

NO. 64012-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

SERGIO REYES-BROOKS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

---

**BRIEF OF RESPONDENT**

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A handwritten signature in dark ink is written over a faint, rectangular stamp. The stamp contains the text "SUPERIOR COURT" and "KING COUNTY" in a grid-like arrangement. The signature is written in a cursive style.

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A. ISSUES

1. The Court will not consider an issue for the first time on appeal unless it is a manifest constitutional error. The trial court instructed the jury that in order to answer the special verdict form all twelve jurors must agree. It did not instruct the jury that it need not be unanimous for a "no" vote. Reyes-Brooks did not object to the jury instruction, and the recent Supreme Court case holding a similar instruction was error was not based on a constitutional error. Has Reyes-Brooks identified a manifest constitutional error which would permit review even though the defendant did not object to this instruction at trial?

2. Where only a liberty interest is at issue, equal protection requires no more than a rational basis for a legislative classification; the classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. The legislature has chosen to deter certain conduct by making specific prior offenses "elements" of a greater, related crime, resulting in a requirement that the prior offenses be proved to a jury beyond a reasonable doubt. The legislature has chosen to treat recidivism in general differently; when the prior conviction does not change the currently charged crime, but merely has the

effect of increasing the punishment, the prior convictions may be found by the court by a preponderance of the evidence. Does this sentencing scheme rest upon a rational basis?

3. The United States Supreme Court has excepted "the fact of a prior conviction" from those sentencing facts that must be proved to a jury beyond a reasonable doubt. Washington courts have repeatedly recognized this distinction, and have found it valid under the Washington Constitution as well. The trial court found that Reyes-Brooks had two prior "strikes" in addition to his current conviction for Murder in the First Degree. Did the trial court properly sentence Reyes-Brooks as a persistent offender without resorting to a jury to determine his prior convictions beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Sergio Reyes-Brooks, was charged with Murder in the First Degree with a Firearm Enhancement, and Unlawful Possession of a Firearm in the First Degree on December 6, 2006. CP 1-2. The trial commenced in February 2009 and the

jury returned a verdict on April 2, 2009. 9 RP 2-7<sup>1</sup>; CP 408-09. The jury returned a verdict of guilty as charged to Murder in the First Degree and Unlawful Possession of a Firearm in the First Degree. CP 408. In addition, the jury answered "yes" on the special verdict form for the firearm enhancement. CP 409.

Reyes-Brooks was sentenced on August 7, 2009. 38 RP 1. He was sentenced as a persistent offender to life without the possibility of parole. CP 454-62. The court based its sentence on two prior convictions: a 1997 conviction for Robbery in the First Degree and Assault in the Second Degree; and a 2002 conviction for Burglary in the First Degree and Assault in the Second Degree. 38 RP 15-16.

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<sup>1</sup> The verbatim report of proceedings consists of thirty-eight volumes, which will be referred to on this brief as follows: 1 RP (12/28/08), 2 RP (1/15/09), 3 RP (1/30/09), 4 RP (2/4/09), 5 RP (2/3/09), 6 RP (2/4/09), 7 RP (2/5/09), 8 RP (2/10/09), 9 RP (2/12/09), 10 RP (2/13/09), 11 RP (2/17/09), 12 RP (2/18/09), 13 RP (2/23/09), 14 RP (2/24/09), 15 RP (2/26/09), 16 RP (3/2/09), 17 RP (3/3/09 morning), 18 RP (3/3/09 afternoon), 19 RP (3/4/09), 20 RP (3/5/09), 21 RP (3/6/09), 22 RP (3/9/09 morning), 23 RP (3/9/09 afternoon), 24 RP (3/10/09), 25 RP (3/11/09), 26 RP (3/12/09), 27 RP (3/16/09), 28 RP (3/17/09), 29 RP (3/18/09), 30 RP (3/19/09), 31 RP (3/23/09), 32 RP (3/24/09), 33 RP (3/25/09), 34 RP (3/26/09), 35 RP (3/30/09), 36 RP (3/31/09), 37 RP (7/17/09), 38 RP (8/7/09).

## 2. SUBSTANTIVE FACTS

Dominique McCray was at a gas station in West Seattle on the evening of December 1, 2006 when he met Reyes-Brooks, with Ray Porter and Porter's girlfriend Crystal Moore. 31 RP 22. Porter offered McCray a ride to a local bar. 31 RP 26. Unbeknownst to McCray, Reyes-Brooks and Porter were angry with him because they believed he had robbed or molested a friend of theirs. 24 RP 128-29, 134, 142-43. Reyes-Brooks was driving and Porter was in the front seat. 31 RP 27. Crystal Moore and McCray were in the back. Id. Reyes-Brooks drove them to a secluded, dead end street near Sea-Tac Airport. 31 RP 31. Porter and Reyes-Brooks confronted McCray about robbing or molesting their friend. 31 RP 28-29. McCray was forced to strip naked at gunpoint while in the car. 31 RP 31. Moore saw Reyes-Brooks pull out a gun and point it at McCray. 31 RP 32-33. McCray got out of the car to flee when Porter shot him twice. 31 RP 33-34. One shot entered the back of the victim's shoulder, the second shot struck the victim in the back of the head. 27 RP 139. Porter used a semi-automatic Grendal .380 caliber handgun. 31 RP 51. He left two .380 shell casings near the body. 23 RP 79. Porter returned to the car and Reyes-Brooks asked if McCray was dead. 31 RP 34. Reyes-Brooks

exited the car, walked over to the victim and fired a single shot into the back of the victim's head with a .357 Smith and Wesson revolver. 28 RP 69; 31 RP 34. They returned to a bar in White Center where Reyes-Brooks told a friend "[b]rains were blown in the street." 25 RP 34.

Deputy Christian was a K9 officer who was looking for a place to let his dog relieve himself around 10 p.m. on December 1, 2006. 23 RP 43. He turned down a secluded dead end street in Seatac and was startled to discover the dead nude body of Dominique McCray in the middle of the road. 23 RP 47, 49. McCray had been shot once in the back, and twice in the back of the head. Detectives responded and found the two .380 shell casings, and a spent bullet. 23 RP 79.

Police found Reyes-Brooks, Porter, and Moore later that night at a party in White Center. King County Sheriff's deputies responded to an unrelated shooting outside the party. 26 RP 139. During the investigation Deputy Steve Cox interviewed people at the party including Porter. 24 RP 85. Porter shot and killed Deputy Cox, and proceeded to engage in a gun battle with other sheriff's deputies. 24 RP 88-89. Porter then turned the .380 handgun on himself, taking his own life. 27 RP 154-55. The .380 handgun was

recovered at the scene of Porter's death. 24 RP 89-90.

Reyes-Brooks and Moore were detained, and Moore told the detectives about the McCray murder. 25 RP 79; 31 RP 51, 54.

Later, police found the .357 revolver in Reyes-Brooks' car, under the driver's seat. 27 RP 22. Ballistics testing showed this weapon fired one of the two shots into the back of McCray's head<sup>2</sup>. 28 RP 69. DNA testing on the .357 revolver revealed a partial profile consistent with Reyes-Brooks from swabs taken from the handle, hammer and trigger areas of the gun, and a small drop of blood that matched McCray's DNA. 28 RP 83-84, 86, 88, 89. Police also found blood-stained clothes at Reyes-Brooks' home. 26 RP 147. DNA testing showed the blood was McCray's. 28 RP 94-95. Furthermore, the blood was in a high velocity pattern indicating Reyes-Brooks was at very close range. 27 RP 209-10; 28 RP 8, 13. Police also found McCray's clothes in a garbage bag in the car of Reyes-Brooks' girlfriend. 26 RP 115.

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<sup>2</sup> Ballistics testing also confirmed that the .380 handgun recovered from Porter's remains fired the other shot to McCray's head, and the shot to McCray's back. 27 RP 146, 153; 28 RP 64, 66.

C. ARGUMENT

1. THE COURT SHOULD REJECT REYES-BROOKS' CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Reyes-Brooks challenges the instruction for the Firearm special allegation, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, Reyes-Brooks did not object to this instruction below, and because the claimed error is not of constitutional magnitude, he has waived this issue on appeal.

a. Relevant Facts.

The court provided the jury with a special verdict form for the Firearm special allegation. The instruction for the special verdict form stated in pertinent part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 198A (Instruction No. 24). This instruction is identical to WPIC 160.00. The court, prosecutor and defense had extensive

discussion about the instructions and Reyes-Brooks did not raise any concerns about instruction number 24. 29 RP 3-13; 34 RP 3-17. The trial court specifically asked whether Reyes-Brooks had any objection to instruction number 24 (the special verdict instruction) and his attorney replied that she did not. 35 RP 61.

b. Reyes-Brooks Has Waived Any Challenge To The Special Verdict Instruction.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Reyes-Brooks must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by Reyes-Brooks, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was

charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Bashaw, 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence." Bashaw, 169 Wn.2d at 146.

In so holding, the court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw, 169 Wn.2d at

146 n.7. Instead, the court cited policy justifications for this common law rule:

The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Reyes-Brooks does not explain how the issue raised is of constitutional magnitude. He waived his challenge to this instruction by not objecting to it in the trial court, and cannot raise it for the first time on appeal.

- c. The Jury Was Required To Be Unanimous To Reach A Verdict For Unlawful Possession Of A Firearm; Any Error Requiring Unanimity On The Special Firearm Verdict Was Harmless.

Since the instructional error in Bashaw was not of constitutional magnitude the Court can address whether the error was harmless. To show actual prejudice the defendant must show

that the error had a practical and identifiable consequence in the trial of the case. Id. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. O'Hara, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

Bashaw declined to find the erroneous instruction harmless because the process by which unanimity was obtained was flawed by requiring agreement to answer "no" on the special verdict form. Bashaw, 169 Wn.2d at 147. The jury in Bashaw may not have initially agreed to answer "yes" on the special verdict, but may have continued to deliberate because the instructions required them to. Id. That flaw in the deliberative process is not present in Reyes-Brooks' case because he was charged with Unlawful Possession of a Firearm in count II. The jury was required to unanimously decide if "on or about December 1, 2006 the

defendant knowingly had a firearm in his possession or control<sup>3</sup>." CP 401 (Instruction No. 21). The jury was required to be unanimous in this finding even to answer "not guilty." The jury would have resolved the charged counts before turning to the special verdict form. CP 405-07, 408, 409. Unlike in Bashaw, had the jury been unable to initially agree whether Reyes-Brooks possessed a firearm, the deliberative process would have properly continued in an effort to achieve a unanimous verdict on count II.

Furthermore, the evidence that Reyes-Brooks possessed a firearm was overwhelming. Moore testified that she saw Reyes-Brooks pointing a gun at McCray while in the car. 31 RP 31. She saw Reyes-Brooks get out of the car and heard a shot. 31 RP 34. The .357 revolver was found in Reyes-Brooks' car. 27 RP 22. There was a DNA profile on the gun consistent with Reyes-Brooks. 28 RP 88. The evidence overwhelmingly demonstrated the nexus

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<sup>3</sup> The elements required for Unlawful Possession of a Firearm and the special verdict are similar. The special verdict required Reyes-Brooks to be "armed" with a firearm, defined as easily accessible and readily available for offensive or defensive use. CP 405 (Instruction No. 22). If a participant is armed with a firearm then an accomplice is deemed armed with a firearm. Id. Unlawful Possession of a Firearm requires possession, defined as being in one's physical custody (actual possession), or having dominion or control over the item (constructive possession). CP 402 (Instruction No. 20). Unlawful Possession of a firearm also required two additional elements, that the acts occurred in the State of Washington, and that Reyes-Brooks was previously convicted of a violent offense (which was stipulated to in Instruction No. 21A). CP 404.

between the gun and McCray's murder. Ballistics testing matched one of the bullets that killed McCray to the .357 revolver. 28 RP 89. The gun had McCray's blood on it, and Reyes-Brooks' clothes had high velocity blood spatter on them indicating he was very close to bullet impact. 27 RP 8, 13; 28 RP 89.

Reyes-Brooks cannot show prejudice from the erroneous instruction because the deliberative process properly required the jury to unanimously find he possessed a firearm before turning to the special verdict, and because the evidence was overwhelming.

d. The Rule In Bashaw Is Contrary To Legislative Intent.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, §§ 21 and 22. Const. art. I, § 21 which provides that "[t]he right of trial by jury shall remain inviolate" preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989).

This right, in criminal cases, included a right to a twelve-person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. The legislature gave force or meaning to a non-unanimous verdict in only one sentencing statute concerning aggravated first-degree murder. See RCW 10.95.080(2). For all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

2. REYES-BROOKS' RIGHT TO EQUAL PROTECTION OF LAW WAS NOT VIOLATED WHEN THE TRIAL COURT FOUND HIS PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE RATHER THAN PROOF BEYOND A REASONABLE DOUBT.

Reyes-Brooks next argues that, because a prior conviction that elevates the current crime to a higher level requires proof

beyond a reasonable doubt of that prior conviction, his right to equal protection of the law was violated where his prior convictions, found by the court by a preponderance of the evidence, were used to increase his punishment for the current crimes. This claim does not withstand scrutiny. This Court has recognized that while a prior conviction that the legislature has made an element of a crime must be proved to a jury beyond a reasonable doubt, the legislature had a rational basis to treat ordinary recidivism differently.

Under the Equal Protection Clause of the Fourteenth Amendment, as well as article I, § 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. State v. Thorne, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Courts employ three different levels of scrutiny in determining whether this right has been violated: 1) strict scrutiny, when a classification affects a suspect class or a fundamental right; 2) intermediate scrutiny; or 3) rational basis. Id. A statutory classification that implicates physical liberty only is not subject to intermediate scrutiny unless it also affects a semisuspect class. Id. Recidivist criminals are not a semisuspect class; thus, the proper test to apply where only a liberty interest is asserted is the rational basis test. Id.; State v.

Manussier, 129 Wn.2d 652, 673-74, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997).

The rational basis test is a deferential one: a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. Thorne, 129 Wn.2d at 771. The burden is on the challenging party to show that the classification is purely arbitrary. Id. The rational basis test requires only that the means employed be rationally related to a legitimate State goal; the means need not be the best way of achieving that goal. Manussier, 129 Wn.2d at 673. The legislature has broad discretion to determine the public interest, as well as the measures necessary to protect that interest. Id.

This Court recently rejected an identical equal protection challenge in State v. Langstead, 155 Wn. App. 448, 455, 228 P.3d 799 (2010)<sup>4</sup>. Langstead, like Reyes-Brooks, challenged as arbitrary the distinction drawn in State v. Roswell between a prior conviction used as an element and a prior conviction used to aggravate a sentence. Id. at 455 (citing State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008)). This Court noted that recidivists who are eligible for sentencing under the POAA are not situated similarly to

recidivists like Roswell. Id. at 455. Recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense. Id. at 455-56. This is not necessarily true for recidivists like Roswell, who was convicted of the crime of felony communication with a minor for immoral purposes. Roswell, 165 Wn.2d at 192. This crime is elevated from a gross misdemeanor to a felony if the defendant was previously convicted of the crime or a felony sexual offense. RCW 9.68A.090(2).

The Court then applied the rational basis that analyzed the distinction created by Roswell, and concluded that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.” Langstead, 155 Wn. App. at 456-57. The Court rejected Langstead's equal protection challenge. Id. at 457.

Reyes-Brooks, like the defendant in Langstead, relies primarily on an interpretation of Roswell in making his equal protection argument. He argues that, because the court in Roswell

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<sup>4</sup> The Supreme Court denied review on November 4, 2010 (No. 84741-0).

recognized that elements of a crime must be proved to a jury beyond a reasonable doubt, even where the element is a prior conviction, it follows that *all* prior convictions must be treated as elements of a crime where they are used to increase the punishment for that crime. This argument ignores the distinction between a prior conviction that actually alters the crime that may be charged, and a prior conviction that is used solely to establish recidivism.

In Roswell, the court addressed RCW 9.68A.090(1), under which a person who communicates with a minor for immoral purposes is ordinarily guilty of a gross misdemeanor; however, under RCW 9.68A.090(2), if the defendant has previously been convicted of a felony sexual offense, he is guilty of a class C felony. Roswell, 165 Wn.2d at 190. Addressing confusion that had arisen at argument concerning whether the prior conviction was an aggravating factor or an element of the charged crime, the court clarified:

[A] prior sexual offense conviction is an essential element that must be proved beyond a reasonable doubt. The prior conviction is not used to merely increase the sentence beyond the standard range but *actually alters the crime that may be charged*.

Roswell, 165 Wn.2d at 190, 192 (emphasis added).

The legislature chose to elevate certain crimes if the defendant had been convicted of closely related conduct in the past. See, e.g., RCW 9.68A.090(2) (elevating Communicating With a Minor For Immoral Purposes from a gross misdemeanor to a felony if defendant was previously convicted of a felony sexual offense); RCW 25.50.110(5) (elevating Violation of a Domestic Violence Court Order from a gross misdemeanor to a class C felony if defendant has at least two prior convictions for violating such an order). These prior convictions, which serve as elements of the crime and thus must be proved to a jury beyond a reasonable doubt, are closely connected in subject matter to the crimes that they elevate, and these prior convictions actually change the crime currently charged.

By contrast, Reyes-Brooks would still be guilty of the same crime, Murder in the First Degree, whether or not the State proved the prior convictions that establish him as a persistent offender. This is because, under the SRA, the legislature has chosen to use prior convictions purely for recidivist purposes as to most crimes, simply counting all felonies of any nature in calculating the punishment for the current conviction. See RCW 9.94A.525. And under the persistent offender provisions of the SRA, the legislature

has chosen to punish those defendants who have committed a crime classified as a "most serious offense" and who have been convicted on at least two separate occasions of prior "most serious offenses" (regardless of the nature of the "most serious offense") more harshly, with a sentence of life without possibility of parole. RCW 9.94A.030(33); 9.94A.570.

The fact that the legislature has chosen to handle these situations differently is not irrational. Making specific crimes more serious by reason of specific, related prior crimes evinces a legislative intent to deter repeat offenses of a specific nature by making subsequent violations a more serious crime. Increasing the punishment for felonies in general, and for certain "most serious offenses" in particular, by taking recidivism into account, reflects a different, more generalized legislative choice to protect the public.

Reyes-Brooks' equal protection argument, taken to its logical conclusion, would invalidate not only the POAA, but the sentencing scheme of the SRA in general – all prior convictions would have to be treated as "elements" of the current crime and proved to a jury beyond a reasonable doubt. The Washington courts have in general rejected such claims. See In re Personal Restraint of Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998) (no equal

protection violation when legislature changed its view of criminal punishment, resulting in offenders being subject to different punishment schemes); State v. Ross, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004) (same); Manussier, 129 Wn.2d at 672-74 (POAA passes rational basis test and thus does not violate federal or state equal protection clauses).

This Court should reject Reyes-Brooks' equal protection violation claim.

3. NEITHER DUE PROCESS NOR THE RIGHT TO A JURY TRIAL PRECLUDED THE TRIAL COURT FROM DETERMINING WHETHER REYES-BROOKS HAS TWO PRIOR CONVICTIONS THAT QUALIFY AS "STRIKES" UNDER THE POAA.

Reyes-Brooks contends that his federal constitutional rights under the Sixth and Fourteenth Amendments, to a jury trial and to proof beyond a reasonable doubt, were violated when the trial court, rather than a jury, found the existence of his two prior "strikes." These arguments have repeatedly been rejected by Washington courts.

The relevant line of cases begins with Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In that case, the United States Supreme Court held that "[o]ther

*than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). Despite this explicit language, defendants have argued that Apprendi conferred a right to a jury trial in persistent offender sentencings; i.e., that the State must prove the relevant prior convictions to a jury beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 119, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). The Washington Supreme Court rejected this argument: "Unless and until the federal courts extend *Apprendi* to require such a result, we hold these additional protections [charging prior "strike" convictions in an information and proving them to a jury beyond a reasonable doubt] are not required under the United States Constitution or by the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW." Id. at 117.

Subsequently, in State v. Smith, the Washington Supreme Court addressed these same issues under the Washington Constitution, article I, sections 21 and 22, in another POAA case. 150 Wn.2d 135, 139, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). The court first reaffirmed its holding in Wheeler under

the federal constitution. Id. at 143. Then, after a full Gunwall<sup>5</sup> analysis, the court rejected the claim that the Washington Constitution requires a jury trial for determining prior convictions at sentencing. Id. at 156. See also In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.").

Reyes-Brooks nevertheless argues that the United States Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), altered this law as it applies to prior convictions, in that it extended the constitutional protections to facts that elevate a sentence above the standard range. Brief. of App. at 11-13; 542 U.S. at 303-04. Again, the Washington Supreme Court has rejected this argument. In State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007), another POAA case, the defendant cited Blakely as well as Apprendi in support of his argument that he had a right to a jury determination of his prior conviction. Citing Lavery, Smith and Wheeler, the court reiterated: "This court has repeatedly rejected similar arguments

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<sup>5</sup> State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

and held that *Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." Thiefault, 160 Wn.2d at 418.

Most recently, this Court has rejected the same argument in State v. Langstead, 155 Wn. App. 448, 453, 228 P.3d 799 (2010). The Court recognized that the Washington Supreme Court has repeatedly rejected the argument that due process requires the fact of a prior conviction to be submitted to a jury and proved beyond reasonable doubt for sentencing purposes. Id. The Court went on to hold, "[b]ecause of the exception for 'the fact of a prior conviction,' there is no violation of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment when a judge determines by a preponderance of the evidence that a defendant has two prior 'strikes' for purposes of the Persistent Offender Accountability Act." Id.

Based on this unbroken line of cases rejecting the argument Reyes-Brooks makes in this case, this Court should hold that Reyes-Brooks did not have a right to a jury determination of proof beyond a reasonable doubt of the prior convictions that constituted his first two "strikes." The trial court properly made this determination.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Reyes-Brooks' sentence as a persistent offender and the special firearm finding.

DATED this 6<sup>th</sup> day of December, 2010.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the petitioner, Thomas Kummerow, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle WA 98101, containing a copy of the Brief of Respondent, in STATE V. SEGIO REYES-BROOKS, Cause No. 64012-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Wynne Brame  
Done in Seattle, Washington

  
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Date 12/6/10

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