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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 92979-3

NO. 72852-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY BRINKLEY

Petitioner.

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

The Honorable Eric Z. Lucas, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jeffrey Brinkley asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' published decision in State v. Jeffrey Brinkley, filed February 1, 2016 ("Opinion" or "Op."), appended to this petition.

C. ISSUE PRESENTED FOR REVIEW

Under current state and federal law, a judge rather than a jury may find the "fact of" a prior conviction. But the Persistent Offender Accountability Act[1] (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 petitioner's

[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).

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

D. STATEMENT OF THE CASE

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

Brinkley appealed. CP 44-55 (mandate and opinion of Court of Appeals in case no. 69851-6-I). On appeal, he argued the jury was instructed on an uncharged alternative means of committing first degree robbery. CP 48. Alternatively, he argued, the trial court violated the prohibition on double jeopardy by failing to merge the assault and the robbery. CP 51. As to the first argument, the Court of Appeals agreed but found the error was harmless. CP 49-50. As to the second argument, the Court agreed and concluded that "[b]ecause Brinkley's assault conviction merges into the robbery conviction, we remand with instructions to vacate the assault conviction and for resentencing." CP 55.

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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.

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[3] and Blakely v. Washington[4] 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 scores 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 scope of the "fact of criminal conviction" exception under Apprendi.

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[3] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[4] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Moreover, prior appellate cases challenging the validity under the POAA did not control because they did not address this specific issue. CP 24-25.

The sentencing court rejected Brinkley's argument and entered an order amending the judgment and sentence to dismiss the assault conviction. CP 18. The court ruled that the POAA life sentences on the other counts remained in effect. CP 8.

Brinkley again appealed. CP 1. He argued the superior court violated his constitutional rights to have a jury determine all the facts necessary for a POAA sentence.

In a February 1, 2016 published decision, the Court of Appeals rejected this argument. The Court held the facts at issue were within the Apprendi prior conviction exception, because they were "intimately related" to the prior convictions under State v. Jones, 159 Wn.2d 31, 149 P.3d 636 (2006) (permitting judge to find community custody status for purposes of offender score calculation). Op. at 1.

Brinkley now asks this Court to accept review, reverse the Court of Appeals, and order the case remanded to the superior court for the imposition of a standard range sentence.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3) BECAUSE THE SENTENCING COURT VIOLATED BRINKLEY'S CONSTITUTIONAL RIGHTS WHEN A JUDGE, RATHER THAN A JURY, MADE A FINDING THAT HE WAS A "PERSISTENT OFFENDER" UNDER THE POAA.

"The problem with Almendarez-Torres[5] arises because the government is rarely satisfied to do what the prior convictions exception permits it to do. . . . That is, the government is almost never content to prove 'the fact of a prior conviction.'" Matthew Engle, The Prior Convictions Exception - A Comment, 72 Wash. & Lee L. Rev. 473, 475 (2015). 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." No mechanism exists for a jury to make such findings, so Brinkley must be sentenced within the standard range.

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[5] Almendarez-Torres v. United States, 523 U.S. 224, 244, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

1. The constitution[6] requires 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.

Later, in Blakely, 542 U.S. at 313-14, that 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), this 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." This 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 stated they were preserving a rule exemplified by Almendarez-Torres, 523 U.S. at 244, 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 Supreme 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).

Whether a prior conviction qualifies as "strike" under the POAA implicates Apprendi and the Sixth Amendment jury trial right. State v. Irby, 187 Wn. App. 183, 206, 347 P.3d 1103 (2015), review denied, ___ Wn.2d ___ (Feb. 10, 2016).

Brinkley acknowledges, however, that since Apprendi and Blakely were decided, Washington courts have held that, for the purposes of the POAA, a judge, not a jury, may make certain 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"); 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 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 in the superior court and the Court of Appeals, no Washington case has explicitly addressed whether the temporal relationships between 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.").

2. Under *Apprendi* itself, the "fact of a prior conviction" is narrow in scope and the findings necessary under RCW 9.94A.030(37)(a) fall outside such a determination.

Brinkley is aware of no Washington case addressing this precise issue. Thus, 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). Moreover, the primary case relied on by the Court of Appeals is not on point and was, in any event, wrongly decided.

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.

Here, the Court of Appeals nonetheless determined that, based on this Court's broad interpretation of the prior conviction exception in Jones, 159 Wn.2d 231, Brinkley's claims should be rejected. Op. at 4-5. In Jones, this Court determined that the Sixth Amendment permitted a judge to determine whether a defendant was on community custody at the time of the charged crime—a fact that would increase the offender score and therefore the sentencing range—because such a determination was "intimately related" to the prior conviction. Jones, 159 Wn.2d at 245.

But Jones does not control the outcome here because rather than the analysis of as series of temporal relationships, it involved a binary yes/ no inquiry: Was the defendant on community custody, or was he not?

Brinkley also respectfully asserts that, even assuming that Jones applies by analogy, the case goes too far in its application of the "prior conviction" exception. Because the opinion runs contrary to the Sixth Amendment right to a jury trial, Jones is both incorrect and harmful, and should be rejected. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

In Jones, this Court stated that:

> Similar to the determination of a fact or character of prior conviction, a sentencing judge can readily determine a defendant's probation status on the date he committed the present crime merely by reviewing court records relating to that prior conviction. . . . It may rely on the judgment and sentence from the prior crime, the criminal history submitted, and those documents flowing from the prior conviction and sentence, such as the presentence report and department of corrections' records. See, e.g., RCW 9.94A.480, .500.

Jones, 159 Wn.2d at 244-45.

But, as the dissent persuasively argues, community custody status is not, in fact, sufficiently "intimately related" to the fact of a prior conviction for it to come within the exception identified in Apprendi. That is because the determination may involve "numerous factors requir[ing] the trial court to look beyond the prior conviction to determine the actual facts." Jones, 159 Wn.2d at 251 (Sanders, J., dissenting). Moreover, "[u]nlike a prior conviction, a jury has never previously

determined that these defendants were on community placement at any particular point in time." Id. Therefore, according to the dissent, a judicial determination of community custody status violates the Sixth Amendment. Id.

Unlike Jones, the Ninth Circuit's decision in Butler is consistent with Apprendi and the Sixth Amendment jury trial right. There, the court determined that a defendant's probation status, used to impose an enhanced sentence, did not fall within the narrow prior conviction exception. "That the defendant was initially sentenced to probation should be ascertainable from the conviction documents and, we may assume, would be a fact coming within the prior conviction exception." Butler, 528 F.3d at 645. However, "[t]he fact that a defendant was on probation at the moment of the current crime . . . is not reflected in the documents of a prior conviction nor, for that matter, may it be conclusively inferred from those documents." Id. at 645-46. Under California law, for example, a probation term may be terminated early, or be extended, or be revoked as a result of a probation violation, and such changes would not appear in the original conviction documents, as they would occur later. Id. at 646.[8] "That determination . . . can only be made by drawing inferences

[8] Cf. Jones, 159 Wn.2d at 250 (Sanders, J. dissenting) (explaining multitude of variables present in determining community custody status at

from the prior conviction documents and by considering facts and circumstances that occurred after the prior conviction." Id.

United States v. Salazar-Lopez is also instructive. 506 F.3d 748 (9th Cir. 2007), cert. denied, 553 U.S. 1074 (2008). There, 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 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

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any given time) (citing State v. Jones, 126 Wn. App. 136, 143-44, 107 P.3d 755 (2005), rev'd, 159 Wn.2d 31, 149 P.3d 636 (2006)).

court document—may exceed the scope of permissible judicial fact-finding.

This Court should accept review, hold that Jones does not control, and hold that, under Apprendi itself, the "fact of a prior conviction" is narrow in scope, and the findings regarding the temporal relationships between prior crimes and convictions necessary under RCW 9.94A.030(37)(a) (offense → conviction → offense → conviction → offense→ conviction) fall outside the narrow exception.

3. Even if the date of a crime appears on a judgment and sentence, *Apprendi* is still implicated.

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.[9] But the date listed on the judgment and sentence may or may not coincide with the precise date of the commission of the offense. Thus, for this reason as well, a jury should be required to make the necessary findings regarding the relationship between the dates of the prior crimes and convictions.

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[9] 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)).

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"). CP 80-177. Under the fact of prior conviction exception, the sentencing judge was entitled to find that prior convictions had occurred in 1996 and 1999. 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. Yet Brinkley or another defendant in his position may have had no incentive to challenge a date of offense on conviction paperwork.

The Court of Appeals' decision in Irby is instructive in this respect. 187 Wn. App. 183. There, the 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 204-08.

The 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, the Court recognized, the offenses are not *legally* comparable. Id. at 208.

Regarding the second possible method of demonstrating comparability, the 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, 187 Wn. App. at 206-07 (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. Irby, 187 Wn. App. at 207.

In the superior court, the trial court found Irby's birthdate was established by certified records from *other* court cases and concluded that Irby was almost 18 when the crime was committed. The Court of Appeals 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. Irby, 187 Wn. App. at 207-08 (citing Ortega, 120 Wn. App. at 171-72).

On appeal, however, the State argued that a 36-month age disparity between Irby and the 1976 complainant 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.'" Irby, 187 Wn. App. at 208.

The Court of Appeals 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. (citing Lavery, 154 Wn.2d at 249). The fact of Irby's birthdate 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.'" Irby, 187 Wn. App. at 208 (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. Also as in 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.

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

To impose the life sentence, the superior court judge had to make factual findings regarding the necessary temporal relationships beyond the mere "fact" of the prior conviction. But the constitution required a jury to make such findings beyond a reasonable doubt. This Court should accept review and 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).[10] Thus, this Court should remand for sentencing within the standard range.

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[10] 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).

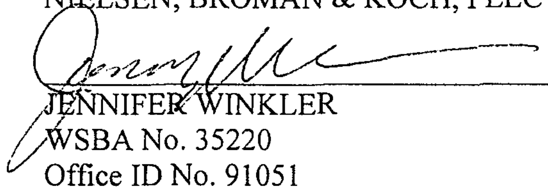
D. CONCLUSION

For the foregoing reasons, this Court should accept review under RAP 13.4(b)(3).

DATED this 22nd day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Petitioner

APPENDIX

COURT OF APPEALS
STATE OF WASHINGTON
2016 FEB -1 AM 11:0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHNGTON, Respondent, v. JEFFREY LAFATE BRINKLEY, Appellant.	NO. 72852-1-I DIVISION ONE PUBLISHED OPINION FILED: February 1, 2016

LAU, J. — Appellant Jeffrey Brinkley was sentenced under the Persistent Offender Accountability Act (POAA), Washington's "three strikes" recidivism law. Brinkley claims the trial court erred when it determined the "temporal relationship" of his prior convictions, in violation of the rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. N.J., 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Because the facts here fall squarely within the Apprendi exception and are facts "intimately related" to the conviction under State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006), we affirm the judgments.

FACTS

In 2011, Brinkley was convicted of one count of first degree robbery, one count of second degree kidnapping, and one count of second degree assault based on a dispute over a drug debt.

At sentencing in January 2013, the State provided certified copies of Brinkley's two prior judgments and sentences. In the first, Brinkley pleaded guilty to first degree robbery in King County. The face of the certified judgment and sentence indicates the crime occurred on March 30, 1996, and he pleaded guilty on July 1, 1996. In the second, Brinkley pleaded guilty to second degree robbery in Spokane County. The face of the judgment and sentence indicates the crime occurred on November 26, 1998, and he pleaded guilty on January 29, 1999.

The sentencing court reviewed the certified copies of the prior judgments to determine Brinkley's status as a persistent offender. He sentenced Brinkley to life imprisonment on each charge. On direct appeal, we reversed and vacated Brinkley's assault conviction on double jeopardy grounds and remanded for resentencing.[1]

At resentencing, Brinkley contended a jury was constitutionally required to determine his status as a persistent offender. He argued the "temporal relationships" between the convictions was necessarily a jury question. Report of Proceedings (RP) (Nov. 21, 2014) at 3-5. The court disagreed, amended the judgment to reflect the dismissed assault conviction, and left the life sentences on the two remaining counts unchanged.

Brinkley appeals.

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[1] State v. Brinkley, noted at 179 Wn. App. 1053, 2014 WL 953487.

ANALYSIS

Brinkley argues his due process rights under the Sixth and Fourteenth Amendments of the United States Constitution were violated when the trial court determined he was a persistent offender under the POAA.[2]

By statute, a "[p]ersistent offender" is defined as someone who at the time of sentencing for a current most serious offense, has been convicted twice before of most serious offenses under RCW 9.94A.525. The statute states in part:

> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
>
> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

RCW 9.94A.030(38)(a)(i)-(ii).

Brinkley argues his persistent offender sentence violates the rule in Apprendi. He claims the constitution requires a jury to find the temporal relationship between convictions and offenses, "i.e. the requisite offense → conviction → offense → conviction → offense → conviction." Br. of Appellant at 15.

Under the statute, the court must determine the date of the prior convictions to see if they occurred before commission of the present offense. Next, the court must

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[2] Brinkley also suggests a state constitution claim. Article I, section 21 of the Washington State Constitution provides that "[t]he right of trial by jury shall remain inviolate. . ." But as Brinkley acknowledges, in State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), the court rejected the contention that the state constitution separately prohibits fact-finding under the POAA.

determine the date of one of the earlier offenses and decide whether it followed the date of the other prior conviction. The certified judgments presented at Brinkley's sentencing hearing encompassed all of these facts.

Recidivism need not be pleaded and proved to the jury beyond a reasonable doubt. In Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), the Court held that prior convictions are sentence enhancements and not elements of a crime. Therefore, they need not be submitted to the jury because "the sentencing factor at issue here—recidivism—is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." Almendarez-Torres, 523 U.S. at 243.

In Apprendi, the Court held that "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 490. Brinkley does not dispute that Washington's persistent offender statute is a recidivism statute.

Washington courts have repeatedly rejected assertions similar to those made by Brinkley. In Jones, the court considered whether an increase in the offender score for crimes committed while on community supervision must be submitted to the jury. The defendant argued that Apprendi's prior conviction exception did not include facts that were merely "related" to a prior conviction. Rejecting this claim, the court explained:

> [T]he prior conviction exception encompasses a determination of the defendant's probation status because probation is a direct derivative of the defendant's prior criminal conviction or convictions and the determination involves nothing more than a review of the defendant's status as a repeat offender. In this regard, the community placement conclusion does not implicate the core concern of Apprendi and Blakely—that is the

> determination does not involve in any way a finding relating to the present offense conduct for which the State is seeking to impose criminal punishment and/or elements of the charged crime or crimes. To give effect to the prior conviction exception, Washington's sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts "intimately related to the prior conviction" such as the defendant's community status.

Jones, 159 Wn.2d at 241 (emphasis added). Under Jones, Washington courts may determine "as a matter of law" facts "intimately related to the prior conviction."[3]

In State v. Witherspoon, 180 Wn.2d 875, 893, 329 P.3d 888 (2014), the court reaffirmed its adherence to the rule that the POAA procedures do not violate federal or state due process. Strike offenses need not be proved to a jury:

> We have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence. In Manussier, 129 Wn.2d [652, 681-84, 921 P.2d 473 (1996),] we held that because other portions of the SRA utilize a preponderance standard, the appropriate standard for the POAA is by a preponderance of the evidence. We also held that the POAA does not violate state or federal due process by not requiring that the existence of prior strike offenses be decided by a jury. This court has consistently followed this holding. We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. See State v. McKague, 172 Wn.2d 802, 803 n.1, 262 P.3d 1225 (2011) (collecting cases); see also 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 do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA).
>
> . . . .
>
> Accordingly, it is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offense be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

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[3] Brinkley filed no reply and his opening brief ignores Jones. He also cites to cases arguably critical of the prior conviction exception. We are not persuaded.

Witherspoon, 180 Wn.2d at 892-93 (emphasis added).

Brinkley relies on inapposite cases.[4] See Butler v. Curry, 528 F.3d 624, 644-45 (9th Cir. 2008) (question of whether defendant committed crime while on probation involved facts occurring after prior conviction and was therefore outside the scope of Apprendi); United States v. Salazar-Lopez, 506 F.3d 748 (9th Cir. 2007) (for crime of illegal reentry, whether defendant was removed from the country after felony conviction involved finding facts outside of Apprendi); State v. Irby, 187 Wn. App. 183, 147 P.3d 1103 (2015) (in determining factual comparability of prior offenses under POAA, trial court considered facts outside prior convictions and violated Apprendi).

We conclude that Brinkley's overly narrow view of Apprendi is not supported. Jones and Witherspoon control. To determine whether Brinkley is a persistent offender "involves nothing more than a review of the defendant's status as a repeat offender." Jones, 159 Wn.2d at 241. The court is entitled to consider "facts intimately related to the prior convictions" such as the dates of conviction, offense dates and the underlying offense. Jones, 159 Wn.2d at 241. These facts all appear on the face of the judgments.

Indeed, other jurisdictions addressing Brinkley's specific contention rejected it.

In People v. Rivera, 362 Ill. App. 3d 815, 841 N. E. 2d 532 (2005), the court considered a three strikes law that, as in Washington, required the trial court to find the second felony was committed after conviction for the first, and the third after conviction for the second. The Rivera court rejected the same argument made by Brinkley:

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[4] At oral argument in this court, appellate counsel candidly admitted disagreement with Jones.

> We reject defendant's argument that defendant's age and prior convictions and the timing, degree, number and sequence of defendant's prior convictions are 'facts other than the fact of a prior conviction' that the State is required to submit to a jury and prove beyond a reasonable doubt. As a result, the exception articulated in Apprendi applies to this case and defendant's contention that the circuit court may not rely on the [presentencing investigation] for determining those ancillary elements fails.

Rivera, 362 Ill. App. 3d at 821.

In United States v. Grisel, 488 F.3d 844 (9th Cir. 2007), the Ninth Circuit also rejected a similar contention involving prior guilty pleas. The defendant claimed that the dates of his prior convictions were not part of the "fact" of his prior convictions. The court disagreed, holding that the date of offense constitutes a part of the fact of conviction:

> When, as here, the face of the document demonstrating Defendant's prior conviction includes the date of the offense, the date is just as much a part of the plea as is the nature of the offense described on the face of the document.

Grisel, 488 F.3d at 847.[5]

In sum, the "prior conviction" exception includes not only the fact of the conviction itself but also "facts intimately related to the prior conviction." Jones, 159 Wn.2d at 241. As the Fourth Circuit observed, a prior conviction cannot "be reduced to nothing more than that the defendant was at some prior time convicted of some crime" and therefore, should include "other operative facts." United States v. Thompson, 421 F.3d 278, 282 (4th Cir. 2005). The dates of Brinkley's prior convictions, the dates of the prior offenses,

[5] The State cites to additional cases from other jurisdictions holding that judicial fact-finding under Apprendi may include the date of the offense. See U.S. v. Elliott, 703 F.3d 378, 381-82 (7th Cir. 2012) (court could find crimes committed over five days were "committed on occasions different from one another"); Commonwealth v. Gordon, 596 Pa. 231, 251, 942 A.2d 174, 186 (2007) (concluding that "logical and temporal relationship between predicate crimes" is not fact-finding).

and the offenses resulting in the prior convictions are all facts that fall within the facts of prior conviction exception.

CONCLUSION

We affirm Brinkley's judgment and sentence.

Jau, J.

WE CONCUR:

Trickey, J

Becker, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFREY BRINKLEY, Petitioner.	)))))))))	SUPREME COURT NO. _______ COA NO. 72852-1-I

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 22ND DAY OF FEBRUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF FEBRUARY, 2016.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

February 22, 2016 - 2:34 PM

Transmittal Letter

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