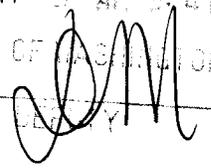


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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

NO. 40732-9-II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN EUGENE ONG

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 05-1-00230-1

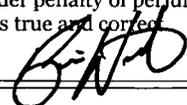
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**BRIEF OF RESPONDENT**

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**I. ISSUE STATEMENT:**

1. Does the Persistent Offender Accountability Act (POAA) deprive criminal defendants of due process when a sentencing judge, rather than a jury, determines the existence of any prior convictions?
2. Does the POAA draw a purely arbitrary distinction between (1) recidivists whose prior convictions constitute “elements” of a crime that the State must prove to a jury beyond a reasonable doubt, and (2) recidivists whose prior convictions constituted “sentencing factors” that a judge may find by a preponderance of the evidence?

**II. STATEMENT OF THE CASE:**

A jury convicted Mr. Steven Ong of two crimes: (1) assault in the second degree with sexual motivation, and (2) assault in the fourth degree. CP 55, 57-58.

At sentencing, the Superior Court found that Ong had previously been convicted for two felonies that were most serious offenses. CP 21, 24; RP (5/8/2008) at 73. As such, the sentencing judge determined that Ong was a “persistent offender.” CP 24; RP (5/19/2010) at 23; RP (5/8/2008) at 73, 79-80. The judge sentenced Ong to life in prison without the possibility of parole under RCW 9.94A.570. CP 8, 11, 24; RP (5/19/2010) at 30; RP (5/8/2008) at 79-80.

On appeal, Mr. Ong only challenges the sentence imposed. He argues his sentence violated his rights to due process and a jury trial.

### III. ARGUMENT:

#### A. A SENTENCING JUDGE MAY DETERMINE THE EXISTENCE OF PRIOR CONVICTIONS.

Mr. Ong argues that the Superior Court violated his constitutional rights when it sentenced him as a “persistent offender” under RCW 9.94A.570 because the judge, rather than a jury, determined the existence of his prior convictions through a preponderance of the evidence. *See* Brief of Appellant at 13-22. This argument fails.

1. Under existing federal and state law, a judge may lawfully determine the existence of prior offenses for sentencing purposes.

In 1994, Washington’s legislature enacted the Persistent Offender Accountability Act (POAA). Laws of 1994, ch.1, §§ 1-3. Pursuant to this Act, and despite the statutory maximum sentence for a crime, a defendant found to be a persistent offender “shall be sentenced to a term of total confinement for life without the possibility of release[.]” RCW 9.94A.570. A “persistent offender” is (1) an individual who has been convicted of a felony that is a most serious offense, and (2) has been convicted previously on two separate occasions of most serious offenses.<sup>1</sup> Former

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<sup>1</sup> In May 2005, Mr. Ong committed the crimes that gave rise to the present appeal. As such, the State cites the version of the statute that was in effect at that time. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). The parties do not dispute that Ong has committed three offenses that are “strikes” under the POAA: Assault in the Second

RCW 9.94A.030(32)(a)(i), (ii) (2003). *See also* Former RCW 9.94A.030(28) (2003) (defining “most serious offense”). A sentencing judge has the lawful authority to determine if a criminal defendant is a persistent offender under the POAA.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution “entitle a criminal defendant to a jury determination that he is guilty of every *element* of the crime with which he is charged, beyond a reasonable doubt.” *State v. McKague*, 159 Wn. App. 489, 513, 246 P.3d 558 (2011) (emphasis added) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Although the right to a jury trial and the prosecution’s burden of proof beyond a reasonable doubt are “constitutional protections of surpassing importance”, *McKague*, 159 Wn. App. at 513 (quoting *Apprendi*, 530 U.S. at 476), the Supreme Court has decided that these protections do not apply when determining the existence of prior convictions upon sentencing. *McKague*, 159 Wn. App. at 513 (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 239, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)).

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Degree (2005); Kidnapping in the Second Degree (1995); Assault in the Second Degree (1992). *See* CP 21.

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The constitutionality of finding past convictions by a preponderance of the evidence was first addressed in *Almendarez-Torres*. There, the U.S. Supreme Court held, under a federal statute authorizing enhanced sentences for recidivist criminals, recidivism was not an element of the offense that was required in an indictment. *Almendarez-Torres*, 523 U.S. at 226-27. The high court reasoned that recidivism is a traditional basis for a court to increase an offender's sentence. *Id.* at 243.

In *Apprendi*, the U.S. Supreme Court affirmed the understanding that a sentencing judge has the lawful authority to determine the existence of prior convictions for sentencing purposes. The *Apprendi* court held that any fact that increases the penalty beyond the statutory maximum must be proved to a jury beyond a reasonable doubt. 530 U.S. at 489-90. However, the high court carved out a specific exception to this rule:

*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*

530 U.S. at 490 (emphasis added). The U.S. Supreme Court continues to recognize and apply this "prior conviction" exception. *See United States v. O'Brien*, -- U.S. --, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010) (recognizing the exception carved out by *Almendarez-Torres* and *Apprendi*); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159

L.Ed.2d 403 (2004) (accepting *Apprendi's* exclusion of prior convictions from the rule requiring proof to a jury beyond a reasonable doubt).

The Washington Supreme Court “has repeatedly rejected” the argument that due process requires the State to prove the existence of a prior conviction to a jury during the sentencing phase of a criminal proceeding. *See e.g. State v. Magers*, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (approving of the interpretation that *Blakely* does not apply to sentencing under the POAA); *State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (due process does not require the fact of a prior conviction to be submitted to a jury and proved beyond reasonable doubt for sentencing purposes); *State v. Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005) (applying the “prior conviction exception” recognized in *Apprendi* and its progeny); *State v. Smith*, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003) (specifically holding there is no right to a jury trial on prior convictions used to establish persistent offender status under the POAA), *cert. denied*, 541 U.S. 909, 124 S.Ct. 1616, 158 L.Ed.2d 256 (2004); *State v. Wheeler*, 145 Wn.2d 116, 34 P.3d 799 (2001) (rejecting the argument that the federal constitution requires recidivism to be pleaded and proved to a jury beyond a reasonable doubt), *cert denied*, 535 U.S. 996, 122 S.Ct. 1559, 152 L.Ed.2d 482 (2002); *State v. Thorne*, 129 Wn.2d 736, 781-82, 921 P.2d 514 (1996) (under the SRA, the trial court, rather than a

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jury, determines whether a defendant has any criminal history in order to impose the appropriate sentence).

The Washington Court of Appeals adheres to the above-cited federal and state precedent. *See e.g. State v. Langstead*, 155 Wn. App. 448, 453, 228 P.3d 799 (2010) (no violation of the rights to due process or a jury when a judge determines by a preponderance of the evidence whether a defendant has “strikes” for purposes of the POAA). As such, this Court recently affirmed the ability of a judge, rather than a jury, to determine prior convictions for purposes of the persistent offender sentencing. *McKague*, 159 Wn. App. at 517. *See also State v. Ball*, 127 Wn. App. 956, 959, 113 P.3d 520 (2005) (reasoning that *Blakely* does not apply to sentencing under the POAA). In *McKague*, the majority endorsed the reasoning it employed four years earlier:

(1) existing case law does not give [an individual] the right to have a jury decide whether he is the same defendant who committed the crimes resulting in his prior convictions used as strike offenses to establish his persistent offender status under the POAA and, thus, subject him to life imprisonment without parole for his new crime; (2) identity is a fact so “intimately related to [the] prior conviction,” under [*State v.*] *Jones*, [159 Wn.2d 231, 149 P.3d 636,] as to be virtually inseparable from the finding of the existence of a prior conviction; (3) the *Almendarez-Torres* fact-of-the-prior conviction exception to the *Apprendi* / *Blakely* jury trial requirement necessarily includes identity; and (4) thus, *Apprendi* and *Blakely* do not require a jury to decide the identity component of the fact of a prior conviction.

Therefore, the sentencing court may, as it did here, find by a preponderance of the evidence that the perpetrator of the present crime is the same person as the perpetrator of a prior crime used as a strike offense for POAA sentencing purposes.

*Id.* at 516 (quoting *State v. Rudolph*, 141 Wn. App. 59, 71-72, 168 P.3d 430 (2007), *review denied*, 163 Wn.2d 1045, 190 P.3d 54 (2008)). These precedential opinions control this Court’s review of the present appeal.

Here, the sentencing court did not violate Ong’s constitutional rights when it found the existence of his prior convictions for purposes of the POAA. The sentencing court properly applied the “fact of a prior conviction” exception. Thus, there was no violation of the Sixth Amendment right to a jury, or the Due Process Clause of the Fourteenth Amendment. Mr. Ong’s argument fails.

2. This Court must affirm the sentence unless/until the higher courts overrule their prior decisions.

It is true that criminal defendants and appellate courts have questioned the wisdom and continued viability of *Almendarez-Torres*. However, the U.S. Supreme Court has affirmed the rule it first applied in *Almendarez-Torres*. In *Apprendi*, despite expressing reservations about *Almendarez-Torres*, a majority of the high court carved out an exception for prior convictions and thereby preserved its earlier decision. 530 U.S. at 489. Additionally, the *Blakely* Court, without discussing *Almendarez-*

*Torres*, accepted the exception that *Apprendi* preserved. 542 U.S. at 301. Finally, the U.S. Supreme Court has recently re-affirmed this exception in *United States v. O'Brien*, *supra*. 130 S.Ct. at 2174.

Although the Washington Supreme Court has acknowledged that the recidivism issue raised in *Apprendi* is arguably undecided, it has also recognized that *Apprendi* confined its decision to factors other than recidivism. *Wheeler*, 145 Wn.2d at 122-23. The state's highest court continues to recognize that *Almendarez-Torres* remains good law, and that no other case has extended *Apprendi* to require the State to prove recidivism to a jury beyond a reasonable doubt. *Id.* at 123. Thus, even if the issue is not foreclosed, there is no controlling law that alters the clearly stated exception in *Apprendi*.

Mr. Ong encourages this Court to disregard clearly established precedent. *See* Brief of Appellant at 16-23. The U.S. Supreme Court has cautioned expressly against such a practice:

We [the United States Supreme Court] do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, *yet appears to rest on reason rejected in some other line of decisions*, the [lower courts] should follow the case which directly controls, leaving to this Court *the prerogative of overruling its own decisions.*”

*McKague*, 159 Wn. App. at 515 (emphasis in original) (quoting *Agostini v. Felton*, 421 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). The Ninth Circuit adhered to this very principle, despite recognizing concerns regarding the viability of *Almendarez-Torres*. *United States v. Pacheco-Zepeda*, 234 F.3d 411, 414 (9th Cir. 2000) (confirming the U.S. Supreme Court has not to overrule *Almendarez-Torres* and unmistakably carved out an exception for prior convictions).

Accordingly, and until reexamined by a higher court, this Court must reject Mr. Ong's invitation to reject established, controlling precedent. *See State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). This Court should affirm.

**B. PERSISTENT OFFENDER SENTENCING  
DOES NOT VIOLATE CONSTITUTIONAL  
SAFEGUARDS OF EQUAL PROTECTION .**

Mr. Ong argues that his right to equal protection was compromised when the sentencing court found the existence of his prior convictions and determined that he was a persistent offender under the POAA. He argues that it is arbitrary to distinguish between: (1) the cases that require a jury to find, beyond a reasonable doubt, the existence of a prior conviction when said conviction is an element of an offense; and (2) the cases that allow a judge to find, by a preponderance of the evidence, the existence of

prior convictions when a defendant is sentenced as a “persistent offender” under RCW 9.94A.570. *See* Brief of Appellant at 5-12. This Court should reject the argument.

1. Standard of Review.

Under the federal and state constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive equal treatment. U.S. Const. amend XIV; Wash. Const. article I, § 12; *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S.Ct. 1563, 137 L.Ed.2d 709 (1997); *State v. McKague*, 159 Wn. App. 489, 517, 246 P.3d 558 (2011).

Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification: (1) strict scrutiny when a classification affects a suspect class or threatens a fundamental right; (2) intermediate or heightened scrutiny when important rights or semi-suspect classifications are affected; and (3) rational basis scrutiny when none of the above rights or classes are threatened. *Manussier*, 129 Wn.2d at 672-73; *State v. Williams*, 156 Wn. App. 482, 496-97, 234 P.3d 1174 (2010).

Mr. Ong, a persistent offender, asserts a liberty interest. A statutory classification that implicates physical liberty is not subject to the

intermediate level of scrutiny under the equal protection clause unless the classification also affects a suspect or semi-suspect class. *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996); *McKague*, 159 Wn. App. at 517. Under RCW 9.94A.570, persistent offenders are not a suspect or semi-suspect class. *Manussier*, 129 Wn.2d at 673; *McKague*, 159 Wn. App. at 517. Thus, Ong’s challenge to his life sentence imposed under the POAA is subject to rational basis review. *Manussier*, 129 Wn.2d at 673-74; *McKague*, 159 Wn. App. at 517.

Rational basis review requires that this Court apply a modest level of scrutiny to a challenged statute. *Williams*, 156 Wn. App. at 497. A statute is constitutional if three prongs are satisfied:

(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 purposes of the statute.

*State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991); *State v. Langstead*, 155 Wn. App. 448, 454, 228 P.3d 799 (2010). The defendant has the burden to show a statute violates equal protections, *i.e.* that the classification is “purely arbitrary.” *Thorne*, 129 Wn.2d at 771; *McKague*, 159 Wn. App. at 518; *Williams*, 156 Wn. at 497; *Langstead*, 155 Wn. App. at 454.

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2. Reasonable grounds support the statutory classification.

The Washington Supreme Court has repeatedly rejected equal protection arguments under the POAA that would require the State to submit a defendant's prior convictions to a jury and to prove them beyond a reasonable doubt. *See e.g. State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); *Manussier*, 129 Wn.2d at 674; *Thorne*, 129 Wn.2d at 771-72. Nevertheless, Ong argues the POAA violates equal protection guarantees based on the facts of *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).<sup>2</sup>

In *Roswell*, the State charged the defendant with the crime of communicating with a minor for immoral purposes, a crime that is elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or a felony sex offense. 165 Wn.2d at 190; RCW 9.68A.090(2). The defendant requested that the court bifurcate the trial by having a jury decide the elements of communication with a minor for immoral purposes as a misdemeanor, and the judge determine the element of a prior conviction. 165 Wn.2d at 190. The Supreme Court affirmed the trial court's decision that denied the defendant's request,

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<sup>2</sup> Every division of the Court of Appeals has rejected equal protection challenges to the POAA that cites *State v. Roswell*. *See McKague*, 159 Wn. App. at 519 n.18; *Williams*, 156 Wn. App. at 497-98; *Langstead*, 155 Wn. App. at 454-56. This Court should adhere to this precedent, reject the argument, and affirm.

distinguishing between (1) prior conviction as an aggravator that merely increase the maximum punishment, and (2) prior convictions that actually alter the crime charged. *Id.* at 192-94. The high court concluded that the prior conviction was an essential element of the felony that needed to be proved to a jury beyond a reasonable doubt because the defendant could not have been convicted of the crime charged without proof of the prior conviction. *Id.* at 194.

Ong argues that the *Roswell* court's distinction between (1) a prior conviction as a sentencing aggravator, and (2) a prior conviction as an element of a crime, is "wholly arbitrary." He argues that the recidivist fact in his case operates in the same fashion as it did in *Roswell*: it merely alters the maximum penalty to which the offender is subject. *See* Brief of Appellant at 11.

However, Ong is not similarly situated to other recidivists. There is a rational distinction between recidivists (as in *Roswell*) that engage in minor criminal misconduct more than once and persistent offenders (like Ong) that have criminal records that include two or more felonies that are most serious offenses. *See Langstead*, 155 Wn. App. at 456-57. With respect to the former, the prior conviction is an element necessary to bring

them into a circle labeled “felons.”<sup>3</sup> *Langstead*, 155 Wn. App. at 456. With respect to the latter, offenders like Ong are already in that circle and continue to subject the community to crimes of violence.

The POAA seeks to improve public safety by placing the most dangerous criminals in prison and to reduce the number of serious, repeat offenders with tougher sentencing. RCW 9.94A.555; *Thorne*, 129 Wn.2d at 772; *Williams*, 156 Wn. App. at 498. The legislature did not include all recidivists under the POAA, but specifically targeted the most serious, dangerous offenders. *Thorne*, 129 Wn.2d at 764 (distinguishing the habitual criminal statute, which could apply to a relatively minor crime like petit larceny as well as serious felonies, from the POAA, which is limited to a person convicted on three occasions of serious crimes). The fact the legislature elected to treat differently people who repeatedly commit the same, less serious crimes from those who repeatedly commit serious felonies does not violate equal protection. Under the rational basis test, the legislature can reasonably treat these two types of recidivists

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<sup>3</sup> Mr. Ong argues that prior convictions as “elements” serves only to increase an offender’s confinement term. See Brief of Appellant at 8-9. However, other collateral disabilities flow from a felony conviction, such as the right to possess a firearm. The Washington Supreme Court has held that such a disability ensures the public’s safety by regulating a potentially dangerous activity by persons deemed unfit to possess firearms. See *State v. Schmidt*, 143 Wn.2d 658, 678, 23 P.3d 462 (2001).

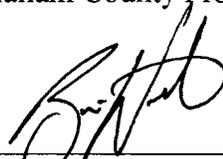
differently. *Williams*, 156 Wn. App. at 497-98; *Langstead*, 155 Wn. App. at 456-57. Mr. Ong's equal protection argument fails.

**IV. CONCLUSION:**

The U.S. Supreme Court, the Washington Supreme Court, and all three divisions of the Court of Appeals have expressly held that the POAA is not constitutionally infirm on due process, equal protection, or other grounds. For the reasons stated above, the State respectfully requests that this Court affirm the Mr. Ong's sentence under the POAA.

RESPECTFULLY SUBMITTED this 6th day of May 2011.

DEBORAH S. KELLY  
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