosecution needed to prove beyond a reasonable doubt that Davis intentionally and "unlawfully took personal property from the person or in the presence of another," by using or threatening force and displaying what appeared to be a firearm. CP 29. The court's instructions did not permit the jury to hold Davis liable based on actions of another person.

b. Robbery requires the perpetrator take property from the victim or in the victim's presence.

Robbery requires a forcible taking of property from a person against the owner's will. State v. Nam, 136 Wn.App. 698, 705, 150 P.3d 617 (2007); RCW 9A.56.190. Either the taking of property, or the use of force to retain property, must occur in the presence of the person who has the required ownership interest in the property. State v. Tvedt, 153 Wn.2d 705, 715-16, 107 P.3d 728 (2005). The unit of prosecution defining a robbery does not rest on the amount taken or the number of

items stolen. Id. at 714. It is based on the physical taking or retention of property from a person. Id. at 714-15.

Jury instructions define how the jury must consider whether the State proved all essential elements. Nam, 136 Wn.App. at 705. In Nam, the jury instructions defined robbery as taking personal property from the victim's person, omitting the alternative means of robbery based on property taken in the victim's presence. Id. at 703-05. To prove the charged crime as instructed, the prosecution needed to establish that the victim's purse was taken from her person. Id. at 705. Yet the victim was not holding or touching her purse when it was taken; it was on a seat near her. Id. Because the elements of the statute must be strictly construed, and it would render the "in the presence" means of committing robbery superfluous if property that was simply within the victim's reach proved robbery "from the person," the Nam Court concluded there was insufficient evidence that taking a purse sitting on a seat constituted robbery. Id. at 706-07.

As the court explained in Nam, the sufficiency of the evidence rests on whether the jury's verdict can be sustained under the law as set forth in the jury instructions. Id. at 706. The prosecution "assumes the burden of proving the elements as instructed or charged." Id. (citing

State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) and Tonkovich v. Dep't of Labor & Indus., 31 Wn.2d 220, 225, 195 P.2d 638 (1948)). Here, the jury was instructed that to convict Davis, it must find he actually took the property. CP 29.

The prosecution did not ask the jury to convict Davis based on another person's conduct, as was its choice. See Nam, 138 Wn.App. at 704. The court did not explain the law of accomplice liability to the jury. CP 17-38. A conviction may not be upheld based on accomplice liability where the jury is not accurately instructed on its requirements. State v. Teal, 152 Wn.2d 333, 338, 36 P.3d 974 (2004). It violates the right to trial by jury for the court to impose punishment based on accomplice liability when the jury never considered that possibility or weighed its legal requirements. See State v. Williams-Walker, 167 Wn.2d 889, 899-900, 225 P.3d 913 (2010); U.S. Const. amend. 6; Const. art. I, §§ 21, 22. The prosecution was required to prove Davis committed the acts essential to first degree robbery; it failed to do so.

c. Davis did not take any property in the presence of or from the person of another.

Michael Acton was the only eyewitness to the incident who testified. He said Davis held what looked like a gun while Sanders took money and cigarettes from the store's cash register. 1RP 38-42.

Acton did not claim that Davis took any property in his presence. 1RP 40-41. He said Sanders took the property and the two men left the store. Id. He did not see Davis possess property taken from the store. Id. While the police found money in Davis's pockets, Davis did not take that money from Acton's person or in his presence. The prosecution did not prove Davis "took" property from Acton's person or in his presence, as it was required to prove under the "to convict" instruction. CP 29.

d. The failure to prove Davis's personal culpability for each essential element of the crime requires reversal.

Davis did not take property from Acton's person or in his presence as required to convict him of robbery. CP 29. The prosecution's failure to prove Davis "unlawfully took property" from Acton personally or in Acton's presence constitutes insufficient evidence to prove robbery. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. **The court instructed the jury to convict Davis based on an uncharged alternative means of committing robbery**

a. The court must instruct the jury on the offense charged in the information.

A charging document must notify a criminal defendant of the nature of the accusation with reasonable certainty. U.S. Const. amends. 6, 14;[2] Const. art. I, § 22;[3] Cole v. Arkansas, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948); State v. Kjorsvik, 117 Wn.2d 93, 105, 812 P.2d 86 (1991); State v. Williamson, 84 Wn.App. 37, 42, 924 P.2d 960 (1996). It violates the defendant's right to notice of the charge to try a defendant under an uncharged statutory alternative. State v. Doogan, 82 Wn.App. 185, 188, 917 P.2d 155 (1996).

When the information presents one alternative means of committing a charged crime, it is error for a trial court to instruct the jury it may convict the defendant based on a different statutory means of committing the same offense. State v. Severns, 13 Wn.2d 542, 548,

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[2] The Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation." The due process clause of the 14th Amendment "provides essentially the same protection to defendants" pertaining to notice of charges. See Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992).

[3] The Washington Constitution, article I, section 22 guarantees the right of an accused person "to demand the nature and cause of the accusation against him . . . ."

125 P.2d 659 (1942); State v. Chino, 117 Wn.App. 538, 540, 72 P.2d 256, 261 (2003). A person "cannot be tried for an uncharged offense." State v. Bray, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988).

This error occurs "regardless of the strength of the trial evidence" pertaining to the charged or uncharged means presented to the jury. Chino, 117 Wn.App. at 540. Since the constitution prohibits the court from instructing the jury on an uncharged alternative means of conviction, the error may be raised for the first time on appeal even if not objected to below. Williamson, 84 Wn.App. at 42; RAP 2.5(a)(3). The error is a "manifest error affecting a constitutional right" that Davis may raise on appeal without an objection below. State v. Laramie, 141 Wn.App. 332, 342, 169 P.3d 859 (2007); Chino, 117 Wn.App. at 538.

In Chino, the defendant was charged with intimidating a witness by one means, using a threat to try to induce a witness not to report information to a criminal investigation. 117 Wn.App. at 533. The "to convict" instruction included an alternative means involving inducing a person to fail to appear in court. Id. at 539.

By letting the jury consider an uncharged means of committing the crime in the "to convict" instruction, the Chino Court found a fundamental instructional error occurred. Id. at 540. This error was

presumed prejudicial, and only could be harmless if other instructions "clearly and specifically define the charged crime" and exclude the alternative means as a basis for conviction. Id. Where no other instruction clarified the alternative means, it was "possible the jury convicted Mr. Chino on the basis of the uncharged alternative. Accordingly, the error is not harmless." Id. at 540-41.

b. The "to convict" instruction allowed the jury to convict Davis based on an uncharged means of committing the crime.

Similarly to Chino, the charging document in the case at bar listed a single means of committing robbery. The amended information read in pertinent part,

> BILLY WAYNE DAVIS, . . . did unlawfully take personal property, to wit: cash, which belonged to a person other than the accused, in the presence of Michael Acton against such person's will by use or threatened use of immediate force, violence or fear of injury to such person . . . .

CP 65.

The "to convict" instruction told the jury it must convict Davis if it found the prosecution proved beyond a reasonable doubt that Davis, "unlawfully took personal property from the person or in the presence of another . . . ." CP 29 (Instruction 9; emphasis added).

The statute defining robbery "clearly sets forth two ways to commit a taking of another's personal property." State v. O'Donnell, 142 Wn.App. 314, 323, 174 P.3d 1205 (2007). These "two alternatives [are]: taking from a victim's person or taking property in a victim's presence." Id. (quoting Nam, 136 Wn.App. at 323). In O'Donnell, as in Nam, the prosecution charged and sought a jury instruction based solely on the taking "from a person" alternative means of committing robbery.

In the instant case, the prosecution charged Davis with the single alternative of taking property "in the presence of" Acton and not from his person. CP 65. The "to convict" instruction and the instruction defining robbery included both alternative ways of committing robbery. CP 28, 29. Accordingly, the jury was asked to convict Davis based on means of committing the crime that was not charged. Chino, 117 Wn.App. at 540; Bray, 52 Wn.App. at 34.

c. The error requires reversal.

Permitting the jury to convict a person based on an uncharged alternative means is a constitutional error that is presumed prejudicial and requires reversal. Chino, 117 Wn.App. at 538. It may be harmless only in the narrow circumstance where other instructions "clearly and specifically defined the charged crime." Id. at 540.

No further instructions specifically limited the jury's verdict to only the charged crime. On the contrary, the separate instruction defining robbery echoed the "to convict" instruction and included the uncharged alternative means. CP 28 (Instruction 8). The verdict form did not ask the jury to specify the basis of its verdict. CP 16.

Based on these instructions, the verdict may have represented a finding by some jurors that Davis committed an uncharged crime. Bray, 52 Wn.App. at 34. Because reversal is required regardless of the strength of proof, Davis's conviction for robbery must be reversed. Chino, 72 P.3d at 261.

3. **The court impermissibly ordered Davis to submit to a second mental evaluation by a state psychiatrist merely because the prosecution disliked the result of the initial court-ordered evaluation by another state psychiatrist**

a. The court's authority to order an accused person submit to a psychiatric examination is limited by statute and due process.

When a person might not be competent to stand trial, or he has pleaded not guilty by reason of insanity, the court shall order an evaluation of the person's mental status. RCW 10.77.060(1)(a). The "procedures of the competency statute [chapter 10.77 RCW] are mandatory." State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201

(2009) (citing In re Pers. Restraint of Fleming, 142 Wn.2d 858, 863, 16 P.3d 610 (2001)). The "failure to observe these procedures is a violation of due process." Id.

Pursuant to the mandatory procedures for evaluating a person's competency or sanity, the court:

> shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a). The this multiple-expert appointment applies only when the parties do not stipulate to a single expert. Id.

The Legislature amended the statute in 2004 to add that the parties may agree to have a single evaluator. Laws of 2004, ch. 9, § 1. This amendment occurred because ordering multiple evaluators to examine the accused person was unduly time-consuming, burdensome, and unproductive, with backlogs in eastern Washington.[4] RCW 10.77.060(1)(a). The amended statute provides:

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[4] The bill reports from SB 5126 (2004) explain the impetus for amending the statute was that Eastern State Hospital was particularly overburdened by using multiple evaluators and the evaluations were taking too long. See Final Bill Report E2SSB 5216 & Original Bill SB 5126, available at: http://apps.leg.wa.gov/documents/billdocs/2003-04/Pdf/Bills/Senate%20Bills/5216.pdf (last viewed Oct. 18, 2012).

> Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant.

Id.[5]

b. The court lacked authority to order Davis submit to a second mental examination by another state expert.

The court's initial order for a mental health evaluation by Eastern State Hospital stated that "Unless this box is checked one expert shall conduct and report on the evaluation for purposes of this Court ordered evaluation under RCW 10.77.060(1)(a)." CP 61. The box was unchecked. Id. By leaving the box unchecked, the court was ordering a report by a single evaluator.

The prosecution conceded that its practice was to request a single evaluation and it had agreed by "stipulation" to one evaluator. CP 52; see also 10/19/10RP 2 (prosecution notes it has no objection to the court's order for a competency evaluation); CP 63 (prosecutor's signature as presenting order to court).

The agreed order requested an in-patient evaluation from Eastern State Hospital. CP 62. The single evaluator was directed to report to the court on Davis's competence to stand trial, his sanity at the

time of the offense, his capacity to form the intent necessary to commit first degree robbery, and his current dangerousness. CP 62.

When the psychiatrist from Eastern State Hospital submitted his report after conducting the court-ordered evaluation, the State disliked the result because the report found Davis lacked the ability to understand the difference between right and wrong at the time of the offense. CP 51-52; CP 54. The prosecution asked to have Davis "re-evaluated by a second expert, the same way as a defense counsel could have a second evaluation done if Eastern State Hospital had found him competent and sane." CP 52.

The prosecution did not ask for a different type of evaluation from a professional in another area of expertise. Instead, the prosecution sought a second complete psychiatric evaluation because it disagreed with the results by the first state psychiatrist.

In response to Davis's objection to the second evaluation, Judge Vandershoor entered findings of fact misconstruing the nature of the original mental examination ordered by Judge Spanner. CP 49-50. Judge Vandershoor found that Judge Spanner's order "did not specify

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[5] In 2012, the statute was amended to mandate only a single evaluator without requiring a stipulation by the parties. Laws of 2012, ch. 256, § 3.

that the parties stipulated to one evaluator" or that the State approved of a specific evaluator. CP 49 (Finding of Fact 1). Yet Judge Vandershoor's finding was wrong, because the order stated that unless the box was checked, the parties were requesting a single evaluator. CP 62. Indeed, the parties had not claimed otherwise; Davis and the prosecutor agreed that, consistent with local practice, they stipulated to a single examination by one evaluator. CP 52; 12/28/10RP 8.

Judge Vandershoor may have been misled by the introduction to Judge Spanner's order, which ambiguously requested that Davis "be evaluated by an expert(s) of the staff of Eastern State Hospital." CP 59. But this ambiguity was clarified in the body of the court order. The order provided that the evaluation "shall be completed as specified below." CP 60. Under the title "Examination Requirements," the court specified that "one expert" shall conduct the evaluation unless the court ordered additional experts by checking the box, and the court did not check the relevant box. CP 62. This portion of the court order clarified that one expert was being requested.

The prosecution admitted its request was because "we disagree with the opinion of the evaluator from Eastern on this case." 1/25/11RP 7. The prosecution wanted a "second evaluation" by another Eastern

State Hospital evaluator. Id. Judge Vandershoor also misapprehended the nature of the State's request by calling it a "supplemental" examination when, in fact, the prosecution wanted a "second evaluation" akin to the first, by a different psychiatrist. 1/25/11RP 7; CP 61-62; CP 49 (Finding of Fact 3).

The prosecution equated its need for a second evaluation with the defense's ability to seek another expert's opinion if it disagreed with the State's original evaluation. 1/25/11RP 7; CP 52. But as Davis explained, the statute does not grant the State authority to seek a second full evaluation on the ground that it does not like the results of the first evaluation conducted by a state psychiatrist.

The controlling statutory procedures do not place the prosecution and the accused in the same position in terms of ordering the defendant to submit to a mental examination. When the court orders a mental examination by a state designated expert under RCW 10.77.060(1), the defendant may retain an expert to "witness the examination authorized in subsection (1) of this section." RCW 10.77.060(2). This provision lets the defense expert observe the evaluation by the court-ordered and state-designated expert, thus

enabling the defense expert to base her report on the same information obtained from the initial examination.

Additionally, RCW 10.77.020(2) grants the accused person the right to retain his own expert to perform an examination in his behalf.[6] This statutory provision applies only to the person "subjected to an examination." Id. If the Legislature granted the prosecution the same right to additional examinations on its behalf, the statute would say so. See State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792, 795 (2003) (statutes relating to criminal law are given a "strict and literal interpretation"); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes must be construed "so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

As a further matter of statutory construction, RCW 10.77.060(1)(a) provides that when the court orders an evaluation, at least one of the evaluators must be "approved by the prosecuting attorney." This same subsection also states that the court may order a single evaluator "upon agreement of the parties." Id. Construing these

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[6] RCW 10.77.020(2) states in pertinent part, "Whenever any person is subjected to an examination pursuant to any provision of this chapter, he or she may retain an expert or professional person to perform an examination in his or her behalf."

provisions together, the prosecution has necessarily approved of the evaluator when the parties agree to a single evaluator. It would render the agreement to a single evaluator meaningless if the State could request another evaluation after it agreed to a single evaluator. See J.P., 149 Wn.2d at 450.

These limitations on the availability of court-ordered mental examinations are purposeful and reasonable due to the nature of a mental examination. The examination is extremely intrusive to the individual. See In re Det. of Williams, 147 Wn.2d 476, 498, 55 P.3d 597 (2002) (Chambers, J., concurring) ("an examination by an expert hired by the opposition is rarely a desirable experience. . . . Such extreme exercise of judicial power should only happen upon a most stringent showing of necessity"); see also Schlegenhauf v. Holder, 379 U.S. 104, 119-20, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964) (court ordered mental or physical examinations, unlike other discovery, require good cause and court limits on scope of examination).[7]

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[7] See, e.g., State v. Canady, 445 A.2d 895, 901 (Conn. 1982) (mental examinations may be "tool of harassment"); In re: T.M.W., 553 So.2d 260, 263 (Fla. App. 1989) (compulsory mental examination "traditionally deemed invasion of privacy"); Simms v. Montana 18th Judicial Dist. Ct., 68 P.3d 678, 683 (Mont. 2003) (right to obtain mental examination must be weighed against state constitutional right to privacy).

A mental examination requires the accused person to talk about the incident, and the prosecution would abuse the process if it could obtain incriminating statements from the accused through repeated examinations. See RCW 10.77.020(5) (if defendant in sanity evaluation refuses to answer questions, court "shall" exclude defendant's own expert from testifying at trial); U.S. Const. amend. 5; Const. art. I, § 9.[8]

The evaluator who works for the state is more likely to be aligned with the prosecution. The accused person may want an examiner who is unaffiliated with the prosecution and therefore the statute gives the accused the right to have an independent evaluator. RCW 10.77.020(2); RCW 10.77.060(2). It is reasonable as well as faithful to the express language of the statutory scheme to authorize only the defense and not the prosecution the ability to seek a second opinion after stipulating to a single evaluator.

c. The unauthorized evaluation should not have been obtained or introduced into evidence.

The remedy for wrongfully compelling the accused to submit to an intrusive mental examination is the exclusion of the results of the

[8] The Fifth Amendment guarantees that in a criminal case, no person "shall be compelled to give evidence against himself." Article I, section 9 uses essentially identical language.

examination at trial. See State v. Winterstein, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009). Excluding the evidence from trial remedies the injury inflicted on the individual whose rights were violated and protects the integrity of the trial process. Id.

The prosecution heavily relied on the testimony of Dr. William Grant, who performed the second evaluation. Grant spoke at length about Davis's explanation of the incident, his prior criminal history, his predisposition to violence and robberies, and his intentional acts on the night of the incident. 3RP 18-53. Because Grant's testimony was critical to the prosecution's case, Davis is entitled to a new trial at which the improperly gathered information is not presented to the jury.

4. **The introduction of propensity evidence that Davis was dangerous based on his past criminal convictions denied Davis a fair trial.**

   a. A person accused of a crime may not be convicted because he is dangerous or likely to commit similar acts if not confined.

It can be brutally prejudicial to present the jury with evidence that permits them to infer the accused person is dangerous or violent based on uncharged acts. State v. Freeburg, 105 Wn.App. 492, 500, 20 P.3d 984 (2001). An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481

U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidence deprives a defendant of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice").

Allegations that an accused person committed an uncharged crime are presumed inadmissible under ER 404(b). Uncharged criminal conduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused's propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697

(1982)); ER 404(b).[9] Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776.

This Court reviews *de novo* whether a trial court correctly interpreted an evidentiary rule in deciding to admit evidence. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The DeVincentis Court warned that the State's burden of proving the admissibility of the uncharged conduct is "substantial." Id. at 17-18.

b. The jury was encouraged to treat Davis's prior convictions from many years earlier as evidence of his predisposition for committing robbery.

Davis objected before and during the trial to the prosecution's intent to elicit details of Davis's prior convictions from many years earlier. 1RP 90; 2RP 139-40; 3RP 47, 85. Davis explained the State had no good faith basis to admit Davis's criminal history and asked to limit what was admitted. 2RP 144-45, 146. He asked for an offer of proof so

[9] Under ER 404(b):
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

that any criminal history elicited could be narrowly tailored to its precise probative value. 2RP 140; 3RP 47.

The prosecution insisted that Davis's criminal history was relevant because if the jury found he was not guilty by reason of insanity, it would need to decide whether he was a substantial danger to others unless kept under control by the court or an institution. 2RP 141.[10] The court ruled the prosecution could elicit from its expert any information on which he relied. 2RP 149. It refused Davis's repeated requests for an offer to proof before the prosecution's psychiatrist Grant testified about matters that were not material to the opinions he would be permitted to render. 2RP 146; 3RP 47-50.

In fact, Grant did not believe Davis was a substantial danger or substantially likely to commit criminal acts to others if not confined. As to Davis's dangerousness, Grant said, "[h]e's not dangerous as he sits here now." 3RP 52.

However, Grant said he thought Davis had the "potential" to commit another serious offense, and this would arise only if he were

[10] Under RCW 10.77.010(5), a person is "criminally insane" if he:

"under stress, [and] he's going to drink and use drugs." 3RP 52. Grant also conceded that although Davis used drugs and alcohol regularly since 1996, he had not committed any serious crimes until this incident, which was in 2010. 3RP 52. Under Grant's reasoning, Davis's likelihood of reoffending was not imminent. He thought Davis was inherently predisposed to commit certain types of crime but was not substantially likely to do so in the absence of a confluence of events that had occurred only once in the last 14 years.

Even though Grant did not render the opinion that Davis was substantially likely to commit dangerous acts unless confined, the prosecution used Grant to elicit Davis's predisposition for committing crimes like the crime charged. The prosecutor asked Grant whether Davis's behavior during the incident could be explained by his "predisposition." 3RP 44. Grant expressed confusion and the prosecutor agreed to come back to that question later. 3RP 45.

Shortly thereafter, Grant explained that "the best single predictor of future behavior is past behavior." 3RP 46. Without limiting Grant to

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has been acquitted of a crime charged by reason of insanity, and thereupon found to be a substantial danger to other persons or to present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other

whether Davis would be dangerous if found not guilty by reason of insanity, the prosecutor asked Grant what past behavior he "took into account in this case." 3RP 46. Davis asked for a side bar to determine whether Grant would be making a "blanket statement" tying Davis's criminal history into his responsibility for the charged crime. 3RP 47. The court asked the prosecutor to limit his questions to what Grant relied on, but did not limit the question of Davis's dangerousness to whether he would be dangerous if found not guilty by reason of insanity and released. 3RP 48.

Grant then repeated Davis's criminal history for the jury. 3RP 50. He said Davis had committed a "substantial number of thefts, burglaries, robberies and assaults. He has spent 12 to 13 years of his adult life in prison, and some of the robberies where people got hurt." 3RP 51. One prior offense occurred when Davis "pistol whipped a drug dealer" who had cheated him and another occurred when he "charged" at a cab driver who had overcharged him. 3RP 51.

Grant said Davis had a "predisposition to theft, robberies, violence." 3RP 51. He said the instant offense was "a coming together of this predisposition" with "a very frustrating day. . . . and the

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persons or institutions.

combination of the cocaine and the alcohol, which just came together, you know, the background predisposition and the bad day and the drugs and alcohol, which led to the offense at this time." 3RP 51.

c. The evidence of Davis's predisposition to commit wrongful acts like the crime charged denied him a fair trial.

The prosecution used Grant to diagnose Davis as "predisposed" to commit crimes, which constitutes the very propensity evidence forbidden by ER 404(b) and violates his right to a fair trial. The court admitted this evidence without any limitation on its use and despite Davis's objections.

Prior conviction evidence is "inherently prejudicial." State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984). "[A] jury is more likely to convict a person with a criminal record," even with a limiting instruction. Id. "It is difficult for the jury to erase the notion that a person who had once committed a crime is more likely to do so again."

The jury was told Davis had the predisposition to commit violent robberies, which is exactly what he was charged with doing. This claim was highly prejudicial. See Jones, 101 Wn.2d at 120; Freeburg, 105 Wn.App. at 500-01. Reasonable jurors could not disregard evidence that Davis's past history of significant, violent

robberies to conclude he was a bad person who bore the permanent character trait of being a violent robber. This evidence's probative value was grossly outweighed by its brutally prejudicial effect and denied Davis a fair jury trial. Freeburg, 105 Wn.App. at 501.

5. **The trial court denied Davis his rights to a jury trial and the due process of law when it increased Davis's sentence based on unreliable, unproven aggravating facts.**

   a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence.

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A criminal defendant has the right to a jury trial and may only be convicted if the government 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, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum

penalty faced by the defendant. Blakely, 542 U.S. at 304. Blakely held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Id. at 304-05; see Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002) (invalidating death penalty scheme where jury does not find aggravating factors). In Apprendi, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. 530 U.S. at 492-93.

More recently, the Supreme Court recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. Southern Union Co. v. United States, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrary labeling of facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one

act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. A judge may not impose punishment based on additional findings. Blakely, 542 U.S. at 304-05.

b. The rights to a jury trial and proof beyond a reasonable doubt apply in this case.

The Supreme Court has never conclusively held the Sixth Amendment does not apply to proof of prior convictions which elevate the maximum punishment. Before Apprendi, it held that recidivism was not an element of the substantive crime that needed to be pled in the information. Almendarez-Torres v. United States, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

Since Almendarez-Torres, the Court has not analyzed recidivism and carefully distinguished prior convictions from other facts used to enhance the penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476. Apprendi explained that Almendarez-Torres only addressed the charging document. 530 U.S. at 488, 495-96. Apprendi also noted "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.

This demonstrates that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that Almendarez-Torres was wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J. concurring). Justice Thomas suggested the test should be that when a fact, including a prior conviction, is a basis for imposing or increasing punishment, it serves as an element that must be proved to the jury. Id. at 499-519; accord, Ring, 536 U.S. 610 (Scalia, J. , concurring).

The Washington Supreme Court has noted the United States Supreme Court's failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 142, 75 P.3d 934 (2003) (addressing Ring) cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). But it has felt it must "follow" Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case.

Indeed, the Washington Court's "following" of this case has been sharply criticized. State v. Witherspoon, _ Wn.App. _, _ P.3d _, 2012 WL 4882668, *15 (Oct. 16, 2012) (Quinn-Brintnall, J, dissenting in part). The Washington Supreme Court's original decisions addressing the Sixth Amendment's application to the Persistent Offender Accountability Act (POAA) were premised upon the conclusion that the legislative characterizations of a fact as either an "element" or "sentencing fact" was determinative of the constitutional protections to be afforded. Moreover, the court found it significant whether the Legislature codified the applicable fact to be proved at sentencing. State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1994). The distinctions upon which Thorne rested ceased to be constitutionally relevant following Apprendi and Blakely. Apprendi, 530 U.S., at 476; Blakely, 542 U.S. at 304-05. The Washington Supreme Court has not addressed this question following the decisions in Blakely and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) which plainly rejected the artificial distinction between elements and sentencing factors.

Treating a persistent offender finding as a mere sentencing factor is in stark contrast to this State's prior habitual criminal statutes,

which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). And historically, Washington cases required a jury determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18. Many other states' recidivist statutes require proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Davis's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. Davis was entitled to a jury finding beyond a reasonable doubt that he is a persistent offender.

c. Washington requires reliable evidence to impose enhanced punishment.

When the prosecution does not prove the existence of prior convictions beyond a reasonable doubt, it violates due process under article I, section 3. Historically, Washington's sentencing laws required the prosecution to prove prior convictions resulting in habitual offender status beyond a reasonable doubt. See State v. Holsworth, 93 Wn.2d 148, 159, 607 P.2d 845 (1980) (holding that existence of three valid felony convictions "must be proved by the State beyond a reasonable doubt"); State v. Chevernell, 99 Wn.2d 309, 315, 662 P.2d 836 (1983) (construing Holsworth as "based on constitutional mandates which we must obey"); see also State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719 (1986) (affirming State's historical burden of proving prior convictions in proving status of habitual criminal offender). Although the majority declined to apply this traditional interpretation of due process to the Persistent Offender Accountability Act in Manussier, Davis respectfully contends the majority discounted the procedures mandated by our constitution. See 129 Wn.2d at 691-93 (Madsen, J., dissenting).

In Davis's case, the prosecution offered meager evidence to support its request for sentence of life without the possibility of parole. Generally, identity of names is insufficient to prove that a document

relates to the person before the court when a prior conviction is an element of the crime. State v. Huber, 129 Wn.App. 499, 502, 119 P.3d 388 (2005). Although the court permitted a standard range sentencing calculation based on identity of names in Ammons, the Ammons court also relied on prior law that there was a "fundamental distinction between the more rigid procedural protections necessary in using a prior conviction to prove an element of the crime or of habitual criminal status" than to calculate the standard sentencing range. In re Pers. Restraint of Williams, 111 Wn.2d 353, 367, 759 P.2d 436 (1988). Prior convictions are not used in a persistent offender sentencing to determine the standard range; they are used to eliminate judicial discretion, resulting in mandatory punishment of the severest kind short of death. RCW 9.94A.570; see Graham v. Florida, _ U.S. _, 130 S.Ct. 2011, 2027, 176 L.Ed.2d 825 (2010) (sentence of life without parole is the "severest penalty" short of death and shares characteristics with death sentences "that are shared by no other sentences").

Identity of names does not accurately establish a person's persistent offender status. Huber, 129 Wn.App. at 502. The prosecution did not present testimony from a fingerprint examiner or eyewitness to

establish Davis's identity. 12/13/11RP 7, 13. The State did not directly connect Davis to the prior convictions.

Moreover, a prior conviction does not count as a persistent offender predicate unless it could be included in the person's offender score, meaning it must not be subject to the "washout" provisions of the SRA. State v. Keller, 143 Wn.2d 267, 279-80, 19 P.3d 1030 (2001). The prosecution presented the court with judgment and sentences from prior offenses, the most recent of which occurred in 1990. Davis explained that he had been out of prison and living in the community since 1996, and had been in little trouble, none of which was serious. 12/13/11RP 10, 12. Yet the prosecution did not prove that the prior convictions had not washed out.

The prosecution alleged Davis was convicted of second degree robbery in 1988 and attempted first degree robbery in 1990, both of which are class B felonies. CP 7. Class B felonies wash out if a person lived in the community without any convictions for 10 years. RCW 9.94A.505(2).[11]

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[11] Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of

The court made no findings about the nature of the convictions or how they qualified as most serious offenses. The court made no findings on the washout of class B felonies. The court merely stated that it received certified copies of prior convictions that "are strikes" and the sentence "has to be life in prison." 12/13/11RP 13.

In the context of imposing a sentence of life without the possibility of parole, due process protections should be at their highest. Based on Washington's historical protections for habitual offenders predicated on due process considerations and the requirements of the Sixth and Fourteenth Amendments, the prosecution's failure to offer reliable evidence connecting Davis to valid prior convictions that may count in his offender score should result in the vacation of the three strikes sentence and remand for a new sentencing hearing.

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judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

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

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); U.S. Const. amend. 14. When analyzing equal protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

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

159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

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

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.

The legislature has an interest in punishing repeat criminal offenders more severely than first-time offenders. 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). 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, the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have been attached to them.

Where prior convictions increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. See State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony); Oster, 147 Wn.2d at 146 (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). 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. 456, 475, 237 P.3d 352 (2010). The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence, they have been termed "sentencing factors," and treated as findings fora judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143. Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers as "elements," the Legislature has never labeled the fact at issue here as 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").

If anything, there might be more of a reason for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context due to the severity of the punishment. Rationally, the greatest procedural protections should apply in that context. It makes no sense to for greater procedural protections where the necessary facts only marginally increase punishment, but not where the necessary facts result in the most extreme increase possible.

Being free from government-imposed physical detention one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprives Davis of this basic liberty; it subjects him to life in prison without the possibility of parole. It does so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. This Court should hold that the judge's imposition of a sentence of life without the possibility of parole violated the equal protection clause. The case should be remanded for resentencing within the standard range.

F. CONCLUSION.

For the reasons stated above, Mr. Davis respectfully asks this Court to reverse his conviction for robbery in the first degree. Alternatively, he asks this Court to order a new trial based on the instructional and evidentiary errors, and reverse his sentence and remand this case for a jury trial on the enhanced sentencing factors.

DATED this 23rd day of October 2012.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

FILED
FRANKLIN CO CLERK
2011 FEB -8 A 10:15
MICHAEL J. KILLIAN
BY DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

STATE OF WASHINGTON, Plaintiff, vs. **BILLY WAYNE DAVIS,** D.O.B.: 04/16/1945 Defendant	No. 10-1-50293-8 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON HEARING PURSUANT TO CrR 7.8

THIS MATTER, having come duly and regularly for a hearing on the 25th day of January, 20011, before the Honorable Judge Vic Vanderschoor, Judge of the above-entitled Court upon the plaintiff's motion pursuant to RCW 10.77.060, the defendant being personally present and represented by Shelley Ajax, Attorney for Defendant; and the plaintiff being represented by Shawn Sant, Franklin County Prosecuting Attorney, by and through Brian Hultgrenn, Deputy Prosecuting Attorney for Franklin County; and the Court having heard and considered the statements and arguments of counsel, and having reviewed the case record to date, and having been fully advised in the premises, now, therefore, makes the following:

FINDINGS OF FACT

1. On October 19, 2010, at the request of defense counsel, the court entered an order for a competency evaluation pursuant to RCW 10.77.060. That order did not specify that the parties stipulated to one evaluator or that the State had approved any specific evaluator to conduct the examination.

2. On December 21, 2010, Dr. Avery Nelson, of Eastern State Hospital, prepared a report as to the competency of the defendant.

3. Following receipt of this report, the State contacted Eastern State Hospital and asked if a supplemental evaluation could be done on the defendant. Eastern State Hospital agreed to conduct the supplemental evaluation pursuant to original order, entered October 19, 2010.

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CONCLUSIONS OF LAW

1. The State did not specifically stipulate to having only one "qualified expert" appointed or designated by the secretary; absent a stipulation to examination by only one expert, RCW 10.77.060(1)(a) requires appointment or designation of "at least two qualified experts or professional persons, on of whom shall be approved by the prosecuting attorney."

2. In an case where competency and/or sanity is an issue, the prosecuting attorney is entitled to have the defendant examined by an expert approved by that official. RCW 10.77.060.

3. The defendant shall make himself available for interview with Eastern State Hospital for the scheduled appointment.

DONE IN OPEN COURT this 8 day of February, 2011.

Judge

Presented by:

STEVE M. LOWE #14670\#91039
Prosecuting Attorney for
Franklin County

VIC L. VANDERSCHOOR

by: _____
Brian Hultgrenn, #34277
Deputy Prosecuting Attorney

Approved as to form:

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Attorney for Defendant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 30485-0-III
	)	
BILLY DAVIS,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF OCTOBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SHAWN SANT, DPA FRANKLIN COUNTY PROSECUTOR'S OFFICE 1016 N 4TH AVE PASCO, WA 99301	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	BILLY DAVIS 622780 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE. WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF OCTOBER, 2012.

X_____

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