No. 31187-2
(consolidated with No. 31188-1)

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ARMANDO LOPEZ,

Appellant.

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

BRIEF OF APPELLANT

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10. In the absence of sufficient evidence the trial deprived Mr. Lopez of due process by entering convictions for first degree assault.

11. The trial court deprived Mr. Lopez of his right to a jury trial in violation of the Sixth Amendment and Article I, section 22 when the court instructed the jury in a manner which relieved the State of its burden of proving each element of the offense of first degree assault.

12. The trial court deprived Mr. Lopez of due process in violation of the Fourteenth Amendment when the court instructed the jury in a manner which relieved the State of its burden of proving each element of the offense of first degree assault.

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

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

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. Where there is no actual battery, a specific intent to cause injury or fear is an essential element of assault. Instructions 16 through 22, the "to convict" instructions, omitted this element. Do the instructions relieve the State of its burden of proof?

2. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a reasonable doubt. Where there is no actual battery, a specific intent to cause injury or fear is an essential element of assault. In the absence of

proof of that element, do Mr. Lopez's convictions for first degree assault deprive him of due process?

3. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court instruct the jury in manner which conveys this requirement. Instruction 15 suggests to the jury that if a person acts recklessly or negligently in firing a gun into a building, that the jury may find the requisite intent necessary for first degree assault. Does Instruction 15 relieve the State of its burden of proving the elements of first degree assault?

4. The Supreme Court has recognized that in limited circumstances "routine booking questions" are not custodial interrogation for purposes of the Fifth Amendment and *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). That exception does not apply where jail staff should know the question is reasonably likely to elicit an incriminating response. Did the trial court err in concluding the jail officers' questions to Mr. Lopez regarding gang affiliation following his arrest for a drive-by shooting was not custodial interrogation?

5. Expert opinion is proper under ER 702 where the witness (1) possesses sufficient knowledge, experience, and familiarity with the matter to offer an opinion; (2) the opinion is rationally related to this experience and knowledge; and (3) the opinion is helpful to the jury. The trial court permitted the State to offer the testimony of a police officer as a gang expert where the jury was equally knowledgeable of the subject matter of the testimony. Did the trial court abuse its discretion in admitting the testimony?

6. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. Where a prior conviction elevates the punishment for an offense the Supreme Court has held it is an element of the offense. Here, Mr. Lopez's two prior offenses elevated the range of punishment for his offense and thus were elements of first degree assault. Instructions 16 through 22, the "to convict" instructions, omitted this element. Do the instructions relieve the State of its burden of proof?

7. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury

determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Lopez's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had at least two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

8. The right to due process of law is strongly protected under Article I, sections 3 and 22. Is Mr. Lopez's right to due process of law violated by imposition of a sentence of life without the possibility of parole based on information that was not proved reliable and accurate?

9. The Equal Protection Clauses of the Fourteenth Amendment and Article I, section 12 require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, statutes authorize greater penalties for specified offenses based on recidivism. However, in some instances the prior convictions are treated as "elements" that must be proven to a jury beyond a reasonable doubt, and in other instances, they are treated as "sentencing factors" proven to a judge by a mere preponderance of the evidence. Where no rational

basis exists for this arbitrary distinction and its effect is to deny some persons the protections of a jury trial and proof beyond a reasonable doubt, does it violate equal protection?

C. STATEMENT OF CASE

Early one morning, Maria Rincon and her family were awoken by gunshots outside their home in Outlook. The Rincon family was familiar with gunshots, as their home had been the target of drive-by shootings on four or five prior occasions. RP 213. Presumably this was due to the family association with the North Side Varrio (NSV) gang, a group associated with the Norteños. RP 212, 271, 840.

Immediately following the shooting, witnesses saw a car leaving the area of the shooting and followed it several miles out of Outlook. RP 355-57. Police subsequently stopped the car driven by Mr. Lopez with three other inside. RP 462-70. The four men were arrested, advised of their rights, and taken to the Yakima County jail. P 137.

At the jail, and despite having asserted their right to remain silent, the four were each asked whether they were members of a gang. They were told by jail staff that the information was needed only to ensure they were safely housed in the jail. RP 132. Mr. Lopez and the others acknowledged they were members Little Valley Locos (LVL) a

Sureños gang. RP 116-20. That information was then provided to prosecutors who offered it at the subsequent trial. RP 601-05.

Police found three guns on the roadside along the route the car took from Outlook to the point of the stop. RP 540. Ballistics and tool mark analysis indicated the three guns matched bullets and magazines found at the Rincon home. RP 644-54.

The State charged Mr. Lopez with drive-by shooting, unlawful possession of a firearm, and seven counts of first degree assault each with three firearm enhancements. CP 33-35. The State also alleged Mr. Lopez was a persistent offender. CP 35.

A jury convicted Mr. Lopez as charged, except for the persistent offender allegation. CP 84-108. That allegation was determined by the trial court by a mere preponderance of the evidence. CP 115-18.

D. ARGUMENT

1. Instructions 16-22 omitted an essential element of the crime of first degree assault.

a. The state must prove and a jury must find each element of an offense beyond a reasonable doubt.

"The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.'" *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2156 (2013). This right,

together with the Fourteenth Amendment Due Process Clause, requires the State prove each element to a jury beyond a reasonable doubt. *United States v. Gaudin,* 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995); *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A similar requirement flows from the jury-trial guarantee of Article I, section 22 and the due process provisions of Article I, section 3 of the Washington Constitution. *State v. Mills,* 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. *Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

b. A to-convict instruction must include each essential element of the offense.

"A 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, "an instruction purporting to list all of the elements of a crime must in fact do so." *Id.* (citing *State v. Emmanuel,* 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). A reviewing court may not to look to other jury instructions to supply a missing element from a "to convict" jury instruction. *State v. Sibert,*

168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63).

Here the to-convict instructions on each of the assault charges omit at least one essential element of the offense.

c. The to-convict instructions omitted essential elements of first degree assault.

The relevant provisions of RCW 9A.36.011 provide:

> A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death . . .

However, the assault statue does not contain all the elements of the crime. Rather, the Supreme Court has long held that the three common law definitions of assault must also be employed in conjunction with the statutory elements. *State v. Wilson,* 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Those definitions are:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

Id. But beyond simply defining the term, the Court has made clear "specific intent either to create apprehension of bodily harm or to cause

bodily harm **is an essential element**" of assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (emphasis added.). The Court reiterated its holding a year later saying "[a]s we settled in *Byrd,* specific intent represents an 'essential element' and its omission results in manifest error." *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). Thus, both *Byrd* and *Eastmond* concluded that because they constitute an essential element of the offense it was error not to instruct the jury on the relevant definition of assault.

Because in those cases no definition was provided to the jury, neither *Byrd* nor *Eastmond* addressed the issue at hand; whether that essential element must be contained in the to-convict. But the answer to that question flows readily from those case as well as the Court's steadfast insistence that the to-convict must include every essential element of the offense. *Smith*, 131 Wn.2d at 263; *Emmanuel,* 42 Wn.2d at 819. None of the to-convict instructions in this case contained those essential elements. CP 61-67 (Instructions 16-22).

d. <u>This Court must reverse Mr. Lopez's assault convictions</u>.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct.

1827, 144 L. Ed. 2d 35 (1999)). However, the Court held "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at, 265). In other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *Mills*, 154 Wn.2d at 15 n.7, (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet that burden in this case.

The omission of specific intent allowed the jury to rely instead on a *mens rea* that amounts to negligence or recklessness. The jury was able to conclude Mr. Lopez committed or was an accomplice to an assault merely by shooting into a building which happened to be occupied. The jury was not required to find that Mr. Lopez or an accomplice specifically intended to injure or cause fear in any specific person.

The harm which flowed from that failure was amplified by the court instructing the jury on the common-law theory of transferred intent. CP 60; RP 950. That instruction, together with the failure to instruct on specific intent to harm or cause fear, permitted what

amounts to a drive-by shooting or unlawful discharge of a weapon to be elevated to several counts of first degree assault without any proof of a heightened *mens rea*.

Because Instructions 16 through 22 "relieve[] the State of its burden to prove every element of a crime [they] require[] automatic reversal." *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at 265). The same result is required under *Neder*, as the State cannot prove the error was harmless beyond a reasonable doubt. Thus, this Court must reverse Mr. Lopez's assault convictions.

2. **The State did not prove each essential element of the crimes beyond a reasonable doubt.**

a. The State must prove each element of the charge beyond reasonable doubt.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Gaudin*, 515 U.S. at 510; *Winship*, 397 U.S. at 364; *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process "indisputably entitle[s] a criminal defendant to 'a . . . determination that he is guilty

of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77 (quoting *Gaudin*, 515 U.S. at 510).

b. The State did not prove each of the elements of first degree assault.

RCW 9A.36.011 provides:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> (c) Assaults another and inflicts great bodily harm.

In addition, and as discussed above, where there is not an actual battery the specific intent to either cause fear or cause injury in a specific person is an essential element of an assault. *Eastmond*, 129 Wn.2d at 502 (citing *Byrd,* 125 Wn.2d at 713-14). *Eastmond* observed

> These two forms of assault . . . require inapposite elements of fear: although the State need not prove fear in fact to support a conviction for assault by attempt to cause injury, fear is a necessary element of assault by attempt to cause fear.

129 Wn.2d at 503-04.

The State did not prove Mr. Lopez or an accomplice had the intent to cause great bodily injury to a specific person. Further, the

State offered no evidence to prove Mr. Lopez or an accomplice had such a specific intent to cause injury or fear to a specific person. The State never established that Mr. Lopez or an accomplice knew who was inside the building. Necessarily, the State then failed to prove a specific intent. Instead, the State operated under the belief that the theory of transferred intent was sufficient the bridge the gap in evidence. However, it does not.

In *State v. Elmi*, the Court recognized that under the first degree assault statute the specific intent to cause great bodily injury to a specific person could transfer to other unintended victims. 166 Wn.2d 209, 218, 207 P.3d 439 (2009). Critically, the Court recognized that transfer can only occur where the State can first establish a specific intent to harm a specific person. *Id.* Here, the State did not offer any proof of that threshold fact.

Elmi did not hold that anytime a person shoots into a building they are guilty of one count of assault for each person inside. *Elmi*, instead, presents a much different scenario, as the defendant knew his intended victim was inside her home when he shot at her. 116 Wn.2d at 218-19. Thus, he plainly had formed the specific intent either to injure her or cause fear. That intent was then transferred to the unintended

victims. Here, the State offered no evidence that Mr. Lopez or any of his alleged accomplices knew who was inside the home. In the absence of such proof the State could not prove Mr. Lopez or an accomplice had a specific intent to cause great bodily injury to a specific person. Because the State did not prove Mr. Lopez or an accomplice had a specific intent to cause great bodily injury to a specific person, under RCW 9A.36.011 there was no intent which transferred to other persons. The State did not prove Mr. Lopez or an accomplice assaulted any of the named victims.

In any event, the to-convict instructions in this case preclude application of the statutory transferred-intent theory addressed in *Elmi*. Each to-convict lists a separate victim, and specifies that Mr. Lopez or an accomplice acted with intent to inflict great bodily injury on that person. CP 61-67. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn. 2d 97, 102, 954 P.2d 900 (1998). Thus, even if *Elmi* would not require the State prove a specific intent to injure each person, the State assumed that burden by virtue of the instructions to the jury. Each of the instructions required the State

prove for each named victim that Mr. Lopez or an accomplice acted with the specific intent to assault the named victim, and that he intended to cause great bodily injury to the named victim. Moreover, because none of the victims was actually struck, the State was also required to prove a specific intent to either cause injury or fear. The State offered no proof of that intent.

c. This Court should reverse Mr. Lopez's assault convictions.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Green*, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State failed to prove the necessary intent it failed to prove first degree assault and the Court must reverse Mr. Lopez's assault convictions.

3. Instruction 15 misstated the law and relieved the State of its burden of proving each element of the assault.

a. Jury instructions must inform the jury that the State bears the burden of proving each element beyond a reasonable doubt.

The Sixth and Fourteenth Amendments require the State prove each element to a jury beyond a reasonable doubt. *Gaudin,* 515 U.S. at 510. Instructions must convey to the jury that the State must prove each element beyond a reasonable doubt. *State v. Schulze,* 116 Wn.2d 154, 167–68, 804 P.2d 566 (1991). An instruction which relieves the State of that burden of proof violates this constitutional protection. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

b. Instruction 15 relieved the State of its burden of proving the specific intent necessary to convict Mr. Lopez of first degree assault.

Over defense objection, the court instructed the jury

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

CP 60 (Instruction 15); RP 952.

The State contended, and the trial court found, that *Elmi* had approved the use of this instruction. RP 950-51; *Elmi.* 166 Wn.2d at 213. However, the Supreme Court expressly declined to address whether it was appropriate to give such an instruction where the unintended victim did not suffer injury. The Court said:

> Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

Elmi, 166 Wn. 2d at 218. Indeed, the dissent chastised the majority's failure to address the instruction, "I respectfully cannot see how this court can grant Elmi's 'petition for review on the issue of transferred intent' and refuse to discuss application of the doctrine under the statute." Elmi, 166 Wn.2d at 220 (Madsen, J., dissenting, joined by Sanders and Fairhurst, JJ).

Thus, the theory of transferred intent approved in *Elmi* was that encompassed in the statutory language and was not a separate theory. 166 Wn.2d at 218 (the *mens rea* is "transferred under RCW 9A.36.011.") Because the theory is encompassed in the language of RCW 9A.36.011, it stands to reason, that the statutory theory of transferred intent is fully communicated to the jury if the jury is

instructed in terms of the statutory elements. Here the jury received such an instruction. *Compare* RCW 9.36.011; CP 61-67 (Instructions 16-22). Having instructed the jury in the statutory terms, there is no recognized basis to further instruct the jury on transferred intent. Doing so blurs the State's burden of proof if not wholly eliminating it.

Critical to the holding in *Elmi* is that the actor first had the specific intent to assault a particular person. 166 Wn.2d at 618-19. *Elmi* did not conclude that a person commits first degree assault simply by firing a gun into a building which happens to be occupied. That would be an extraordinary expansion of the crime of assault. Instead, *Elmi* is grounded in the common-sense idea that before intent may be transferred there must be an intended victim.

Instruction 15 goes far beyond the holding of *Elmi*. The instruction's included terms "mistake, inadvertence, or indifference" are terms that define recklessness or negligence and suggest those lower mental states as substitutes for intent. That is especially prejudicial in a case such as this where the State never endeavored to prove who the intended victim was. In doing so, Instruction 15 relieved the State of its burden of proving the requisite specific intent.

c. This Court must reverse Mr. Lopez's assault convictions.

Like the omission of specific intent from the to-convict instructions, Instruction 15 allowed the jury to rely instead on a *mens rea* that amounts to negligence or recklessness by its use of the terms "mistake, inadvertence, or indifference." CP 60. And as discussed previously, this prejudice was increased due to the failure to instruct on specific intent to cause fear or injury.

Because Instruction 15 "relieve[ed] the State of its burden to prove every element of a crime [it] requires automatic reversal." *Brown*, 147 Wn.2d at 339 (citing *Smith*, 131 Wn.2d at, 265). The same result is required under *Neder*, as the State cannot prove the error was harmless beyond a reasonable doubt. Thus, this Court must reverse Mr. Lopez's assault convictions.

4. The trial court erred in refusing to suppress statements obtained in violation of Mr. Lopez's constitutional rights.

a. Jail guards interrogated Mr. Lopez following his assertion of his rights.

Following his arrest, an officer read Mr. Lopez his rights and Mr. Lopez asserted those rights. RP 137. Mr. Lopez was taken to the Yakima County Jail.

At the jail, and despite his prior assertion of his rights, a jail guard, Steven Winmill, asked Mr. Lopez several questions including whether he was a member of a gang. Mr. Winmill did not tell Mr. Lopez that he did not have to answer his questions. RP 133. Indeed, Mr. Winmill testified he is required to ask every question on the standard booking form regardless of whether an inmate refuses to answer. RP 122. Mr. Winmill assured Mr. Lopez the questions "were just to make sure [he was] housed safely" in the jail. RP 132.

Despite those assurances, Mr. Winmill testified at trial that Mr. Lopez and his codefendants admitted they were "associated with Sureños." RP 601-05.

Mr. Winmill knew the information he gathered would be available to the prosecutor's office. RP 121. Mr. Winmill knew from experience that answers regarding gang membership could have criminal consequences, particularly as proof of aggravating factors. RP 122. Indeed, Mr. Winmill testified that he has previously been called as a witness to testify regarding a person's admission of gang membership. RP 130.

Mr. Lopez and his codefendants asked the court to suppress the admissions as involuntary and as violations of *Miranda*. The State

contended the interrogation consisted merely of routine booking questions and thus was not really interrogation subject to *Miranda*. RP 122.

Nonetheless, the trial court concluded the admissions were admissible. The trial court reasoned that because gang affiliation was not an element of any of the charges, the questioning did not require a defendant to comment on the charges against them. RP 157.

That conclusion is incorrect.

b. The questioning at the jail was custodial interrogation in violation of *Miranda*.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Police officers must advise suspects of their rights prior to engaging in custodial interrogations. *Miranda*, 384 U.S. at 444. A person he may invoke his "right to cut off questioning" at any time. *Id.* at 474. Once he does so, "the interrogation must cease." *Michigan v. Mosley*, 423 U.S. 96, 101, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) (citing *Miranda*, 384 U.S. at 474). If an individual's right to cut off questioning is not "scrupulously honored," statements obtained after the individual invoked his right to silence must be suppressed. *Mosley*, 423 U.S. at 104.

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response

Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The court explained the "should know" provision

> reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police

Id.

While an exception exists for routine booking questions, it is not enough to simply attach that title to custodial questioning. "[T]he nature of the procedure during which the question is asked is not decisive; the nature of the question is." *State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). A court must determine whether the booking officer "should have known" the question was reasonably likely to elicit an incriminating response. *State v. Denney*, 152 Wn. App. 665, 671, 218 P.3d 633 (2009) (citing *State v. Willis,* 64 Wn. App. 634, 637, 825 P.2d 357 (1992)).

Denney explained that in the analysis the relationship between the alleged crime and the question asked is "highly relevant." 152 Wn.

App. at 672. *Denney* concluded that while asking incoming inmates whether they had recently used drugs was a routine and valid question, it was interrogation when asked of a person arrested on a drug possession count. Similarly, asking a person about gang affiliation after their arrest for the drive-by shooting of a gang house is plainly interrogation as any reasonable questioner would know the question would elicit an incriminating response. In fact, Mr. Winmill knew that information about gang affiliation would be available to the prosecutor's office and that it could have criminal consequences. RP 121-22.

The trial court reasoned that no interrogation occurred because gang affiliation did not establish an element of the offense and thus the questions were not interrogation. RP 157. The distinction the court drew between elements and non-elements is both incorrect and irrelevant. "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." *Alleyne*, 133 S. Ct. at 2155. Here, the State alleged that the crime was committed to enhance Mr. Lopez's standing in a gang or to benefit that gang. A jury finding on those facts serves to

permit a court to impose an exceptional sentence. RCW 9.94A.535. Thus, the gang allegation is an element.[1] *Alleyne*, 133 S. Ct. at 2155.

In any event, whether a questioning is interrogation does not turn on whether the answer directly proves an element of an offense. *Miranda* itself held:

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory.

Miranda, 384 U.S. at 476-77. Here, the State argued the crimes were gang motivated. Plainly an admission of gang membership is incriminating regardless of whether it directly proves an element. The trial court's distinction was erroneous.

Although jail personnel may legitimately use such information for housing and safety purposes, it may not be used against a defendant at trial. *Denney*, 152 Wn. App at 673. Indeed, doing so will cause suspects to stop answering gang- and drug-related questions at booking,

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[1] It does not matter that the court subsequently dismissed the jury's verdict on these two elements for lack of evidence. Those facts were nonetheless elements submitted to jury. If, following a verdict of guilty of first degree theft, a judge determines the State did not prove the amount taken exceeded $5,000, and thus finds the defendant guilty on of second degree theft, it does not mean that the $5,000 threshold was not an element, only that it was not proved.

thereby compromising institutional safety. *Id.* The trial court erred in holding the jail officer's questions about gang affiliation did not constitute an interrogation for Fifth Amendment purposes.

Furthermore, the admission of the statements at trial violated Mr. Lopez's right to due process because he was told the answers would be used only for jail classification purposes. *Cf. Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (Use of defendant's post-arrest silence for impeachment violates due process because *Miranda* warnings imply that silence will carry no penalty). "Elementary fairness requires that an accused should not be [so] misled." *Id.* at 619 n.9 (citing *Johnson v. United States*, 318 U.S. 189, 197, 63 S. Ct. 549, 87 L. Ed. 704 (1943)).

c. The Court should reverse Mr. Lopez's convictions.

The State cannot prove beyond a reasonable doubt the error was harmless, as required under *Chapman*, 386 U.S. at 24. The central theme of the State's case was that the offenses were gang-motivated. Mr. Lopez's statement was a critical piece of the evidence relied upon by the State to make that claim. The State cannot prove the erroneous admission of that statement was harmless.

Furthermore, because gang evidence is so prejudicial, the State cannot show Mr. Lopez would have been convicted of the underlying offenses absent the evidence. The booking statements infected the entire trial. This Court should accordingly reverse and remand for a new trial.

5. The trial court impermissibly permitted a witness to testify as a "gang expert."

a. Mr. Lopez objected to the improper opinion testimony.

Prior to its admission, Mr. Lopez objected to the State's proposal to offer Sunnyside Police Office Jose Ortiz as a gang expert. RP 235. Mr. Lopez argued the proffered testimony was not helpful to the jury and thus not admissible under ER 702. RP 819. Specifically, Mr. Lopez argued the officer's proposed testimony that rival gangs engage in acts of violence against one another was a matter of common knowledge. RP 819-20.

The court admitted the testimony determining the officers was qualified as an expert. RP 823.

b. Because it amounts to an opinion as to guilt, profile evidence is improper.

A witness may offer an opinion on a matter which is based on the perceptions of the witness and helpful to a clear understanding of a

fact in issue. ER 701. Moreover, if the witness is qualified as an expert based on his or her experience, training, or knowledge, the witness may testify by way of opinion where doing so will assist the trier of fact. ER 702. Neither a lay opinion nor an expert opinion are excludable merely "because [they] embrace[] an ultimate issue." ER 704.

To be admissible:

> [u]nder [ER] 701 and [ER] 602, the witness must have personal knowledge of matter that forms the basis of testimony of opinion; the testimony must be based rationally upon the perception of the witness; and of course, the opinion must be helpful to the jury (the principal test).

State v. Ortiz, 119 Wn.2d 294, 308-09, 831 P.2d 1060 (1992) (citing, E. Cleary, *McCormick on Evidence* (3d ed. 1984)).

Such evidence is also limited by notions of relevancy and prejudice found in ER 402 and ER 403. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Expert testimony is further limited by the rule that "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *Black*, 109 Wn.2d at 348; *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

This Court has said:

> [a]s a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.

State v. Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). Where testimony "[implies] guilt based on characteristics of known offenders" the evidence is inadmissible because of its undue prejudice. *Id.* at 937.

Here, Officer Ortiz's testimony did just this. Officer Ortiz testified all LVL members are enemies "to all Norteño" gangs, and that they "hate each other." RP 839-40. He opined that the enmity alone "is enough for retaliation." RP 841. The mere fact that Mr. Lopez was allegedly a member of LVL was sufficient for him to commit the alleged crime. That is an improper and irrelevant inference of guilt.

Further, the evidence was not helpful to the jury. The notion that rival gangs sometimes act out violently against each other is not novel or complicated. And as to the trial court, it is well within the common understanding of jurors, particularly in places such as Yakima County which have witnessed so much gang violence. All the State's evidence afforded the jury was the testimony of a government official implying Mr. Lopez's guilt based upon his association with a gang. That is not helpful to the jury.

Because the evidence was not relevant, was overly prejudicial, and was an improper opinion, the evidence should have been excluded under ER 702.

c. The erroneous admission of the officer's testimony requires reversal of Mr. Lopez's convictions.

The erroneous admission of evidence requires reversal unless within reasonable probabilities, the outcome of the trial would not have been different absent the error. *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991); *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). Here, permitting the State to present lengthy "expert" testimony on such a prejudicial matter as gang involvement alter the outcome of trial. This is especially so when coupled with the erroneous admission of the defendants' answers to booking questions. Thus, this Court should reverse Mr. Lopez's convictions.

6. The court's instructions omitted an essential element of the offense.

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense.

Alleyne, 133 S. Ct. at 2158. A fact that increases the punishment for an offense is an "element." *Id.*, at 2155. Where a prior offense increases the punishment for an offense it is an element of the offense. *State v.*

Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008); *State v. Chambers*, 157 Wn. App. 456, 475, 237 P.3d 352 (2010). In such circumstances, *Roswell* recognized, the prior offense does more than merely increase the punishment it alters the offense itself. 165 Wn.2d at 192.

Here, the fact that Mr. Lopez is a persistent offender increased his punishment to a mandatory minimum sentence of life without the possibility of parole. Thus, his status as a persistent offender is an element of the offense.

Indeed, the State recognized the elemental nature of prior offenses where it alleged and the jury was charged with determining whether Mr. Lopez had a prior conviction of a serious offense for purposes of the unlawful possession of a firearm. CP 35, 72-73, 76. Thus, the State cannot contend that prior offenses are not elements.

Further, as with each other element, the State alleged Mr. Lopez was a persistent offender in the Information. CP 35. The essential elements rule requires a charging document allege the facts supporting every element of the offense and identify the crime charged. *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (*Recuenco III*); *State v. Quismundo*, 164 Wn.2d 499, 503, 192 P.3d 342 (2008). Consistent with that rule, the State properly alleged the general

elements of first degree assault, the firearm enhancement, the gang aggravating factor, **and** the persistent offender allegation. This illustrates the State clearly understands the elemental nature of the persistent offender allegation.

Yet having complied with the essential-elements rule for charging, the jury instructions completely omit any mention of the persistent offender element. Every other fact alleged in the information was submitted to the jury as required by the Sixth Amendment. The fact that Mr. Lopez had previously been convicted of two most serious offenses was an element of first degree assault in the same manner that the fact that he was previously convicted of a serious offense was an element of the unlawful possession charge. While the later act was contained in the to-convict instruction for the possession count, the former was omitted from the instructions pertaining to the assault counts.

The exclusion of that element denied Mr. Lopez his Sixth and Fourteenth Amendment rights to a jury determination of every element beyond a reasonable doubt. Because it offered inadequate evidence of this element to the jury, the State cannot prove it was harmless the omission in the instruction was harmless beyond a reasonable doubt.

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

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

The Due Process Clause ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. Together these provisions guarantee a criminal defendant the right to require the government prove every element of a crime to the jury beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2156. A fact that increases the punishment for an offense is an "element." *Id*, at 2155.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. *Blakely*, 542 U.S. at 304. The Court recently recognized that requirement applies with equal force to facts which increase the minimum sentence, such facts "form[] an essential ingredient of the offense." *Alleyne*, 133 S. Ct. at 2161. The Court has also recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under

Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, __ U.S. _, 132 S. Ct. 2344, 2356, 183 L. Ed. 2d 318 (2012).

In these cases, the Court rejected the notion that arbitrary labeling of facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. The rule of *Apprendi* "preserves the 'historic jury function' of determining whether the prosecution has proved each element of an offense beyond a reasonable doubt." *Oregon v. Ice,* 555 U.S. 160, 163, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).

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

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

Since *Almendarez-Torres*, the Court has not analyzed recidivism and carefully distinguished prior convictions from other facts used to enhance the penalty. *Blakely*, 542 U.S. at 301-02; *Apprendi*, 530 U.S. at 476. *Apprendi* explained that *Almendarez-Torres* only addressed the charging document. 530 U.S. at 488, 495-96. *Apprendi* also noted "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489.

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

The Washington Supreme Court has noted the United States Supreme Court's failure to embrace the *Almendarez-Torres* decision.

State v. Smith, 150 Wn.2d 135, 142, 75 P.3d 934 (2003) *cert. denied*, 124 S. Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001); *cert. denied*, 535 U.S. 996 (2002). But felt it must "follow" *Almendarez-Torres*. *Smith*, 150 Wn.2d at 143. Since *Almendarez-Torres* only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case.

Indeed, the Washington court's "following" of *Almendarez-Torres* has been sharply criticized. *State v. McKague*, 159 Wn. App. 489, 532, 246 P.3d 558 (Quinn-Brintnall, J, dissenting in part) *affirmed but criticized*, 172 Wn.2d 802 (2011); *State v. Witherspoon*, 171 Wn. App. 271, 306-07, 286 P.3d 996 (2012), *review granted*, 177 Wn.2d 1007 (2013). The Washington Supreme Court's original decisions addressing the Sixth Amendment's application to the Persistent Offender Accountability Act (POAA) were premised upon the conclusion that the legislative characterizations of a fact as either an "element" or "sentencing fact" was determinative of the constitutional protections to be afforded. Moreover, the Court found it significant whether the Legislature codified the applicable fact to be proved at sentencing. *State v. Thorne*, 129 Wn.2d 736, 783, 921 P.2d 514 (1994).

The distinctions upon which *Thorne* rested ceased to be constitutionally relevant following *Apprendi* and *Blakely*. *Apprendi*, 530 U.S. at 476; *Blakely*, 542 U.S. at 304-05. The Washington Supreme Court has not addressed this question following the decisions in *Blakely* and *Cunningham v. California,* 549 U.S. 270, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) which plainly rejected the artificial distinction between elements and sentencing factors.

Treating a persistent offender finding as a mere sentencing factor is in stark contrast to this State's prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125; Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). Historically, Washington required a jury determination of prior convictions prior to sentencing as a habitual offender. *State v. Manussier*, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement); *Furth*, 5 Wn.2d at 18. Many other states' recidivist statutes require proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C.

Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

Alleyne makes clear that the judicial finding by a preponderance of the factor used to elevate Mr. Lopez's minimum and maximum punishments to a life sentence without the possibility of parole violates due process. The "narrow exception" in *Almendarez-Torres* has been marginalized out of existence. Mr. Lopez was entitled to a jury finding beyond a reasonable doubt that he is a persistent offender.[2]

c. Washington requires reliable evidence to impose enhanced punishment.

When the prosecution does not prove the existence of prior convictions beyond a reasonable doubt, it violates due process under Article I, section 3. Historically, Washington's sentencing laws required the prosecution to prove prior convictions resulting in habitual offender status beyond a reasonable doubt. *See State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980) (holding that existence of three valid felony convictions "must be proved by the State beyond a

[2] At sentencing Mr. Lopez stipulated to the existence of two prior convictions for most serious offenses. That stipulation does not alleviate the error in failing to submit that element to the jury as the stipulation was made only after the jury had been dismissed, and was in lieu of the court making the finding by the unconstitutional standard of a preponderance of the evidence. Further, Mr. Lopez was not informed that he had the rights to a jury determination beyond a reasonable doubt, and thus his stipulation cannot be deemed a knowing waiver of those rights.

reasonable doubt"); *State v. Chevernell*, 99 Wn.2d 309, 315, 662 P.2d 836 (1983) (construing *Holsworth* as "based on constitutional mandates which we must obey"); *see also State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986) (affirming State's historical burden of proving prior convictions in proving status of habitual criminal offender). Although the majority declined to apply this traditional interpretation of due process to the Persistent Offender Accountability Act in *Manussier*, that conclusion discounted the procedures mandated by our constitution. *See* 129 Wn.2d at 691-93 (Madsen, J., dissenting).

Generally, identity of names is insufficient to prove that a document relates to the person before the court when a prior conviction is an element of the crime. *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005). Although the Court permitted a standard range sentencing calculation based on identity of names in *Ammons*, the Court also relied on prior law that there was a "fundamental distinction between the more rigid procedural protections necessary in using a prior conviction to prove an element of the crime or of habitual criminal status" than to calculate the standard sentencing range. *In re the Personal Restraint of Williams*, 111 Wn.2d 353, 367, 759 P.2d 436 (1988). Prior convictions are not used in a persistent offender

sentencing to determine the standard range; they are used to eliminate judicial discretion, resulting in mandatory punishment of the severest kind short of death. RCW 9.94A.570; *see Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010) (sentence of life without parole is the "severest penalty" short of death and shares characteristics with death sentences "that are shared by no other sentences").

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

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

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

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

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541.

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

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

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

The legislature has an interest in punishing repeat criminal offenders more severely than first-time offenders. Defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, the prior offenses that cause the significant increase in punishment are

treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have courts attached to them.

Where prior convictions increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. *See \ Roswell*, 165 Wn.2d at 192 (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony); *Oster*, 147 Wn.2d at 146 (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). The State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. *Chambers*, 157 Wn. App. at 475. The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence to life without the possibility of parole these same facts have been termed "sentencing factors," and treated as findings for a judge by a preponderance of the evidence. *Smith*, 150 Wn.2d at 143. Just as the legislature has never labeled the facts at issue in *Oster*, *Roswell*, or

Chambers as "elements," the Legislature has never labeled the fact at issue here as a "sentencing factor." Instead in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

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

Being free from government-imposed physical detention is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here forever deprives Mr. Lopez of this basic liberty; it subjects him to life in prison without the possibility of parole. It does so based

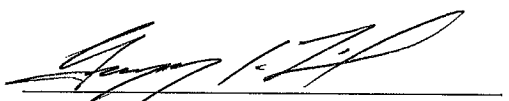
on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

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

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Lopez's convictions and sentence.

Respectfully submitted this 31st day of July, 2013.



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

STATE OF WASHINGTON, Respondent, v. ARMANDO LOPEZ, Appellant.	)))))))))	NO. 31187-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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