NO. 43179-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LORENZO WEBB,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF

Marla L. Zink
Attorney for Appellant

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

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1. The trial court violated Mr. Webb's constitutional right to a public trial when it conducted peremptory strikes on paper.

2. The trial court violated the public's right to open proceedings when the court conducted peremptory strikes on paper.

3. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination, by a preponderance of the evidence, that Mr. Webb had two prior convictions that qualify as "most serious offenses" violated his right to due process and a jury determination of every element of the crime beyond a reasonable doubt.

4. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination, by a preponderance of the evidence, that Mr. Webb had two prior convictions that qualify as "most serious offenses" violated his right to equal protection of the law.

5. The trial court exceeded its sentencing authority in imposing a term of community custody on the life without parole sentence.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

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

proceedings may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. These rights and requirements extend to the jury selection process. Where the trial court ordered that peremptory challenges be made in written form, out of the scrutiny of the public's eyes and ears, without considering the *Bone-Club* factors, was Mr. Webb's and the public's right to an open trial violated, requiring reversal?

2. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court violate Mr. Webb's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Mr. Webb had twice before been convicted of most serious offenses?

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

4. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are not necessary to further a compelling government interest. The government has an interest in punishing repeat offenders more harshly than first-time offenders. However, for some crimes, the existence of prior convictions used to enhance the sentence must be proved to a jury beyond a reasonable doubt, and for others—like those at issue in the Persistent Offender Accountability Act (POAA)—the existence of prior convictions used to enhance the sentence need only be proved to a judge by a preponderance of the evidence. Does the POAA violate the Equal Protection Clause by providing lesser procedural protections than other statutes whose purpose is the same?

5. A court's sentencing authority is limited to the authority expressly provided by statute. The Sentencing Reform Act (SRA) mandates that a persistent offender be sentenced to life without parole and is not eligible for community custody. Did the trial court exceed its authority by imposing a term of community custody on Mr. Webb's life without parole sentence?

C. SUPPLEMENTAL ARGUMENT

1. **The trial court violated Mr. Webb's right to a public trial by conducting peremptory challenges by secret ballot.**

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

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

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v.*

Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

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

Open public access provides a check on the judicial process, which both is necessary for a healthy democracy and promotes public understanding of the legal system. *State v. Sublett*, 176 Wn.2d 58, 142 n.3, 292 P.3d 715 (2012) (Stephens, J. concurring); *Allied Daily*

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

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v.*

Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting *Press-Enterprise I*, 464 U.S. at 510).

This Court reviews violations of the public trial right de novo. *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013). "A defendant does not waive his public trial right by failing to object to a closure during trial." *Id.*

b. The public was improperly excluded from the peremptory challenge process at Mr. Webb's trial because the challenges were made on paper without identifying a compelling interest, considering Mr. Webb's right to a public trial, identifying the least restrictive accommodation and otherwise considering the *Bone-Club* factors.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *Sublett*, 176 Wn.2d at 71-72; *Wise*, 176 Wn.2d at 11-12; *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009); *Orange*, 152 Wn.2d at 804.[1] "The process of juror selection is

[1] Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *State v. Sublett*, 176 Wn.2d at 73 (lead opinion); *id.* at 136 (Stephens, J. concurring); *see State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (distinguishing voir dire, to which open trial right conclusively applies, to pre-voir dire release of prospective jurors by clerk for illness, a stage to which experience and logic test must be applied). However, even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *Jones*, 175 Wn. App. at 98-99

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

The process of excusing prospective jurors is a critical part of voir dire that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures); *State v. Wilson*, 174 Wn. App. 328, 342, 298 P.3d 148 (2013) (noting peremptory and for cause challenges are part of voir dire); *New York v. Torres*, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (closure of courtroom to defendant's wife while initial jury selection held, including exercise of 16 peremptory challenges, is erroneous). The "interplay of challenges for cause and peremptory challenges" are an essential part of criminal trial proceedings. *State v. Vreen*, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923 (2001).

Public scrutiny is essential because there are important limits on both parties' exercise of peremptory challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection,

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(citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court); *see infra* (discussing importance of public scrutiny during peremptory challenges).

including in exercise of peremptory challenge, and critical role of public scrutiny). Peremptory strikes may not be exercised in a racially discriminatory fashion. *Id.* "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts, and permitting such exclusion in an official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." *State v. Saintcalle*, No. 86257–5, __ Wn.2d __, 2013 WL 3946038, *4 (Aug. 1, 2013) (discussing important public interest in proper exercise of juror challenges:); *id.*, at *7 ("peremptory challenges have become a cloak for race discrimination"). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absent an on-the-record consideration of the public trial right, competing interests, alternatives to closing the proceeding and the other *Bone-Club* considerations. *See Jones*, 175 Wn. App. at 98-99 (citing Laws of 1917, ch. 37, § 1 and former RCW 10.49.070 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges to be held in open court).

In *Wilson*, this Court recently distinguished between hardship strikes made by the clerk prior to the commencement of voir dire, which is not subject to the open trial right, and peremptory challenges,

which are part and parcel of voir dire. 174 Wn. App. at 343-34. This Court observed that unlike hardship strikes made by a clerk, "voir dire" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for cause and peremptory challenges. *Id.* at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court and parties' rights to excuse jurors based on cause and peremptory challenges. *Id.* at 343-44.

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

The trial court's use of a secret ballot during Mr. Webb's trial was no more open than the proceedings in *Harris*. The trial court

unilaterally directed that peremptory strikes would be exercised silently on paper. Voir Dire RP 64-65; RP 20 (The Court: "Peremptory challenges, we'll do that on paper.").[2] Thus, at the conclusion of the parties' rounds of interviewing the venire, the courtroom was silent while the attorneys shuffled paper between them. *See* Voir Dire RP 64-65; RP 20-21. The record reflects the following:

> The COURT: Let me see the attorneys briefly. (Pause in proceedings)
>
> The COURT: We have the jury selected for this case. . . . I'm going to call out the number of the jurors that have been selected.
>
> [The court then indicated those jurors who would serve, assigned them with numbers, and excused the remainder of the pool.]

Voir Dire RP 64-65.

Although the public was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order. *Cf. State v. Leyerle*, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom

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[2] The consecutively-paginated volumes of the verbatim report of proceedings are referred to simply as "RP," as they were in Appellant's Opening Brief. The separately-paginated volume of voir dire proceedings held June 1 and 2, 2011 is referred to as "Voir Dire RP."

remained open to public). The public had no basis upon which to discern which jurors had been struck and which were simply excused because the panel had been selected. Put otherwise, there was no public check on the non-discriminatory use of peremptories. This stands in stark contrast to for-cause challenges, which were conducted on the record. Voir Dire RP 63 (court excusing panel member on the record due to scheduling concerns).[3]

Like in *Harris*, the subsequently-filed record of peremptory challenges does not absolve the constitutional violation. *See* CP __ (peremptory challenge sheet and panel section list); *Harris*, 10 Cal. App. 4th at 684-85, 688-89; *Sublett*, 176 Wn.2d at 142 n.3 (Stephens, J. concurring). The existence of records does not dispel the likelihood that different jurors would have been stricken if the parties had to face the public scrutiny of open proceedings. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process."); *Wise*, 176 Wn.2d at 5-6 (openness deters misconduct, tempers bias, mitigates undue partiality). "[P]ublic trials embody a 'view of human nature, true as a

[3] A supplemental designation of clerk's papers has been filed, requesting the trial court to forward copies of the peremptory challenge and panel section lists to this Court.

general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.'" *Strode*, 167 Wn.2d at 226 (quoting *Waller*, 467 U.S. at 46 n.4 (internal quotation omitted)).

c. Because voir dire was closed without proper consideration, Mr. Webb's conviction should be reversed and remanded for a new trial.

When the record "lacks any hint that the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16. "The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." *Easterling*, 157 Wn.2d at 181. "If the trial court failed to [conduct a *Bone-Club* inquiry] then a 'per se prejudicial' public trial violation has occurred "even where the defendant failed to object at trial." *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Here, the court provided no compelling interest that required peremptory strikes to be conducted in secret while for-cause challenges were done "on the record." Voir Dire RP 64-65; RP 20-23. Further, the court failed to consider any of

the *Bone-Club* factors on the record. *See* Voir Dire RP 64-65; RP 20-23.

Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Jones*, 175 Wn. App. at 96 (quoting *Wise*, 176 Wn.2d at 18). Because the trial court conducted peremptory challenges in private without considering the *Bone-Club* factors, Mr. Webb's assault conviction should be reversed and the matter remanded for a new, public trial.

2. The sentencing court violated Mr. Webb's Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt by imposing a life sentence based on the court's finding, by a preponderance of the evidence, that Mr. Webb had twice previously been convicted of 'strike' offenses.

a. Under the Sixth and Fourteenth Amendments, a defendant has a right to a jury determination and proof beyond a reasonable doubt of any fact that increases his maximum sentence.

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The Sixth Amendment provides the right to a jury in a criminal trial. U.S. Const.

amend VI; *Blakely v. Washington*, 542 U.S. 296, 298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Together these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment—whether or not the fact is labeled an "element." *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). It violates the constitution "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. An accused person's constitutional rights to a jury trial and due process of law require the government to submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. *Descamps v. United States*, __ U.S. __, 133 S. Ct 2276, 2285-86, 186 L. Ed. 2d 438 (2013); *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2155, __ L. Ed. 2d __ (2013). Moreover, "such facts must be established by proof beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years

> surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Here, the prior convictions found by the court increased Mr. Webb's sentence to life without the possibility of parole and were thus elements of the offense which were required to be proved to a jury beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2155 ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

b. Mr. Webb had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior 'strike' offenses because they increased his maximum sentence.

Absent the court's finding, by a preponderance of the evidence, that he committed "strike" offenses on two prior occasions, Mr. Webb would not have been subject to a sentence of life without the possibility of parole. The jury verdict for assault does not support a life sentence standing alone. RCW 9A.36.021; RCW 9.94A.515 (assault in the second degree carries a seriousness level of IV); RCW 9.94A.510 (sentencing grid showing standard range sentences for offense with

seriousness level of IV). Because the facts used to impose the life sentence were not found by a jury beyond a reasonable doubt, Mr. Webb's Sixth and Fourteenth Amendment rights were violated.

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

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).[4] In *Apprendi*, the Court recognized that there was no need to explicitly overrule *Almendarez-Torres* in order to resolve the issue before it. However, the Court reasoned, "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at

[4] Mr. Webb recognizes that the Washington Supreme Court has declined to apply *Apprendi* in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules *Almendarez-Torres*. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001). As this Court recognized in *State v. Anderson*, Mr. Webb respectfully contends the time to do so has arrived and urges this Court to take the first step. *See, e.g., State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002) (Court of Appeals need not follow Washington Supreme Court decisions that are inconsistent with cited United States Supreme Court opinions). Moreover, the Washington Supreme Court accepted review of this issue in *State v Witherspoon*, 171 Wn. App. 271, 286 P.3d 996 (2012), review granted by 177 Wn.2d 1007, 300 P.3d 416 (2013), and assigned case No. 88118-9 (oral argument set for Oct. 22, 2013).

489. The *Apprendi* Court described *Almendarez-Torres* as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. *Apprendi*, 530 U.S. at 487.

A member of the 5-justice majority in *Almendarez-Torres*, Justice Thomas has since retreated from the majority holding. His *Apprendi* concurrence noted extensively the historical practice of requiring the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard v. United States*, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring). Moreover, although the continuing validity of *Almendarez-Torres* was not before the Court in *Alleyne*, Justice Thomas further emphasized his retreat from the holding in authoring *Alleyne*. *Alleyne*, 133 S. Ct. at 2155, 2160 n.1.

Even if *Almendarez-Torres* has precedential value, it is distinguishable on several grounds. First, in *Almendarez-Torres*, the defendant had admitted the prior convictions. *Apprendi*, 530 U.S. at

488. Mr. Webb did not admit his prior convictions. Second, the issue in *Almendarez-Torres* was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 488; *Almendarez-Torres*, 523 U.S. at 247-48. Third, *Almendarez-Torres* dealt with the "fact of a prior conviction." *Apprendi*, 530 U.S. at 490. Here, the simple "fact" of the prior convictions did not increase Mr. Webb's punishment; rather, it was the "types" of prior convictions that mattered. To impose a life sentence under the POAA, the State must prove the defendant has been convicted of "most serious" offenses on two prior occasions. RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the *Almendarez-Torres* court noted the fact of prior convictions triggered an increase in the maximum permissive sentence: "[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Thus, the constitutional concern here resembles *Alleyne*, in which the Court held that any fact that

increases a mandatory minimum sentence must be proved as an element, more than *Almandarez-Torres*. *Alleyne*, 133 S. Ct. at 2155. Accordingly, even if *Almendarez-Torres* were still good law, it would not apply here.

Judge Quinn-Brintnall of this Court has recognized that Supreme Court precedent requires the State to prove prior "strike" offenses to a jury beyond a reasonable doubt. *State v. Witherspoon*, 171 Wn. App. 271, 308-15, 286 P.3d 996 (2012), *review granted by* 177 Wn.2d 1007, 300 P.3d 416 (2013) (oral argument set for Oct. 22, 2013); *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011) (Quinn-Brintnall, J., concurring in part and dissenting in part), *aff'd on other grounds*, 172 Wn.2d 802 (2011). Although the Washington Supreme Court has rejected the argument Mr. Webb makes here, Judge Quinn-Brintnall has noted that subsequent United States Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in *Apprendi* and invalidated our State's intervening caselaw. *McKague*, 159 Wn. App. at 530 (Quinn-Brintnall, J., dissenting) (citing *Blakely*, 542 U.S. at 303-04; *Cunningham v. California*, 549 U.S. 270, 281-88, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)). Under recent United States Supreme Court cases, the "prior

conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." *Id.* at 535. This Court, like Judge Quinn-Brintnall, should follow United States Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. Because the life sentence was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range.

The imposition of a sentence not authorized by the jury's verdict requires reversal. *State v. Williams-Walker*, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Mr. Webb. His sentence should be reversed and remanded for the imposition of a standard-range sentence.

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

In the alternative, this Court should hold that a procedural due process analysis under *Mathews v. Eldridge* requires that a POAA sentence be imposed only if the prior serious offenses are found by a jury beyond a reasonable doubt. The government may not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend XIV; Const. art. I, § 3. A procedural due process claim requires the court to balance three factors. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). First, the court must consider private interest at stake. *Id.* Second, the court looks to the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures. *Id.* Third, the court regards government's interest in maintaining the existing procedure. *Id.*

Under the first factor, the accused has a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest at stake is the most elemental of liberty interests—liberty. This interest is "almost uniquely

compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The unparalleled importance of this interest is demonstrated by the significant procedural safeguards required when a person's freedom is at issue. For example, a court may not impose confinement for failure to pay in a civil contempt case absent (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) an opportunity to respond to questions about financial status; and (4) an express judicial finding regarding that the defendant has the ability to pay. *Turner v. Rogers*, __ U.S. __, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011). Similarly, a person may not be subject to involuntary civil commitment absent proof by clear and convincing evidence. *Addington v. Texas*, 441 U.S. 418, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

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

Nonetheless, the current procedure—judicial factfinding by a preponderance of the evidence—creates a significant risk of error. A

preponderance of the evidence is a mere more likely than not finding. A standard greater than a preponderance of the evidence is required when significant interests are at stake. *E.g.*, *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the "significant liberty interests" implicated by an involuntary medication order); *Addington*, 441 U.S. at 433. Furthermore, "it is presumed, that juries are the best judges of facts." *Georgia v. Brailsford*, 3 U.S. 1, 4, 3 Dall. 1, 1 L. Ed. 483 (1794). Juries are well-equipped to evaluate documentary evidence, witness testimony, and expert opinion. The possibility of even occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury.

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

In sum, the balancing test in *Mathews* shows that prior strike offenses must be proved to a jury beyond a reasonable doubt in POAA cases to comport with article I, section 3. *Mathews*, 424 U.S. at 333. On this alternative basis, Mr. Webb's sentence of life without parole should be vacated and the case remanded for a new sentencing hearing. *Id.*

3. The classification of the persistent offender finding as a 'sentencing factor' that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

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

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

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." *Hamdi*, 542 U.S. at 529. Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541; *cf. In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of due process challenge, because civil commitment constitutes "a massive curtailment of liberty").

b. Under any standard of review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. *State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. Under either strict scrutiny or rational

basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Likewise, defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, courts treat prior offenses that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors."

Where prior convictions that increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable

doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. *Oster*, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. *State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

Where, as here, prior convictions that increase the maximum sentence available are classified as "sentencing factors," our state only requires they be proved to the judge by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike), *cert. denied*, 541 U.S. 909 (2004). Just as the legislature has never labeled the facts at issue in *Oster*, *Roswell*, or *Chambers* "elements," the legislature has never labeled the

fact at issue here a "sentencing factor." Instead, in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A"); *State v. Thorne*, 129 Wn.2d 736, 772, 921 P.2d 514 (1996) (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context but not in other contexts, because the punishment in the "three strikes" context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes—even if the prior conviction increases the sentence by only a few months. *Roswell*, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; *Smith*, 150 Wn.2d at 143.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in *Skinner*, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in *Skinner* mandated extreme punishment upon a third conviction for an offense of a particular type. *Id.* at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under

Oklahoma's act the extreme punishment was sterilization. *Id.* The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. *Id.* at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

> We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here forever deprived Mr. Dorsey of this basic liberty based on proof by only a preponderance of the evidence, to a judge and not a jury.

As the Supreme Court explained in *Apprendi*, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." *Apprendi*, 530 U.S. at 476. "The equal protection clause would indeed

be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner*, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding of the necessary facts by a preponderance of the evidence, violated the equal protection clause. The case should be remanded for resentencing within the standard range.

4. The court exceeded its authority in imposing community custody on top of a term of lifetime confinement.

Under the POAA, the court sentenced Mr. Webb to lifetime commitment without parole. Nonetheless, the court ordered a term of 36-months community custody and set conditions. CP 246-48. Because the SRA precludes the imposition of community custody for persistent offenders and sentencing courts cannot exceed the authority provided by statute, the community custody provision should be stricken.

"A trial court only possesses the power to impose sentences provided by law." *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; *In re*

Pers. Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). A community custody term must be authorized by the legislature. RCW 9A.20.021.

By statute, a persistent offender is not eligible for community custody. RCW 9.94A.570 ("no offender subject to this [persistent offender] section may be eligible for community custody"). Thus no term of community custody may be included when a persistent offender is sentenced to life without parole. *Id.*; RCW 9A.20.021; *Carle*, 93 Wn.2d at 33.

The trial court sentenced Mr. Webb to life without parole as a persistent offender. CP 246. It was therefore without authority to also impose a term of community custody.

The court's unauthorized imposition of community custody is similar to the sentence held erroneous in *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). *See also State v. Franklin*, 172 Wn.2d 831, 839-42, 263 P.3d 585 (2011) (total sentence—term of confinement plus community custody—must not exceed statutory maximum). In *Boyd*, our Supreme Court held that a sentencing court must comply with the plain language of RCW 9.94A.701(9), which requires it to impose an aggregate term of confinement and community custody within the

statutory maximum. 174 Wn.2d at 472-73. The sentence imposed exceeded the 60-month statutory maximum by imposing a 54-month term of confinement and 12-month term of community custody. *Id.* Though the sentence included a "*Brooks* notation," which stated "that the total term of confinement and community custody actually served could not exceed the 60-month statutory maximum," that procedure was no longer authorized by the amended statute, which required *the trial court* to reduce the term of community custody to comply with the statutory maximum. *Id.* at 472. Accordingly, the Court remanded to the trial court to bring the sentence into compliance with the statute. *Id.* at 473.

Like in *Boyd*, the trial court exceeded its statutory authority in imposing a term of community custody where none is authorized. The unauthorized imposition of a 36-month term of community custody should be stricken.

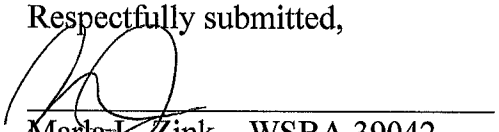
D. CONCLUSION

Because Mr. Webb was denied a public trial, his conviction should be reversed and the case remanded for a new trial. In the alternative, for the reasons set forth above and in Mr. Webb's opening

brief, this Court should vacate the sentence and remand for imposition of a proper sentence.

DATED this 4th day of October, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 43179-3-II
v.	)	
	)	
LORENZO WEBB,	)	
	)	
APPELLANT.	)	

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