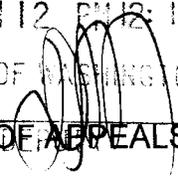


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DIVISION II

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No. 40732-9-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN EUGENE ONG,

Appellant.

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

The Honorable George L. Wood

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Ong's Sixth and Fourteenth Amendment rights to a jury trial and due process.

2. The trial court deprived Mr. Ong the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis

exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

2. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Ong's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

C. STATEMENT OF THE CASE

Steven Ong was found guilty after a jury trial of one count of assault in the second degree with sexual motivation and one count of fourth degree assault. CP 55, 57-58.¹ At sentencing, the court

¹ Mr. Ong had previously been convicted of the same offenses but the convictions were reversed and remanded for a new trial by Division One of this Court on November 23, 2009. CP 113.

found that Mr. Ong had suffered two prior offenses that constituted most serious offenses and found Mr. Ong to be a persistent offender under RCW 9.94A.030(36)(a)(i), (ii). CP 8, 11. Mr. Ong was sentenced to a term of life imprisonment without the possibility of parole under RCW 9.94A.570. CP 11.

D. ARGUMENT

1. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR SENTENCING FACTOR, RATHER THAN AS AN "ELEMENT," DEPRIVES MR. ONG OF THE EQUAL PROTECTION OF THE LAW

a. Mr. Ong did not nor could not waive his right to a jury trial on the persistent offender sentence. It may be argued that the trial court's pretrial ruling based upon the agreement of the parties that the persistent offender finding was not a *Blakely* issue, waived Mr. Ong's right to challenge the court's finding without a jury finding. CP 111. But, the issue of a jury trial waiver is one personal to Mr. Ong and the waiver must be knowing, voluntary, and intelligent. Further, whether a right to a jury trial exists for the persistent offender issue is a legal issue which could not be waived.

"While waiver does not apply where the alleged sentencing error is a *legal error* leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts,

later disputed, or where the alleged error involves a matter of trial court discretion.” *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (emphasis in original). “*Goodwin* turned on the fact that that defendant's sentence contained obvious errors.” *State v. Ross*, 152 Wn.2d 220, 231, 95 P.3d 1225 (2004). *Goodwin's* collateral attack was permissible because the validity of his sentence depended upon the resolution of an immediately apparent legal issue rather than the resolution of a factual dispute. The issue as to whether Mr. Ong possessed a right to a jury trial on the persistent offender issue was a purely legal issue which Mr. Ong could not waive.

In addition, a defendant may waive the right to a jury trial as long as he acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). Waiver of the right to a jury trial will not presumed unless the record establishes a valid waiver. *State v. Pierce*, 134 Wn.App. 763, 771, 142 P.3d 610 (2006); CrR 6.1(a) (“cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court”). While not determinative, a written waiver is strong evidence that a defendant validly waived a jury trial. *Pierce*, 134 Wn.App. at 771.

Because the right to a jury trial is “an important constitutional right,” the defendant’s waiver of that right is reviewed *de novo*. *State v. Vasquez*, 109 Wn.App. 310, 319, 34 P.3d 1255 (2001), *aff’d*, 148 Wn.2d 303, 59 P.3d 648 (2002). Courts indulge “every reasonable presumption ... against the waiver of such a right, absent an adequate record to the contrary.” *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). The State bears the burden to establish a valid waiver. *Wicke*, 91 Wn.2d at 645.

Here this Court should not presume Mr. Ong waived his right to a jury trial on the persistent offender issue absent something more than counsel’s agreement that *Blakeley* does not apply. There must be something in the record which establishes Mr. Ong personally voluntarily, knowing, and intelligently waived his right to a jury trial. No such record exists here.

b. Mr. Ong’s right to equal protection was violated.

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d

934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has recently held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the

[second act] surely does not provide a principled basis for treating [the two acts] differently.” *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

Apprendi makes clear that “[a]ny possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006) (*Recuenco II*). Beyond its failure to abide the logic of *Apprendi*, the distinction *Roswell* draws does not accurately reflect the impact of the recidivist fact in either *Roswell* or the cases the Court attempts to distinguish.

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes. *Id.* at 191. The Court found that in the context of this and related offenses,² proof of a prior conviction functions as an “elevating element,” i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92.

² Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. *Roswell*, 165 Wn.2d at 196, discussing *State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002).

Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the “maximum punishment” was five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 US. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3³ would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See, Washington Sentencing Guidelines Commission, Adult Sentencing Manual 2008, III-76. The “elevation” in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the

³ Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the *penalty* for the substantive crime: see RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). But there is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in certain circumstances and an ‘aggravator’ in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thome*, 129 Wn.2d

736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thome*, 129 Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. *Id.*

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thome, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person’s only felony and thus results in a “maximum sentence” of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an

element because it defined the very illegality, reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject to. *Id.* So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

The recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as an aggravator in another. The Court should strike Mr. Ong’s persistent offender sentence and remand for entry of a standard range sentence.

2. MR. ONG WAS DEPRIVED OF HIS RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WHEN IT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICTIONS THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

The trial court denied Mr. Ong the right to a jury trial when it did not charge the jury with finding beyond a reasonable doubt that Mr. Ong had two qualifying prior convictions for most serious offenses, and instead made that determination on its own and only by a preponderance of the evidence. Mr. Ong's sentence as a persistent offender therefore deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial and must be vacated.

- a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The Due Process Clause 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. It is axiomatic 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. *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). 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).

In recent cases, the Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In *Blakely*, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather

than a jury. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in *Apprendi*, the Court found New Jersey's "hate crime" legislation 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 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S., at 476. *Ring* pointed out the dispositive question is one of substance, not form. "If a State makes an increase in 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." 536 U.S. at 602, *citing Apprendi*, 530 U.S. at 482-83. Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. *Blakely*, 542 U.S. at 304-05.

b. These issues are not controlled by prior by federal decisions. The United States Supreme Court held in *Almendarez-Torres v. United States* that recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Almendarez-Torres* pleaded guilty and admitted his prior convictions, but argued that his prior convictions should have been included in the indictment. 523 U.S. at 227-28. The Court determined Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* The Court concluded the prior conviction need not be included in the indictment 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 not unfair because it created a broad permissive sentencing range and judges have typically exercise their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. *Id.* at 244-45.

Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. *Id.* at 246.

Since *Almendarez-Torres*, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. *Blakely*, 542 U.S. at 301-02; *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).

Apprendi distinguished *Almendarez-Torres* because that case only addressed the indictment issue. 530 U.S. at 488, 495-96.

Apprendi noted “it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated *Almendarez-Torres* as 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.*

In *Blakely*, *Apprendi*, and *Jones*, the Court stated that, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must

be submitted to a jury, and proved beyond a reasonable doubt.”

This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the *Apprendi* rule.

Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under *Apprendi*. Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing 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. 530 U.S. at 499. Rather than focusing on whether something is 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. 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.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the *Almendarez-Torres* decision. *Smith*, 150 Wn.2d 135 (addressing *Ring*); *Wheeler*, 145 Wn.2d at 121-24 (addressing *Apprendi*). The Washington Supreme Court, however, has felt obligated to “follow” *Almendarez-Torres*. *Smith*, 150 Wn.2d at 143; *Wheeler*, 145 Wn.2d at 123-24. Since *Almendarez-Torres* only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, the *Blakely* decision makes clear that the Supreme Court’s protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. *Blakely*, 542 U.S. at 305.

Further, the reasons given by *Almendarez-Torres* to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the POAA. First, *Almendarez-Torres* looked to the

legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not establish the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Mr. Ong' maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in *Almendarez-Torres* has been marginalized out of existence. This Court should revisit Washington's blind adherence to that now-disfavored decision and remand for a jury determination of the prior convictions.

c. The trial court denied Mr. Ong his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. *Almendarez-Torres* held prior convictions need not be pled in the information for several reasons. First the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 523 U.S. at 243-44. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. *State v. Manussier*, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996), *cert. denied sub nom, Manussier v. Washington*, 520 U.S. 1201 (1997) (Madsen, J., dissenting); *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): *Furth*, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An. § 61-11-19.

For several reasons, *Almendarez-Torres* does not answer the question whether Mr. Ong was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he could be sentenced as a persistent offender. The cases cited by *Almendarez-Torres* support

not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, *Almendarez-Torres* noted the fact of prior convictions 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. *Id.* Here, in contrast, Mr. Ong’s prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life without the possibility of parole in Washington is reserved for aggravated murder and persistent offenders. This fact is certainly important in the constitutional analysis.

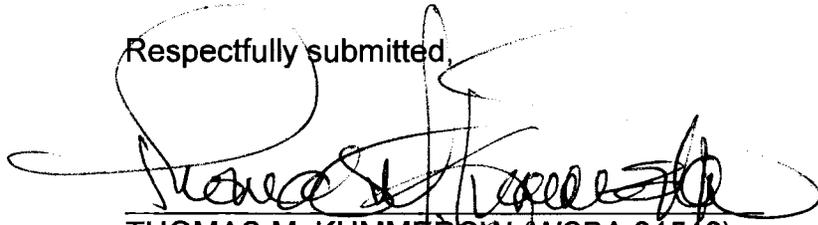
The SRA eliminated a sentencing court’s discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge’s finding regarding sentencing factors. Mr. Ong was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

F. CONCLUSION

For the reasons stated, this Court must either reverse Mr. Ong's conviction and remand for a new trial, or reverse his sentence and remand for sentencing within the standard range.

DATED this 11th of January 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', written over a horizontal line. The signature is stylized and somewhat cursive.

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