

63478-0

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No. 63478-0

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL JOHNSON,

Appellant.

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

BRIEF OF APPELLANT

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GREGORY C. LINK
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting propensity evidence pursuant to RCW 10.58.090 without first finding the evidence necessary.

2. Admission of propensity evidence pursuant to the recently enacted RCW 10.58.090 violates the ex post facto prohibitions of the state and federal constitutions.

3. The Legislature's enactment of RCW 10.58.090 violates the Separation of Powers doctrines of the state and federal constitutions.

4. Mr. Johnson was denied his Sixth Amendment right to a jury and his Fourteenth Amendment right to due process by the imposition of a sentence beyond that alleged in the information and permitted by the jury's verdict.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.58.090 permits a trial court to admit propensity evidence in sex cases where the court determines, in part, the evidence is necessary. Concluding it could not determine whether the evidence was necessary, the trial court chose not to make such a finding prior to admitting the evidence. By refusing to employ the

statutorily required analysis prior to admitting propensity evidence, did the court err in admitting the evidence?

2. A retrospective law violates the ex post facto provisions of the federal constitution if it is substantive and disadvantages the person affected by it. In enacting RCW 10.58.090 the Legislature stated it intended the statute to work a substantive change and that it applies retroactively. Where application of that law in Mr. Johnson's trial permitted the admission of propensity evidence which was previously inadmissible, is application of RCW 10.58.090 to Mr. Johnson unconstitutional?

3. The framers of the Washington Constitution copied the language of Article I, section 23, regarding ex post facto laws, from the Indiana and Oregon constitutions. The Supreme Courts of both those States have interpreted those provisions to bar the retroactive application of evidentiary rules which operate in a one-sided fashion to make convictions easier to obtain. RCW 10.58.090 alters the rules of evidence in a one-sided fashion to make convictions easier to obtain. Does application of RCW 10.58.090 to Mr. Johnson's case violate Article I, section 23?

4. The Separation of Powers doctrine prohibits one branch of government from usurping the prerogatives and duties of another

branch of government. Article IV, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedure. Because it is a procedural rule regarding the admission of evidence, did the legislature unconstitutionally usurp the judiciary's constitutional function by enacting RCW 10.58.090?

5. The Sixth Amendment right to a jury trial prohibits the imposition of a sentence other than that permitted by the jury's verdict. Mr. Johnson was convicted of rape of a child. The trial court, based on its own conclusion that Mr. Johnson was a persistent offender, imposed a sentence of life in prison rather than the sentence authorized by the jury's verdict. Was Mr. Johnson denied his Sixth Amendment right to a jury trial?

6. The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires notice and a jury determination beyond a reasonable doubt of every fact necessary for the punishment imposed. Was Mr. Johnson denied his right to due process of law when he was sentenced to life in prison without the possibility of parole based on a judicial finding of his identity and prior offenses in the absence of formal notice, by proof less than beyond a reasonable doubt to a jury?

C. STATEMENT OF THE CASE

Mr. Johnson was charged with two counts of first degree rape of a child, one count of child molestation, and four counts of possession of depictions of minors engaged in sexually explicit conduct. CP 13-16. Mr. Johnson lived in a basement apartment in the Seattle home in which M.B. and her father, grandmother, and great-grandmother lived. RP 1078. Witnesses testified M.B. spent time in Mr. Johnson's room playing video games. RP 1086. M.B. recounted that on several occasions Mr. Johnson had intercourse with her, and on other occasions felt her chest under her shirt. RP 843-48. At some point, Mr. Johnson, as well as M.B. and her family, moved from the house to separate residences.

More than one year later, in November 2007, M.B. for the first time shared with her father what had happened. RP 1101.

Police searched several computers in Mr. Johnson's apartment and discovered a fair amount of child pornography on computers seized during that search. RP 1214.

Without identifying any particular need for it, prior to trial the state proffered evidence that 20 years earlier, Mr. Johnson had pleaded guilty to several counts of sexual assault against three

girls. RP 437-39. The court found that RCW 10.58.090 allowed the State to offer evidence. RP 500-03.

Pursuant to the court's ruling, three women, now in their mid-30's, testified that as children they were friends of Mr. Johnson's daughter in the 1980's and on occasion spent the night at the Johnson home. RP 990-94, 1010-15, 1045-47. The three women each testified Mr. Johnson molested them during that period of time. RP 1001, 1030-35, 1056-58. Mr. Johnson objected to this testimony. RP 988, 1007-08, 1043,

The jury convicted Mr. Johnson as charged. CP 92-98.

Based upon its own factual finding that Mr. Johnson had previously been convicted of a most serious offense, the trial court sentenced him as a persistent offender to life without the possibility of parole rather than to a standard range sentence. CP 143.

D. ARGUMENT

1. BECAUSE IT FAILED TO APPLY THE ANALYSIS REQUIRED BY THE STATUTE, THE TRIAL COURT ERRED IN ADMITTING PROPENSITY EVIDENCE PURSUANT TO RCW 10.58.090.

- a. Propensity evidence admitted under RCW

10.58.090 must be necessary. Before a court may admit propensity evidence under RCW

10.58.090 the statute requires:

When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;
- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

RCW 10.58.090(6).

Prior to ruling on the admissibility of the state's proffered propensity evidence, the trial court consider many of the factors listed in RCW 10.58.090(6). However with respect to the requirement that it determine the "necessity of the evidence beyond the testimonies already offered," the trial court stated "I'm not quite sure what a court is supposed to do with it." RP 500. The court explained further "I'm just not going to analyze that factor 'cause I

don't - - I just don't know - - I'm not sure which way it is supposed to be analyzed." Id.

The factors set forth in RCW 10.58.090 are not merely advisory. Instead the statute directs the "trial judge shall consider the following factors"

It is well settled that the word "shall" in a statute is presumptively imperative and operates to create a duty.... The word "shall" in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.

State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1995) (citing Erection Co. v. Department of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993)).

In RCW 10.58.090 nothing indicates the legislature intended "shall" to be merely advisory. For instance subsection (g) mirrors the language of ER 403. If "shall" is merely advisory in the statute then in "evaluating whether [the] evidence . . . should be excluded pursuant to Evidence Rule 403" the court need not consider the rule itself. That would be an absurd result. The statute does indicate the Legislature intended "shall" in RCW 10.58.090(6) to be merely permissive.

Despite the plain requirement that it determine the evidence is necessary before admitting it, the trial court did not do so. RP

500. A court abuses its discretion when an “order is manifestly unreasonable or based on untenable grounds.” Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A court abuses its discretion by using the wrong legal standard or by resting its decision upon facts unsupported by the record. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting Fisons, 122 Wn.2d at 339); see also State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993) (failure to follow statutory procedure is legal error reviewable on appeal).

In this case, the court candidly admitted it did not consider nor determine the necessity of the information. RP 500-01. The court’s failure to employ the analysis required by RCW 10.58.090(6) constitutes an abuse of discretion.

b. The evidence was not necessary. Even had the court considered the factor as required by RCW 10.58.090(6), the court could not have concluded the evidence was necessary. The trial court rightly concluded the Legislature has not provided any insight into what “necessary” means for purposes of the statute. But absent a contrary legislative intent statutory terms are given

their ordinary meaning. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

The rules of statutory construction require that we give undefined words their common and ordinary meaning. To ascertain the common and ordinary meaning of a term, we may use a dictionary.

State v. Agueta, 107 Wn.2d 532, 536, 27 P.3d242 (2001) (footnotes and citations omitted).

“Necessity” means:

1: the quality or state or fact of being necessary as: **a:** a condition arising out of circumstances that compels to a certain course of action . . . **b:** INEVITABLENESS, UNAVOIDABILITY . . . **c:** great or absolute need : INDISPENSABILITY . . . **3:** something that is necessary: REQUIREMENT, REQUISITE

Webster's Third New International Dictionary, p. 1511 (1993).

There was nothing in the testimony regarding the present charges against Mr. Johnson required or made the introduction of the propensity evidence inevitable. Indeed, the State was able to fully establish the present charges without the propensity evidence. The trial court found M.B. competent to testify. RP 820-21. M.B. provided direct testimony separately recounting the facts necessary to sustain each of the three convictions. RP 843-49. M.B. recalled the events occurred while she was in kindergarten and first grade, more than two years prior to trial. RP 829. M.B. testified she spent

a significant amount of time in Mr. Johnson's room playing video games. RP 836-37. Several other witnesses provided corroborative evidence. For example, Deborah Montgomery testified that if others in the home couldn't find M.B., the first place to look was in Mr. Johnson's room. RP 575.

Other witnesses recounted the statements made to them regarding the incidents. The jury watched a video of M.B.'s response to the questioning by Carolyn Webster, an employee of the King County Prosecutor's Office. The jury also heard Ms. Webster testify about the interview. RP 894. The jury heard from M.B.'s father recounting her initial disclosure, and also heard her statements to the responding police officer. RP 1101.

Moreover, the State allowed that even if the evidence was not admitted under RCW 10.58.090, "as prosecutor you'd feel pretty good about going in and . . . making a 404(b) argument." RP 439. This observation concedes the absence of necessity in admitting the evidence for its propensity purpose under RCW 10.58.090.

Nothing made the propensity evidence necessary. Had the court considered the factor as required by RCW 10.58.090, it could

not have found the evidence admissible. The admission of propensity evidence which was an abuse of the court's discretion.

c. This court should reverse Mr. Johnson's conviction to allow him a trial free of the unwarranted prejudice of the improperly admitted propensity evidence. The erroneous admission of evidence requires reversal unless this Court can conclude that, within reasonable probabilities, the error did not materially affect the trial.. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984); State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982). The erroneously admitted propensity evidence was not inconsequential to the State's case. Instead, the introduction of the evidence consumed a generous portion of the trial. This Court cannot conclude that evidence did not materially affect the outcome of the case.

2. ADMITTING PROPENSITY EVIDENCE IN MR. JOHNSON'S TRIAL PURSUANT TO RCW 10.58.090 VIOLATED THE STATE AND FEDERAL CONSTITUTIONS PROHIBITIONS OF EX POST FACTO LAWS.

a. The State and Federal Constitutions prohibit ex post facto laws. Article I, section 10 of the United States Constitution and article 1, section 23 of the Washington

Constitution, the *ex post facto* clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); State v. Ward, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

b. RCW 10.58.090 violates the state and federal prohibitions on ex post facto laws.

A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.

State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996) (citing Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981); Collins v., 497 U.S. at 45). RCW 10.58.090 violates the state and federal ex post facto prohibitions.

i. The Legislature has stated RCW 10.58.090 is substantive in nature. The legislative notes following RCW 10.58.090 state that as an evidentiary rule the rule is substantive in nature. Laws 2008, ch. 90, §1. The Legislature's characterization of a statute does not necessarily control the constitutional *ex post facto* analysis. In re the Personal Restraint of Gronquist, 139

Wn.2d 199, 208, 986 P.2d 131 (1999). However, the statute is substantive in nature as it does not fit within the understanding of a procedural statute.

While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins, 497 U.S. at 45 (citing Dobbert v. Florida, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); Mallett v. North Carolina, 181 U.S. 589, 597, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)).

RCW 10.58.090 does not merely define the procedure by which a case is adjudicated but rather redefines the bounds of relevancy for a sex offenses. Thus, the Legislature appropriately recognized the substantive reach of the statute.

ii. RCW 10.58.090 applies to events occurring prior to its enactment. The statute also applies to events which occurred prior to its enactment. The legislature specifically stated the statute should apply to any case tried after its enactment without concern for when the alleged offense may have occurred. Laws 2008, ch. 90 § 3. But more importantly, Mr. Johnson's

offense, and first trial, occurred prior to the effective date of the statute. Thus the statute applies retrospectively.

iii. RCW 10.58.090 substantially disadvantages Mr. Johnson. RCW 10.58.090 allows evidence which is not admissible for a more limited purpose under ER 404(b) to be admitted for any purpose whatever. The State asked the jurors to use the evidence in this case as bald propensity evidence; evidence that because Mr. Johnson had molested children before he must have committed the rape in this case. Washington courts have long excluded this class of evidence precisely because that sort of conclusory logic was deemed unreliable, irrelevant, and overly prejudicial. See State v. Bokien, 14 Wash 403, 414, 44 P. 889 (1896). More specifically though, RCW 10.58.090 substantially disadvantaged Mr. Johnson. Under the test enunciated in Hennings application of RCW 10.58.090 to offenses committed prior to its enactment, such as Mr. Johnson's, violates the ex post facto clause of the United States Constitution.

c. Even if application of RCW 10.58.090 to Mr. Johnson's case does not violate the federal Ex Post Facto Clause, it nonetheless violates the greater protections of Article I, section 23. Article I, section 10 of the United States Constitution provides,

"No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts." The Washington Constitution provides: "[n]o bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Const. art. I, § 23.

The Supreme Court long ago held the provisions of Article I, section 10 reach four classes of laws:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, 3 Dall. 386, 390-91, 1 L.Ed. 648 (1798). While the fourth category identified in Calder, seems to clearly bar retroactive changes in the type of evidence which is admissible, the Supreme Court has concluded "[o]rdinary" rules of evidence do not implicate ex post facto concerns because they do not alter the standard of proof. Carmell v. Texas, 529 U.S. 513, 533 n.23, 120 S.Ct. 1620, 146 L.Ed.2d 577 (1999). The Court previously held a law

permitting the admission of a defendant's letters to his wife for the purposes of comparing them to letters admitted into evidence was not an ex post facto violation because the change in law

did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality.

Thompson v. Missouri, 171 U.S. 380, 387-88, 18 S.Ct. 922, 43 L.Ed. 204 (1898).

The Washington clause is textually different from the federal clause and mirrors the provisions of the Oregon and Indiana Constitutions. Compare, Const. Art. I, § 23; Or. Const. Art. I, § 21; Ind. Const. art. I, § 24. Indeed, the Declaration of Rights, of which Article I, section 23 is a part, "was largely based upon W. Lair Hill's proposed constitution and its model, the Oregon Constitution." R. Utter and H. Spitzer, The Washington State Constitution, A Reference Guide, p 9 (2002). Because its is borrowed from the Oregon Constitution, which in turn took its ex post facto language from the Indiana Constitution,¹ it is useful to look to how the courts

¹ State v. Cookman, 920 P.2d 1086, 1091 (Or. 1996).

of those states have interpreted the relevant provisions of their constitutions. Biggs v. Dep't of Retirement, 28 Wn.App. 257, 259, 622 P.2d 1301 (1981) (turning to interpretations of the Indiana Constitution to interpret similar, although not identical, provisions of Washington Constitution) .

Applying an analysis similar to that set forth in State v. Gunwall,² the Oregon Supreme Court has determined the ex post facto protections of the Oregon Constitution are broader than the protections which the United States Supreme Court has recognized in the federal constitution.³ State v. Fugate, 26 P.3d 802, 813 (2001). Specifically, the Oregon court has interpreted the mirror provisions of the Oregon Constitution's ex post facto clause to prohibit the retroactive application of laws that alter the rules of evidence in a manner which favors only the prosecution. Fugate took pains to distinguish that result from changes in evidentiary

² State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

³ Specifically when determining whether a provision of the Oregon Constitution provides greater protection than does the federal constitution Oregon courts consider the provisions "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." Priest v. Pearce, 840 P.2d 65, 67-69 (Or. 1992). By comparison, Gunwall directs a court should consider six nonexclusive factors: the textual language of the state constitution; significant differences in the texts of parallel provisions of the federal and state constitutions; state constitutional and common law history; preexisting state law; differences in structure between the federal and state constitutions; and matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62

rules which apply equally to both the defense and the prosecution, finding that sort of law of general application was never viewed as resulting in the evil to which the ex post facto clause is addressed. 26 P.3d at 813.

In reaching its conclusion, the Oregon court looked to Indiana's interpretation of its ex post facto protections. Prior to adoption of the Oregon Constitution the Indiana Supreme Court determined

[t]he words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the Legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done; or to add to the punishment of that which was criminal; or to increase the malignity of a crime; or to retrench the rules of evidence, so as to make conviction more easy.

Strong v. The State, 1 Blackf. 193, 196 (1822). Because that interpretation of Indiana's constitution was available to the framers of the Oregon Constitution when they chose to adopt the language of Indiana's ex post facto clause, the Oregon court interpreted the Oregon provisions as, "forbid[ding] *ex post facto* laws of the kind that fall within the fourth category in Strong and Calder, viz., laws that alter the rules of evidence in a one-sided way that makes conviction of the defendant more likely." Fugate, 26 P.3d at 813.

That interpretation of the Indiana Constitution was also available to the framers of Washington Constitution in 1889. Rather than simply adopt the language of Article I, section 10, the framers instead chose to adopt the language of the Oregon and Indiana constitutions. By adopting the different language of the Oregon and Indiana Constitutions, logically, the framers of the Washington Constitution did not intend Article I, section 23 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. Utter, 7 U. Puget Sound L. Rev. 496-97; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001) (“The decision to use other states' constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”).

In fact, two years after Washington became a state, the Supreme Court cited to Calder as providing “a comprehensive and correct definition” of what constitutes an ex post facto law. Lybarger v. State, 2 Wash. 552, 557, 27 P. 449 (1891). Applying an analysis that resembles that of Strong, Lybarger concluded the statute did not violate ex post facto provisions, in part, because

“[i]t does not change the rules of evidence to make conviction more easy.” 2 Wash. at 559. Lybarger applied precisely the analysis which the Oregon Supreme Court applied in Fugate.

Aside from the textual differences and differences in the common-law and constitutional history, the United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 61. That fundamental difference generally favors a more protective interpretation of the Washington provision. So too does the fact that regulation of criminal trials is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990).

The framers of Washington Constitution adopted language that differs from the language of the federal constitution; language that had been interpreted 67 years prior to its inclusion in the Washington Constitution to bar retroactive legislation which alters the rules of evidence in a one-sided fashion. The foregoing analysis demonstrates that by doing so, the framers intended to apply that same protection in Washington.

RCW 10.58.090 unquestionably alters the rules of evidence in a manner that makes convictions easier. RCW 10.58.090 violates Article I, section 23.

d. Mr. Johnson's conviction must be reversed.

Where a constitutional error occurs during a trial, the error is presumed to be prejudicial unless the State can prove beyond a reasonable doubt the jury would have reached the same verdict had the error not occurred. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Thus, the State must convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not attributable to the erroneously admitted evidence. Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). The State cannot meet that burden here. The jury heard an extensive amount of evidence regarding Mr. Johnson's prior convictions. That evidence was woven into the thread of argument presented by the State in closing. It is impossible to now remove that improperly included evidence or more importantly to guess at what the jury might have done without it.

The State cannot prove beyond a reasonable doubt that the jury's verdict was not attributable to the erroneously admitted evidence. This Court must reverse Mr. Johnson's conviction.

3. THE LEGISLATURE'S ENACTMENT OF RCW 10.58.090 VIOLATES THE SEPARATION OF POWERS DOCTRINES OF THE STATE AND FEDERAL CONSTITUTIONS

a. The state and federal constitutions prevent one branch of government from usurping the powers and duties of another.

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments--the legislative, the executive, and the judicial--and that each is separate from the other.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citing State v. Osloond, 60 Wn.App. 584, 587, 805 P.2d 263, review denied, 116 Wn.2d 1030 (1991)). Neither the Washington nor federal constitutions specifically enunciate a separation of powers doctrine, but the notion is universally recognized as deriving from the tripartite system of government established in both constitutions. See, e.g., Const. Arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. Arts. I, II, and III (defining legislative, executive, and judicial

branches); Carrick, 125 Wn.2d at 134-35. Carrick recognized that although the Washington Constitution contains no specific separation of powers provision “the very division of our government into different branches has been presumed throughout our state’s history to give rise to a vital separation of powers doctrine.” Carrick, 125 Wn.2d at 134-35, (citing Osloond, 60 Wn.App. at 587); In re Juvenile Director, 87 Wn.2d 232, 238-40, 552 P.2d 163 (1976).

The fundamental principle of the separation of powers is that each branch wields only the power it is given. State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d 265 (2002). Thus, courts have announced the following test for determining whether an action violates the separation of power:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick, 125 Wn.2d at 135 (quoting Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

b. The Washington Constitution vests the Supreme Court with the sole authority to adopt procedural rules. Article IV, section 1 of the Washington Constitution vests the Washington Supreme Court with the sole authority to govern court procedures.

City of Fircrest v. Jensen, 158 Wn.2d 384, 394, 143 P.3d 776 (2006); State v. Fields, 85 Wn.2d 126, 129, 530 P.2d 284 (1975); “[T]here is excellent authority from an historical as well as legal standpoint that the making of rules governing procedure and practice in courts is not at all legislative, but purely a judicial function.” State ex rel. Foster-Wyman Lumber Co. v. Superior Court for King County, 148 Wash. 1, 4, 9, 267 P. 770 (1928).

Thus, “when a court rule and a statute conflict, the nature of the right at issue determines which one controls.” State v. W.W., 76 Wn.App. 754, 758, 887 P.2d 914 (1995). “If the right is substantive, then the statute prevails; if it is procedural, then the court rule prevails.” Id.

c. If RCW 10.58.090 is a procedural rule, its enactment violates the Separation of Powers doctrine. The legislative notes following RCW 10.58.090 claim the act is substantive. If that is the case, then as argued above the retroactive application of that substantive change violates the Ex Post Facto provisions of the federal and state constitutions. In the alternative, if defining the bounds of the admissibility of evidence is a procedural function and one that lies at the heart of the judicial

function, then the Legislature's effort to alter the rules of admissibility violates the Separation of Powers doctrine.

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

State v. Smith, 84 Wn.2d 498, 501, 527 P.2d 674 (1974). RCW

10.58.090 does not prescribe societal norms or establish punishments. Instead it alters the mechanism by which the substantive rights, a person's guilt of crime, is effectuated by allowing admission of otherwise inadmissible evidence.

The legislative claim aside, RCW 10.58.090 appears to be a purely procedural statute, one which the legislature lacks the authority to enact. Because the legislature did not have the authority to enact RCW 10.58.090, the statute is void. State v. Thorne, 129 Wn.2d 736, 762, 921 P.2d 514 (1996). Because of the readily apparent prejudicial impact the statute had in Mr. Johnson's case, this Court must reverse his conviction.

4. MR. JOHNSON'S CONSTITUTIONAL RIGHTS TO NOTICE, A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WERE VIOLATED WHEN THE COURT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICTIONS FOUND BY THE COURT BY A PREPONDERANCE OF THE EVIDENCE

Based upon a jury conviction for second degree rape, Mr. Johnson was sentenced to life in prison without the possibility of parole under the Persistent Offender Accountability Act (POAA). RCW 9.94A.030(32), (37).

The POAA requires an individual convicted of his second specified sex offense be sentenced to a term of life imprisonment without the possibility of parole, regardless of the statutory maximum otherwise prescribed for the offense. RCW 9.94A.030(37)(b) The sentencing determination is made by the court by a preponderance of the evidence. The POAA deprives Mr. Johnson of his right to due process and to a jury determination of all elements of the crime.

a. Mr. Johnson's sentence exceeds the statutory maximum term. Washington's Sentencing Reform Act (SRA) generally requires a sentencing court to determine an offender's standard sentencing range based on the seriousness of the current

offense and the offender's criminal history. RCW 9.94A.510, .515, .525. Depending on the nature of the current offense and/or the nature of the prior offense, prior offenses contribute points to an individual's offender score in accordance with the provisions of RCW 9.94A.525.

RCW 9.94A.599 provides that a standard range sentence cannot exceed the statutory maximum penalty for the crime. The statutory maximum penalty for first degree rape of a child, without any aggravating factors, is 318 months. RCW 9.94A.510, RCW 9.94A.515.

The POAA alters the normal course of sentencing. Where a person is convicted of a third "most serious" offense or second specified sex offense and the sentencing judge determines the individual has on one or two prior occasions been convicted of most serious or specified sex offenses, the sentencing judge must impose a sentence of life imprisonment without the possibility of parole. RCW 9.94A.570; RCW 9.94A.030(32), (37). A life term is required regardless of the standard range or statutory maximum otherwise in place. Id.

Here, the sentencing court determined by a preponderance of the evidence that Mr. Johnson had a prior conviction of a sex

offense. and sentenced him to life without the possibility of parole. CP 143. Had Mr. Johnson not been a persistent offender, his offender score would have been 23, and his standard ranges would have been 240 to 318 months. CP 134; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.94A.530. Mr. Johnson would have been subject to the provisions of RCW 9.94.712. But even under that indeterminate scheme he would still have the possibility of release upon completion of either his minimum term or when DOC determined it was appropriate. Because only one crime, aggravated first degree premeditated murder, has a statutory maximum of life in prison without the possibility of parole, a sentence of life in prison without the possibility of parole exceeds the statutory maximum for any other offense in Washington.

Mr. Johnson's sentence of life without the possibility of parole exceeds the maximum term permitted by the elements alleged in the information and found in the jury's verdict and thus violates his federal constitutional right to due process and to a jury trial.

b. The constitutional rights to due process and a jury trial require that any fact that increases a defendant's maximum sentence must be pleaded and found by a jury beyond a reasonable doubt. The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. Thus, it is axiomatic that a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77, quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The United States Supreme Court applies this principle to facts that increase the maximum penalty faced by the defendant, even if the fact is labeled as "sentencing factor" by the legislature.

Thus, an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because the sentencing court imposed a sentence over the standard sentence range based upon facts that were not admitted in a plea agreement or found by a jury beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). "Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303. (Emphasis in original).

Blakely was soon followed by an opinion declaring the Federal Sentencing Guidelines to be merely advisory because mandatory application of the guidelines would result in unconstitutional judicial fact-finding. United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Later a California determinate sentencing scheme where the court could chose from sentencing options based upon factual determinations was also found unconstitutional. Cunningham v. California, ___ U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

The United States Supreme Court also held Arizona's death penalty scheme was unconstitutional where a defendant received the death penalty based upon aggravating factors found by a judge by a preponderance of the evidence. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). Similarly, New Jersey's "hate crime" legislation was unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 491-92, 497.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out the dispositive question is one of substance, not form. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602, citing Apprendi, 530 U.S. at 482-83. Thus, a judge may only impose punishment within the maximum term justified by the jury verdict or guilty plea. Blakely, 542 U.S. at 303-04.

c. This Court should address whether the Sixth and Fourteenth Amendments permit a prior conviction “exception” to the *Apprendi* rule. The United States Supreme Court has not recently addressed recidivist legislation, and has been careful to distinguish prior convictions from other facts used to enhance a defendant’s possible penalty. Instead, the rule provides, “Other than the fact of 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.” Blakely, 542 U.S. at 301; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). The rule thus acknowledges the Court has not yet addressed the continuing validity of its 1998 opinion upholding a sentence under the federal illegal entry statute, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Additionally, the Due Process Clause of the Fourteenth Amendment compels any fact which increases a sentence to a term beyond the statutory maximum, be formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. See Specht v. Patterson, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

In Almendarez-Torres, the Court held that the nature of prior convictions was not an element of a federal offense making it illegal for a deported alien to return to the United States and thus did not need to be included in the charging document, even though it increased the defendant's possible punishment. 523 U.S. at 246. The Apprendi Court distinguished Almendarez-Torres because (1) the issue in Apprendi was racial motivation, not recidivism and (2) the defendant in Almendarez-Torres had admitted the prior convictions in his guilty plea and only raised the indictment issue, whereas Apprendi argued he had the right to have a jury find the facts at issue beyond a reasonable doubt. 530 U.S. at 488, 495-96.

The Apprendi Court, however, went beyond distinguishing Almendarez-Torres to cast doubt on its continuing validity. The Court stated, "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. Thus, Almendarez-Torres remains, at best, a "narrow exception" to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id. The wording of the Court's holdings, and the prior conviction "exception," demonstrate that the Court has not yet

addressed the issue of prior convictions. Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004).

For example, Justice Thomas, who signed the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring). Rather than focusing on whether something is labeled a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. Id. at 499-519. Accord, Ring, 536 U.S. at 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”).

Nonetheless, the Washington Supreme Court has refused to address the constitutionality of a POAA sentence until the United

States Supreme Court specifically applies Apprendi to prior convictions. State v. Thieffault, 160 Wn.2d 409, 418-19, 158 P.3d 580 (2007); State v. Smith, 150 Wn.2d 135, 142-43, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. Wheeler, 145 Wn.2d 1167, 123-24, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). Wheeler nonetheless recognized that the continuing validity of Almendarez-Torres is questionable in light of Apprendi. Wheeler, 145 Wn.2d at 123-24.

The Washington Supreme Court has relied upon Almendarez-Torres for the proposition that prior convictions need not be pleaded or proven to a jury. That case, however, is of questionable validity and never supported the court's conclusion. Nor do the pre-Almendarez-Torres cases finding the POAA constitutional withstand the test of time. Thorne, 129 Wn.2d at 781-84; State v. Manussier, 129 Wn.2d 652, 688-91, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). This Court should independently reevaluate Mr. Johnson's sentence in light of the protections of the Sixth and Fourteenth Amendments. See Wheeler, 145 Wn.2d at 125 (Sanders, J., dissenting) ("It may be fairly said that although it is our obligation not to construe the United States Constitution in a manner inconsistent with the United

States Supreme Court, it is equally our responsibility, and solemn duty, to ensure federal constitutional rights of litigants who appear before us are respected and vindicated without exception . . . [I]t is this court's responsibility to apply constitutional principles in a manner consistent with the most recent articulation by the United States Supreme Court.”).

*i. The reasoning of *Almendarez-Torres* has not survived subsequent cases.* The defendant in *Almendarez-Torres* was charged with reentering the United States after being deported, and his maximum term was 20 years because he was deported for an aggravated felony. Mr. *Almendarez-Torres* had pled guilty and admitted three prior aggravated felony convictions, but argued he faced only a two-year maximum because the aggravated felonies were not included in his indictment. 523 U.S. at 227. The Court decided the nature of the prior convictions need not be included in the indictment because Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* at 235. The Court reasoned that creating a separate crime with the prior conviction as an element would be unfair to defendants because juries would learn of their prior convictions. *Id.* at 234-35.

The Court had previously held that Pennsylvania's Mandatory Minimum Sentencing Act did not violate due process in McMillan, supra. The defendant in Almendarez-Torres attempted to distinguish McMillan because in that case visible possession of a firearm triggered a mandatory minimum term, whereas Almendarez-Torres was subject to a higher maximum term. The Court found McMillan nonetheless controlled because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was fair because it created a broad permissive sentencing range and judges typically exercise their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; Congress did not try to "evade" the Constitution. Almendarez-Torres, 523 U.S. at 242-46.

Almendarez-Torres looked to legislative intent and found Congress did not intend to define a separate crime when it provided for a higher maximum term based upon the nature of a defendant's prior convictions Almendarez-Torres, 523 U.S. at 246. But later Supreme Court cases make it clear that legislative intent does not establish the parameters of due process. Blakely, 542 U.S. at 306;

Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 476. Nor does the placement of an enhancement in the sentencing provisions of the criminal code mean that the enhancement is not really an element of a higher offense. Ring, 536 U.S. at 605; Apprendi, at 501 (Thomas, J., concurring). In fact, the Washington Supreme Court has required facts which the legislature, and the public by initiative, enacted as sentencing enhancements be included in the charging document State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III). Thus, the fact the voters intended the POAA as a sentencing provision is not determinative of whether the act violates due process.

The Almendarez-Torres Court noted that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. Almendarez-Torres, 523 U.S. at 243-49. Both the Almendarez-Torres dissent and Justice Thomas's concurring opinion in Apprendi, however, cast doubt on the court's assumption that recidivism has historically been treated differently than other elements of a crime. Apprendi, 530 U.S. at 506-19 (Thomas, J., concurring); Almendarez-Torres, 523 U.S. at 259-60 (Scalia, J., dissenting). Accord Gaudin, supra, (rejecting government's argument that materiality is traditionally found by the

court in prosecutions for making false statements under 18 U.S.C. § 1001 and also suggesting historic practice would not be determinative).

Two of the cases relied upon in Almendarez-Torres to support the proposition that the prior conviction need not be pled in the indictment involve the West Virginia recidivist statute, where the prior conviction must be found by the jury. Oyler v. Boles, 368 U.S. 448, 449-51, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) (prosecutor filed separate information charging defendant as recidivist after conviction for crimes; defendant admitted prior convictions); Graham v. West Virginia, 224 U.S. 616, 624, 32 S.Ct. 583, 56 L.Ed. 917 (1912) (jury found identity in separate proceeding after separate information). Although not mentioned in those cases, West Virginia also requires proof of prior convictions beyond a reasonable doubt. W.Va. Code § 61-11-19; Wanstreet v. Bordenkircher, , 276 S.E. 2d 205, 208 (W.Va 1981).

The fact that recidivism is a “traditional” sentencing factor does not mean that it need not be proven beyond a reasonable doubt or found by a jury. The Apprendi Court rejected the government’s argument that motive need not be found by a jury beyond a reasonable doubt because it was a traditional sentencing

factor. Apprendi, 530 U.S. at 492-95. The argument that recidivism is a traditional sentencing consideration should be even less persuasive in Washington where prior convictions were historically found by the jury when a defendant was charged with being an habitual criminal. See Manussier, 129 Wn.2d at 688-91 (Madsen, J., dissenting) (reciting history of habitual offender proceedings in Washington).

Almendarez-Torres also noted the fact of prior convictions in that case only triggered an increase in the maximum permissive sentence. “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. Almendarez-Torres, 523 U.S. at 244-45. Here, in contrast, Mr. Johnson’s prior convictions lead to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. Mr. Johnson’s sentence – life without the possibility of parole – is higher than the statutory standard sentence range and is even higher than the maximum term found at RCW 9A.20.021(1).

The Almendarez-Torres Court also held that the federal statute did not “create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory

ranges. 523 U.S. at 245. The opinion then notes new sentencing guidelines channel that discretion with sentencing factors the defendant did not claim were elements of the a crime. 523 U.S. at 245-46. This argument has now been completely undermined by Blakely, where the Court found that Washington's aggravating factors act as elements of the crime because they permit the judge to sentence the defendant over the statutory standard sentence range. Blakely, 542 U.S. at 303-05. Here, Mr. Johnson's prior convictions mandate a sentence that exceeds both the SRA standard range and the statutory maximum found at RCW 9A.20.021(1).

Almendarez-Torres further noted Congress had not changed the traditional elements of a crime and was not trying to "evade" the Constitution by treating an element as a sentencing factor. 523 U.S. at 246. Washington had a well-established crime -- being an habitual offender -- and a long history of treating persistent offender status as a separate offense. The POAA radically changed that crime by eliminating its elements and reducing them to sentencing factors. Thus, the voters may well have been attempting to avoid traditional constitutional requirements by placing the POAA within the SRA.

Finally, Almendarez-Torres noted there was no reason to require the government to plead any fact that increases the statutory maximum term when the judge may determine aggravating factors warranting the death penalty. 523 U.S. at 247 (citing inter alia Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), overruled, Ring, 536 U.S. at 609). This argument is no longer valid as the Court overruled Walton as “irreconcilable” with Apprendi, further demonstrating the weakness of the Almendarez-Torres reasoning. Ring, 536 U.S. at 588-89. There is no reason for this Court to feel “bound” by Almendarez-Torres.

ii. Early Washington Supreme Court opinions upholding the constitutionality of the POAA are no longer persuasive. The Washington Supreme Court also rejected arguments that the Sixth and Fourteenth Amendments to the United States Constitution require a jury finding beyond a reasonable doubt in 1996. Thorne, 129 Wn.2d at 781-84; Manussier, 129 Wn.2d at 681-84. The validity of the Court’s reasoning in these two cases has eroded over time, and should be rejected.

Both Thorne and Manussier concluded a defendant does not have a constitutional right to a jury determination of his sentence, relying upon United States Supreme Court cases. Thorne, 129 Wn.2d at 782; Manussier, 129 Wn.2d at 682-83. The Thorne decision noted that “the United States Supreme Court has repeatedly held that a defendant does not enjoy a constitutional right to a jury determination as to the appropriate sentence to be imposed even where the sentence turns on specific findings of fact.” Id. at 782.

This holding is not a correct statement of the law and the cases relied upon do not support the court’s conclusion. For example, the Thorne Court cites Walton, supra, which was overruled on this point in Ring. Ring, 536 U.S. at 609. Both Thorne and Manussier (citing Libretti v. United States, 516 U.S. 29, 116 S.Ct. 356, 133 L.Ed.2d 271 (1995)), which simply finds no constitutional right to a jury determination of the forfeitability of property where the defendant had already agreed to forfeiture in his guilty plea. In both cases, the Court relied upon McMillan, but the conclusion that “jury sentencing” is not required when a statute makes possession of a weapon a “sentencing factor” is no longer correct. See, State v Recuenco, 154 Wn.2d 156, 110 P.3d 188

(2005) (Recuenco I), overruled on other grounds, 126 S.Ct. 2546

(2006) (Recuenco II).

Manussier relied heavily upon Parke v. Raley, 506 U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) to state a jury trial and proof beyond a reasonable doubt of prior convictions were not required under the federal constitution. Id. at 683-84. In Parke the defendant challenged the validity of two convictions used by Kentucky to find he was a “persistent felon,” alleging the guilty pleas did not meet the constitutional requirements of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Under Kentucky law, the State had the burden of proving the fact of the prior conviction beyond a reasonable doubt but did not need to prove the underlying validity of the conviction. The defendant, however, could move to exclude the prior conviction, and the defendant had the burden of refuting the presumption the prior conviction was valid. If the defendant was successful, the burden shifted to the State to affirmatively show the conviction was obtained in a constitutional manner. Parke, 506 U.S. at 23-24.

The United States Supreme Court noted the long history of recidivist statutes in this country and held “Kentucky’s burden-shifting rule easily passes constitutional muster.” Id. at 28. This

holding cannot logically be used to uphold Washington's scheme, which utilizes a lower standard of proof and does not permit the defendant to challenge the validity of any prior conviction unless the conviction has previously been found to be unconstitutionally obtained or is invalid on its face. State v. Ammons, 105 Wn.2d 175, 185-88, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

Thus, the legal foundation upon which the Washington cases upholding the POAA were built no longer exists. This Court should find that Mr. Johnson had a constitutional right to a jury determination of his prior convictions beyond a reasonable doubt.

d. Because Mr. Johnson's constitutional rights to a jury trial and to due process were denied, his sentence must be reversed. A defendant has a right to notice and an opportunity to be heard on whether he has prior convictions that change his maximum possible punishment. Oyler, 368 U.S. at 452 (habitual criminal statute). Facts that increase a defendant's maximum sentence are elements of a greater crime and must be pleaded and found by the jury beyond a reasonable doubt. Blakely, supra; Apprendi, supra. Mr. Johnson's sentence of life without the possibility of parole under the POAA should be reversed.

E. CONCLUSION

For the reasons above this Court must reverse Mr.
Johnson's conviction and sentence.

Respectfully submitted this 31st day of March, 2010.



GREGORY C. LINK - 25228
Washington Appellate Project – 91052
Attorneys for Appellant

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 63478-0-I
)
 DANIEL JOHNSON,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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X for me

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710