72852-1

72852-1

NO. 72852-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY BRINKLEY,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENT OF ERROR

The superior court violated the appellant's right to have a jury determine all the facts necessary to support a sentence of life without the possibility of release under the Persistent Offender Accountability Act[1] (POAA).

Issue Pertaining to Assignment of Error

Although under current state and federal law, a judge rather than a jury may find the fact of a prior conviction, the POAA requires more. The POAA requires a factual finding of a series of temporal relationships between the prior convictions, the underlying prior offenses, and the conviction/offense being punished by life imprisonment without the possibility of release.

In imposing the life sentence in this case, did the superior court violate the appellant's state and federal constitutional rights to have a jury

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[1] RCW 9.94A.570 ("Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release."); see also RCW 9.94A.030(37)(a)(i), (ii) (defining "[p]ersistent offender" based on offender's commission of, and conviction for, three "most serious offenses," provided that before the *commission* of the offense receiving the POAA sentence, the offender was convicted on at least two separate occasions of most serious offenses, and provided that at least one of those *convictions* occurred before the commission of any of the other prior most serious offense convictions).

determine all the facts necessary to find he was a "persistent offender" under the POAA?

B. STATEMENT OF THE CASE

The State charged Jeffrey Brinkley with the first degree robbery, second degree kidnapping, and second degree assault of Kenny Easley.[2] CP 74-75. A jury convicted Brinkley as charged. CP 58. Finding Brinkley a persistent offender, the court sentenced Brinkley to life without the possibility of release. CP 61; Appendix (excerpt from original 1/24/13 sentencing hearing).[3]

Brinkley appealed. CP 44-55 (mandate and opinion of this Court in case no. 69851-6-I). He argued the jury was instructed on an uncharged alternative means of committing first degree robbery. CP 48. In the alternative, he argued the assault elevated the robbery to the first degree, the assault had no independent purpose or effect, and thus the trial court violated the prohibition on double jeopardy by failing to merge the offenses. CP 51. As to the first argument, this Court agreed but found the error was harmless. CP 49-50. As to the second argument, this Court agreed and concluded that "[b]ecause Brinkley's assault conviction

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[2] The information did not allege Brinkley was a persistent offender, although the State notified him of the allegation before trial. CP 74-75.

[3] A motion to transfer the verbatim report of the sentencing hearing to this appeal is being filed contemporaneously with this brief.

merges into the robbery conviction, we remand with instructions to vacate the assault conviction and for resentencing." CP 55.

Resentencing occurred on November 11, 2014. RP 1. At the hearing, Brinkley argued that imposition of a life sentence under the POAA would violate the requirement under Apprendi v. New Jersey[4] and Blakely v. Washington[5] that a jury find any fact that increases the penalty for the crime beyond the statutory maximum. CP 20. Brinkley argued that the exception for prior offenses did not apply because the POAA, in contrast to calculation of offender score under the Sentencing Reform Act (SRA), chapter 9.94A RCW, required findings relating to the "temporal" relationship between the current offense and the prior offenses and convictions, as well as the temporal relationship between the prior offenses and convictions. CP 20, 23. In other words, under the POAA the offense pattern must have occurred as follows: offense → conviction → offense → conviction → offense→ conviction. See CP 22 (making similar argument to sentencing court); see also RCW 9.94A.030(37)(a)(i), (ii) (listing prior conviction requirements, including temporal relationships between dates of conviction and dates of commission of offense). Brinkley pointed out such necessary findings placed the POAA outside the

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[4] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[5] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

scope of the "fact of criminal conviction" exception under Apprendi. Moreover, prior appellate cases challenging the validity under the POAA did not control because they did not address this specific issue. CP 24-25.

Holding it was bound by prior Washington case law upholding judicial fact finding under the POAA, the sentencing court rejected Brinkley's argument and entered an order amending the judgment and sentence to dismiss the assault conviction. CP 18. The POAA life sentences on the other counts remained in effect. CP 8.

Brinkley timely appeals. CP 1-2.

C. ARGUMENT

THE SENTENCING COURT VIOLATED BRINKLEY'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN A JUDGE, RATHER THAN A JURY, MADE A FINDING THAT HE WAS A "PERSISTENT OFFENDER" UNDER THE POAA.

The superior court violated Brinkley's right to have a jury determine whether he was "persistent offender" under RCW 9.94A.030(37)(a) because that determination required the judge to make factual findings beyond the "fact of prior conviction." Because no mechanism exists for a jury to make such a finding, moreover, this Court should remand for sentencing within the standard range.

1. The state and federal constitutions require a jury to find any fact that increases the penalty for a crime beyond the standard range.

In Apprendi, the United States Supreme Court held that, based on the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 476, 490.[6]

Later, in Blakely, 542 U.S. at 313-14, the Court held that a sentence above the standard range, imposed based on a judge's finding of deliberate cruelty, violated the right of an accused to trial by jury under the Sixth Amendment. Following Apprendi, the new question for the Court was whether "the prescribed statutory maximum" for Apprendi purposes was the top of the standard range, or rather the statutory maximum term of 120 months. The Court determined that "the statutory maximum for

[6] Article I, section 21 provides that the right to jury trial shall remain "inviolate." Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." In State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), the Court held that while the Washington constitution "generally offers broader protection of the jury trial right . . . a historical analysis of Washington law at the time of the adoption . . . indicates that juries did not then determine sentences." The Court therefore rejected an argument that the state constitution separately prohibited judicial fact finding under the POAA. Id.

Apprendi purposes is the maximum sentence a judge may impose without any additional findings. 542 U.S. at 303-04 (internal quotations omitted).

Both cases nonetheless preserved the rule set forth in Almendarez-Torres v. United States, 523 U.S. 224, 244, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which held that the "fact of" a prior conviction need not be pleaded in an indictment or proved to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 490 (noting that Court was not overruling Almendarez-Torres as to findings related to recidivism, but characterizing such as a "narrow exception to the general rule"); Blakely, 542 U.S. at 301 (repeating rule, and exception, set forth in Apprendi).[7]

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[7] But see Apprendi, 530 U.S. at 487, 489-90 (noting "prior conviction" exception was at best "an exceptional departure from" historic sentencing practice, and stating that 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"); see also id. at 518-19 (Thomas, J., concurring) (concluding that Almendarez-Torres was wrongly decided); Shepard v. United States, 544 U.S. 13, 27-28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005) (Thomas, J., concurring in part and in the judgment) (observing that "a majority of the Court now recognizes that Almendarez-Torres was wrongly decided" and suggesting that, "in an appropriate case, this Court should consider Almendarez-Torres' continuing viability"); State v. Witherspoon, 171 Wn. App. 271, 306, 286 P.3d 996 (2012) (Quinn-Brintnall, J., dissenting) ("Two recent . . . opinions, Oregon v. Ice, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), and Southern Union Co. v. United States, __ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), cast further doubt on the constitutionality of having a trial court, rather than a jury, decide whether prior convictions are proven by a preponderance of the evidence as, *historically,* juries made this determination under recidivist statutes like the POAA."), aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014), as corrected (Aug. 11, 2014).

Since Apprendi and Blakely were decided, Washington courts have repeatedly held that, for the purposes of imposing a life sentence under the POAA, a judge, not a jury, may make the required findings on the grounds that such findings fall under the "fact of prior conviction" exception. See State v. Witherspoon, 180 Wn.2d 875, 892, 329 P.3d 888 (2014), as corrected, (Aug. 11, 2014) (citing State v. McKague, 172 Wn.2d 802, 803 n. 1, 262 P.3d 1225 (2011) (citing three prior cases and stating "[w]e decline to review the issue again here")); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying Apprendi, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); State v. Smith, 150 Wn.2d 135, 139, 75 P.3d 934 (2003) (prior convictions fall under Almendarez-Torres "fact of prior conviction" exception); cf. State v. Manussier, 129 Wn.2d 652, 677, 681-84, 921 P.2d 473 (1996) (in accord with other SRA provisions, appropriate standard of proof under the POAA is by a preponderance of the evidence; POAA does not violate state or federal due process by not requiring prior "strike" offenses to be found by a jury).

But, as Brinkley argued below, no Washington case has explicitly addressed whether the temporal relationships between the each of the convictions and the underlying crimes are necessarily included within the

"fact of prior conviction" exception. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do not rely on cases that fail to specifically raise or decide an issue."). Thus, to Brinkley's knowledge, he now presents this Court with an issue of first impression.

2. The "fact of a prior conviction" exception is narrow in scope and the findings necessary under RCW 9.94A.030(37)(a) fall outside the exception.

Because Brinkley is aware of no Washington case addressing this issue, it is appropriate for this Court to rely on persuasive authority from other jurisdictions. In re Pers. Restraint of King, 54 Wn. App. 50, 53, 772 P.2d 521 (1989).

The Ninth Circuit has been "hesitant to broaden the scope of the prior conviction exception to facts not apparent on the face of conviction documents." Butler v. Curry, 528 F.3d 624, 644-45 (9th Cir. 2008) (citing United States v. Kortgaard, 425 F.3d 602, 610 (9th Cir. 2005) (concluding that Almendarez-Torres prior conviction exception was a "narrow exception to the general rule")). For example, the prior conviction exception does not extend to "qualitative evaluations of the nature or seriousness of past crimes, because such determinations cannot be made solely by looking to the documents of conviction." Butler, 528 F.3d at 644 (citing Kortgaard, 425 F.3d at 607 (holding that "seriousness" of past crimes and "likelihood of recidivism" are not facts that come within the

"prior conviction" exception); Stokes v. Schriro, 465 F.3d 397, 404 (9th Cir. 2006) (holding that the determination whether the present offense is "strikingly similar" to a past offense does not come within the "prior conviction" exception)).

Nor does the exception apply to proceedings lacking Sixth Amendment protections. Butler, 528 F.3d at 646 (holding that under California probation system, probation status may be altered at any time and in proceeding absent Sixth Amendment protections, and therefore probation status falls outside "prior conviction" exception); United States v. Tighe, 266 F.3d 1187, 1193-95 (9th Cir.2001) ("[T]he 'prior conviction' exception to Apprendi's general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.") (citing Apprendi, 530 U.S. at 496); United States v. Covian-Sandoval, 462 F.3d 1090, 1097-98 (9th Cir. 2006) (holding that prior removal proceedings are not within the exception because they "are civil, not criminal, lacking both juries and the reasonable doubt standard"), cert. denied, 549 U.S. 1301 (2007); see also Jones v. United States, 526 U.S. 227, 249, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

In United States v. Salazar-Lopez, 506 F.3d 748 (9th Cir. 2007), cert. denied, 553 U.S. 1074 (2008), the Court addressed a conviction under 8 U.S.C. § 1326(b)(1), which raises the maximum term for illegal reentry from two to ten years if the relevant prior "removal [i]s subsequent to a conviction for commission of . . . a felony." A jury had found Salazar was removed from the United States at some point, but was not required to find the date of that removal. Salazar-Lopez, 506 F.3d at 751. The Court held that a district judge could determine whether there was a prior felony conviction without committing Apprendi error, but that the *timing* of the later removal must be proved to a jury beyond a reasonable doubt. Salazar-Lopez, 506 F.3d at 751-52. This was so even though the statutory maximum was based in part on the fact and timing of a prior conviction reflected in conviction documents, and even though the date of the later removal was reflected in documents from an immigration court. Id. at 752.

Salazar-Lopez demonstrates how a finding as to the relative timing of an event—even though a date may appear on a court document—may exceed the scope of permissible judicial fact-finding. Here, Brinkley's prior conviction documents establish that the prior convictions were entered on July 1, 1996 (judgment and sentence noting crime occurred "3/30/96") and January 29, 1999 (noting crimes occurred "November 26,

1998"). Supp. CP ___ (sub no. 105, State's Response to Defense Response, at Exhibits A and B); see also Supp. CP ___ (sub nos. 58 and 59, certified copies of judgment and sentence submitted to original sentencing court).

But even though a date of conviction may be listed on the judgment and sentence form, there is no indication of how that date was determined, or its accuracy. For example, where time is not a material element of the charged crime, the language "on or about" in a charging document is sufficient to permit proof of the act at any time within the statute of limitations, where an alibi defense is not asserted. State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). The statute of limitations for any felony is no less than three years. RCW 9A.04.080(1)(h). It is worth noting that, for example, Brinkley's prior convictions are dated less than three years apart.

To impose the POAA sentence, the finder of fact is required to determine not only the temporal relationship between the convictions and offenses but also, necessarily, the dates of commission of those offenses.[8]

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[8] Cf. State v. Newlum, 142 Wn. App. 730, 742, 176 P.3d 529 (2008) (to impose exceptional sentence under RCW 9.94A.535(2)(c), based on commission of multiple current offenses and high offender score, sentencing court need only find the fact of the defendant's convictions to impose sentence; current offenses are to be treated as "prior convictions" under RCW 9.94A.589(1)(a)).

But the date listed on the judgment and sentence may or may not coincide with the precise date of the commission of the offense.

This Court's recent decision in, State v. Irby, is instructive in this respect. ___ Wn. App. ___, __ P.3d ___, 2015 WL 1787896 (Apr. 20, 2015). There, this Court rejected the State's argument that a 1976 statutory rape conviction was comparable to a second degree rape of a child, a most serious offense, for purposes of the POAA. Id. at *11-13. This Court observed that both offenses require proof that the victim was less than 14 years old at the time of the offense. But one of the elements of statutory rape was that the offender was over 16 years old. To be convicted of second degree rape of a child, however, the offender may be younger than 16, as long as he or she is at least 36 months older than the complainant. Moreover, statutory rape was defined to include 11-year-old complainants, while only 12- and 13-year-olds are included in the current offense. Thus, this Court recognized, the offenses are not legally comparable. Id. at *12.

Regarding the second possible method of demonstrating comparability, this Court recognized that factual comparability implicated Apprendi. And the underlying facts of the 1976 conviction proved factual comparability only if the record showed they were admitted, stipulated to, or found by the trier of fact beyond a reasonable doubt. Irby, 2015 WL

1787896 at *12 (citing State v. Ortega, 120 Wn. App. 165, 172, 84 P.3d 935 (2004), review granted in part and remanded, 154 Wn.2d 1031, 119 P.3d 852 (2005)).

The statutory rape verdict stated that Irby was "[g]uilty as charged in the Information." The information charged that Irby, on May 31, 1976, in Chelan County, "being over [16] years of age, did then and there engage in sexual intercourse with [complainant], not being married to [complainant], who was [13] years of age." The information was filed on July 8, 1976.

The documents showed the jury found the complainant was 13 on May 31, 1976, and that Irby was at least 16. But the jury did not find Irby was more than 36 months older than the complainant on that date. Based on the allegation in the charging document, Irby may have been only 16 and the complainant may have been one day short of 14. The information and verdict together did not prove a 36-month difference between their ages. Id. at 12.

In the superior court, the trial court found Irby's date of birth established by certified records from *other* court cases and concluded that Irby was almost 18 when the crime was committed. This Court noted that on appeal, "the State correctly does not pursue this argument as it depends on judicial fact-finding, which is impermissible under Apprendi."

Without the additional fact-finding, the trial court was not authorized to count the 1976 conviction as a "strike" under RCW 9.94A.030(37) and use it to increase the penalty for first degree burglary to life without parole. 2015 WL 1787896 at 12 (citing Ortega, 120 Wn. App. at 171-72).

On appeal, the State argued that a 36-month age disparity between Irby and his 1976 victim was proved by documents showing the information was filed in superior court on July 8, 1976 and juvenile court law did not permit individuals under the age of 18 to be charged in superior court. "'Since he was at least age eighteen when the case was filed, he was also at least age seventeen when the offense occurred just under a month and a half before it was filed.'" Id. at 13.

This Court rejected this argument as well, holding that "it supplies a finding on a factual issue that was not before the jury in 1976. . . . In 1976, the State had no reason to convince the jury that Irby was 18, and Irby had no reason to prove he was not." Id. at 13 (citing Lavery, 154 Wn.2d at 249). The fact of Irby's date of birth was not found by the trier of fact beyond a reasonable doubt and consequently "'may not be used to increase the penalty of a subsequent conviction beyond the statutory maximum.'" Id. at 13 (quoting Ortega, 120 Wn. App. at 172).

Here, likewise, based on the court documents, under the fact of prior conviction exception, the sentencing judge was entitled to find that

prior convictions had occurred in 1996 and 1999. But a jury should have been required to find the additional facts beyond a reasonable doubt, i.e., the requisite "offense → conviction → offense → conviction → offense → conviction" temporal relationship. Such a finding is, in turn, dependent on the dates of commission of the offenses. RCW 9.94A.030(37)(a). As in Irby, Brinkley or another defendant in his position may have had no incentive to challenge a date of offense on conviction paperwork. As in both Salazar-Lopez and Irby, the required factual determination reaches beyond the narrow "fact of prior conviction" exception and thus requires proof to a jury beyond a reasonable doubt.

3. The remedy is remand for sentencing within the standard range.

To impose the life sentence, the trial judge had to make factual findings regarding the necessary temporal relationships beyond the mere "fact" of the prior conviction. Under the state and federal constitutions, however, a jury was required to make this finding beyond a reasonable doubt. This Court should reverse the sentence based on improper judicial fact finding. Trial courts do not have inherent authority to empanel sentencing juries. State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d

1130 (2007).[9] Accordingly, this Court should remand for sentencing within the standard range.

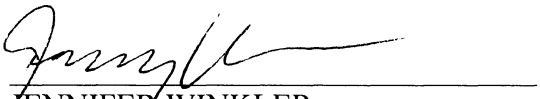
D. CONCLUSION

The judge's imposition of the POAA sentence exceeded the scope of permissible judicial fact finding at sentencing. This Court should remand for the imposition of a standard range sentence.

DATED this 18TH day of May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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[9] Under RCW 9.94A.537(2), "[i]n any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing." A POAA sentence is not an exceptional sentence, State v. Ball, 127 Wn. App. 956, 960, 113 P.3d 520 (2005), review denied, 156 Wn.2d 1018 (2006), nor is it imposed based on an aggravating factor under RCW 9.94A.535(3).

APPENDIX

that cause number.

MR. STEPHENS: Your Honor, for the record, Mark Stephens appearing on behalf of Jeffrey Brinkley. I've reviewed those documents prior to Ms. Wetmore handing them forward. I understand the change in the score due to the recent verdict.

THE COURT: All right.

MS. WETMORE: Thank you, Your Honor. The recommendation is obviously that that run concurrently with cause number 12-1-00210-4. On those charges the defendant was found guilty after a jury trial on January 17th of 2013. Charges are: Count one, first degree robbery, class A felony, violent offense. It's a level nine offense. He has a score of 16 on that matter. There's 18 months of community custody associated with that charge.

Count two is second degree kidnapping. It's a class B violent offense. It's a level five offense, with a score of 16, and 18-month community custody that attaches to it.

Count three was assault two. It's a class B violent offense. It's a level four offense. Eighteen months of community custody attaches to that. And he has a score of 16.

Your Honor, the State's recommendation on these

cases is life without the possibility of parole. Under RCW 9.94A.030(36), the most serious offenses are defined. And under that definition, the defendant has two prior convictions for strike offenses. I am at this time filing copies which I have provided to counsel as well as an opportunity for the Court to previously review Judgment and Sentence for cause number 96-C-02660-0. It's a charge of first degree robbery. Cause number 98-1-02645-7 charges of second degree robbery and second degree assault.

I'm asking that the Court sentence the defendant on each of the three charges to life without the possibility of parole, $500 victim penalty assessment, $100 DNA sample fee, court costs, and attorney's fees, and a lifetime prohibition against contact with Kenny Easley.

THE COURT: All right. Anything else before I go to counsel?

MS. WETMORE: No, sir.

THE COURT: Mr. Stephens.

MR. STEPHENS: Thank you, Your Honor. I apologize for being late. I was preparing paperwork for Mr. Brinkley's appeal.

THE COURT: No problem.

MR. STEPHENS: So, at this time I will hand

attorneys have said, this is the time to do so.

THE DEFENDANT: Yeah. I'd like to add to what my attorney said that the prosecution picked the winners and losers in this case. They decided to believe everything Kenny Easley had to say. The prosecution not once came and asked me what happened that day. I should have testified in my trial, and I didn't. I should have explained to the jury my side of the story, and I didn't.

The people in the courtroom right now are my family, and I love them. And my fight is definitely not over. It's just now starting. I've sat on myself for the whole week thinking about what happened at my trial. And the prosecution took the word of an admitted liar, somebody that lied about everything that happened that day so he could lessen his punishment. And they made me out to be the bad guy. They blamed me for a murder that he went to my house to commit. They blame me for that murder. That's why I'm getting struck out right now and he's not. He had two strikes also.

I just hope and pray that somebody in the justice system will see through the unbelievable amount of lies that were told during this case. That's all I got to say.

THE COURT: Okay. Thank you. First, let me

say this: I am actually always heartened when we do a sentencing and people show up in support. Normally what happens is the courtroom is empty, and there's just the attorneys and the defendant here. And I think that that is probably the saddest thing about our system and a thing that makes it the most sort of disappointing and risky. So when a person has support, there's hope. And that's a good thing.

The other thing is I will echo Mr. Stephen's comments about the sentence in this matter. The sentence in this matter, basically the Court has no discretion. I have to impose what's mandated by statute, what's mandated by the legislature. And then it goes up on appeal.

One thing about the facts of this case -- and I hear what you're saying, Mr. Brinkley. I hear you loud and clear. I don't have a comment on it because I don't know enough about it to comment, which is sort of another unfortunate feature of the system. What I heard is what the jury heard. What I know about the case -- I don't know anything about the backstory. I don't know anything about the details of the relationships between the individuals. What I know is what the jury heard. And from what I saw, one of the things that I can say about the case and the facts that I saw is that this is

a series of unfortunate decisions. And this is the result today for whatever reason.

So, I'm going to go ahead and on cause number ending 14-7, the firearms charge, I'm going to follow the recommendation for 87 months, which is the low end of the standard range, and the legal and financial obligations, the $500 victim penalty assessment, $100 DNA fee. I'm going to make a finding that Mr. Brinkley is indigent and waive court costs and attorney's fees. So that's a total of $600, $25 minimum payment, 36 months to pay it back, due 60 days after release from confinement, which is, at this point, sort of just a statement.

With regard to the matter that went to trial, on count one, as was indicated, the required sentence is life without possibility of parole. And count two and three, it doesn't really matter.

In terms of the legal financial obligations, the same; $500 victim penalty assessment, $100 DNA fee, waive court costs and attorney's fees. And I will impose the lifetime no-contact order with Kenny Easley. And I will impose the 18 months of community custody on each count.

So, in terms of the general warnings, Mr. Brinkley, I have to tell you these things. The first is that --

and I think you know these, but I'm going to repeat them anyway for requirements of sentencing. The first is that when you are sentenced on a felony, you lose your right to possession a firearm. You know that, right? You may not possess, own, or have under your control a firearm unless your right to do so has been restored by a court of record. Do you understand that right?

THE DEFENDANT: Yes.

THE COURT: And you're going to be required to submit a biological sample for DNA. Do you understand that also?

THE DEFENDANT: Yes.

THE COURT: And you're going to lose your right to vote in the state of Washington. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you also understand that I've sentenced you to a third strike. And you understand the implications of that, correct?

THE DEFENDANT: Yep.

THE COURT: And you've had an opportunity to discuss with your attorney what that means, correct?

THE DEFENDANT: Yes.

THE COURT: And on the cause number ending -- the 12 cause number ending 210-4, that guilty

determination was made by a jury at trial. And because it was a trial, that means you have a right to appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And the appeal has to be filed within 30 days of today's date. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And there's a motion and declaration and order for indigency up here so that the appeal can be done at public expense. And the declaration basically indicates that you have no assets or income. Is that correct?

THE DEFENDANT: Yes.

THE COURT: So I'm going to go ahead and sign that order.

I also wanted to note for the record that I did have an opportunity to review the offenses, the strike offenses on which the third strike is based. One is from -- it's a '96 cause number from King County. It's a robbery in the first degree where Judge McCullough was the sentencing judge. It appears that that sentence was imposed June 28, 1996.

And I also have a robbery second degree charge, a '98 cause number from Spokane Superior Court. That offense was sentenced the 29th January of 1999 in front

of Judge Donahue.

Anything else?

MS. WETMORE: Your Honor, just to clarify for the paperwork, you only sentenced to life on count one. I'm assuming you are sentencing to life on counts two and three as well?

THE COURT: Yes.

MS. WETMORE: Legal financial obligations on the trial case, $25 a month --

THE COURT: The same, yes.

MS. WETMORE: Thank you, sir. I have nothing further.

THE COURT: All right. So, Mr. Brinkley, I wish you Godspeed --

THE DEFENDANT: Thank you, Your Honor.

THE COURT: -- for what it's worth.

THE DEFENDANT: Thank you.

MR. STEPHENS: Briefly, Your Honor, for the record, we will waive presence for signing of the Judgment and Sentence.

THE COURT: Thank you.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72852-1-I
	)	
JEFFREY BRINKLEY,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MAY, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] JEFFREY BRINKLEY
DOC NO. 751718
WASHINTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 18 PM 4:26

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MAY, 2015.

X Patrick Mayovsky