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78984-3

COA No. 55405-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS WILLIAMS,

Appellant.

2005 MAY 31 PM 4:41  
CLERK OF COURT  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Anita Farris,  
The Honorable Thomas Wynne

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Appellant Demetrius Williams was unlawfully seized, arrested, and charged with possession of a controlled substance. During the course of those proceedings, Mr. Williams apparently missed a scheduled court appearance. Following a motion to suppress, Mr. Williams' controlled substance charge was dismissed, as the court found it arose from an unlawful seizure. Prior to the court's ruling on the motion, the State charged Mr. Williams with bail jumping for his alleged failure to appear. A jury convicted Mr. Williams of bail jumping.

On appeal, Mr. Williams claims the information failed to adequately apprise him of the bail jumping charge. He additionally contends the "to convict" instruction similarly omitted an essential element of bail jumping. Finally, he argues the court exceeded its authority by imposing a sentence which exceeded the jury's verdict, contrary to Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

B. ASSIGNMENTS OF ERROR.

1. The State violated Mr. Williams' constitutional right to notice when the charging document failed to allege the essential elements of the bail jumping charge.

2. The court violated Mr. Williams' right to due process by permitting the jury to convict Mr. Williams of bail jumping in the absence of proof of every essential element of the charge beyond a reasonable doubt.

3. The sentencing court violated Mr. Williams' right to a jury trial when it imposed a sentence not authorized by the jury's verdict.

4. The sentencing court violated Mr. Williams' right to a jury trial when it included prior juvenile adjudications of guilt in the calculation of his offender score, as the prior offenses were never proven to a jury beyond a reasonable doubt.

5. The sentencing court violated Mr. Williams' right to due process when it included four juvenile offenses in calculating his offender score for the present offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The accused has a constitutional right to be informed of the nature and cause of the charge against him. Accordingly, the charging document must enumerate all essential elements of the charged offense in order to permit the accused to prepare his defense. The failure to properly inform the accused of the elements of the charge against him requires reversal. Where the State failed to adequately identify either the offense underlying Mr. Williams' bail jumping charge, or to identify the potential punishment Mr. Williams faced if convicted, is dismissal required? (Assignment of Error 1)

2. The "to convict" jury instruction must contain all essential elements of the offense as it serves as a yardstick by which the jury measures guilt or innocence. Here, the "to convict" instruction mimicked the language of the faulty charging document, omitting an essential element of bail jumping. Where a jury is permitted to convict the accused without finding all of the essential elements of bail jumping, is reversal required? (Assignment of Error 2)

3. The Sixth Amendment<sup>1</sup> guarantees a defendant the right to a jury trial on every element of the charged crime. Did the sentencing court violate Mr. Williams' right to jury trial when it imposed a sentence based not on the facts found by the jury beyond a reasonable doubt, but on facts inferred by the court by a preponderance of the evidence? (Assignment of Error 3)

4. Did the trial court violate Mr. Williams' right to a jury trial when it included prior juvenile adjudications in the calculation of his offender score where those prior charges were never proven to a jury beyond a reasonable doubt? (Assignment of Error 4)

5. The Due Process Clause of the Fourteenth Amendment<sup>2</sup> requires the State prove every element of the charged crime beyond a reasonable doubt. Did the trial court violate Mr. Williams' right to due process of law when it included prior juvenile convictions in the calculation of his offender score where those

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<sup>1</sup> The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

<sup>2</sup> The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

prior charges were not proven to a jury beyond a reasonable doubt? (Assignment of Error 5)

D. STATEMENT OF THE CASE.

In an information filed April 11, 2003, the State charged Appellant Demetrius Williams with one count of possession of cocaine, in violation of RCW 69.50.401(d). CP 102. In an amended information filed April 23, 2004, the State added a count of bail jumping, in violation of "RCW 9A.76.170(1)," based on Mr. Williams' alleged failure to appear for an omnibus hearing on December 4, 2003.<sup>3</sup> CP 92.

In April 2004, Mr. Williams successfully moved to suppress the evidence arising from his unlawful seizure, thus the drug charge was dismissed. CP 93-99, 88, 29-31; 4/30/04RP 15-72; 5/7/04RP 5-9. After Mr. Williams' drug charge was dismissed, the State filed a second amended information, charging Mr. Williams only with bail jumping. CP 86.

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<sup>3</sup> Although the amended information was filed shortly after Mr. Williams' written motion to suppress, at sentencing, the prosecutor assured the court the State was "not being vindictive or spiteful in any way," by filing the bail jumping charge. 11/9/04RP 4. The verbatim reports of proceedings consist of five volumes and will be cited by date, followed by page number, i.e., "5/7/04RP 3."

A jury convicted Mr. Williams of bail jumping. CP 69.

Although the court noted that the standard range sentence for Mr. Williams' offense was "out of proportion" to the sentence he would have received had he been convicted of the underlying drug offense, the court noted it had to impose a sentence within the standard range. 11/9/04RP 10-11. This appeal timely follows. CP 4-5.

E. ARGUMENT.

1. THE INFORMATION FAILED TO ADEQUATELY NOTIFY MR. WILLIAMS OF THE ESSENTIAL ELEMENTS OF BAIL JUMPING, REQUIRING REVERSAL.

a. A defendant has a constitutionally protected right to notice of the accusation against him. The state and federal constitutions require the State to inform the accused of the nature and cause of the accusation against him. U.S. Const. amend. 6; Wash. Const. art. I, § 22. By court rule, the charging document "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). Thus, a charging document should contain "[a]ll essential elements of a crime." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991).

Under the "essential elements" rule, the charging document must also contain facts supporting every element of the offense and sufficiently identify the crime charged. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Moreover, the information must explain the facts behind both the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 101.

When challenged for the first time on appeal, a charging document is construed liberally. State v. Ibsen, 98 Wn.App. 214, 216, 989 P.2d 1184 (1999). Under this analysis, an appellate court determines whether the necessary facts appear in any form in the charging document. Id. at 216.

b. The underlying charge or conviction is an essential element of the crime of bail jumping and the failure to adequately inform the accused of that offense violates due process. RCW 9A.76.170(1) defines the elements of bail jumping as:

Any person having been released by court order or admitted to bail with the knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping.

Bail jumping is then divided into classifications based on the class of the underlying offense. RCW 9A.76.170(3).

In Ibsen, the defendant was charged with bail jumping. 98 Wn.App at 215. The charging document made no mention of the underlying offense Ibsen faced. Id. In light of this failure, Ibsen proposed a jury instruction permitting conviction for the misdemeanor offense of bail jumping. Id. The court refused Ibsen's instruction and instead instructed the jury the underlying offense was second degree assault. Id. at 216. After conviction, Ibsen appealed. Id. Division Two of this Court held the underlying crime, charge, or conviction is an essential element of bail jumping. 98 Wn.App. at 217. Because the information failed to apprise Ibsen of the underlying charge he faced, the Green Court dismissed Ibsen's bail jumping conviction. Id. at 215.

In another case, the information alleged the defendant failed to appear in Mason County Superior Court in a particular cause number. State v. Green, 101 Wn.App. 885, 889, 6 P.3d 53 (2000). Ignoring Ibsen, the State argued that as to bail jumping charges, the classification of the bail jumping charge was not an essential element of the charge. Id. The State additionally argued the

inclusion of the cause number in the charging document sufficed to inform the accused of the bail jumping offense. Id. Division Two noted that an “information will be upheld on appeal under the liberal construction rule if ‘an apparently missing element . . . [may] be fairly implied from language within the charging document.’” Green, 101 Wn.App. at 889 (quoting Kjorsvik, 117 Wn.2d at 104). Even under the liberal construction standard applied to a post-conviction challenge to a charging document, such a reading “cannot be construed to give notice of or to contain in some manner the essential elements of a crime” where the information is lacking. Green, 101 Wn.App. at 890. Quoting State v. McCarty, 140 Wn.2d 420, 427, 998 P.2d 296 (2000), the Green Court recognized that “to ensure due process, the notice of the charge on which a defendant will be tried must logically be given at some point prior to the opening statement of the trial.” 101 Wn.App. at 891. Significantly, the Green Court found it improper to force the accused to search “for the rules or regulations they are accused of violating.” Id. at 891 (quoting City of Auburn v. Brooke, 119 Wn.2d 623, 635, 836 P.2d 212 (1992)). As in Ibsen, the State’s failure to include the classification of bail jumping in Green’s charging

document required dismissal of the charge without prejudice. Id. at 891.

Finally, in State v. Pope, 100 Wn.App. 624, 629, 999 P.2d 51 (2000), in the “to convict” instruction, the jury was informed it could convict if it found the defendant’s act of bail jumping occurred when he failed to appear “regarding a felony matter.” The Pope Court explicitly found this instruction failed to inform the jury of the elements of bail jumping found in former RCW 9A.76.170(2)(c) (not RCW 9A.76.170(3)), as it never required jurors to determine if the defendant was held for a class B felony, an essential element of his bail jumping charge. Id. See also State v. Spiers, 119 Wn.App. 85, 89-91, 79 P.3d 30 (2003) (information alleging underlying offense was “class B or C felony” sufficient to notify defendant he was charged with class C felony bail jumping).

c. Mr. Williams was never adequately notified of the underlying charge, nor the penalty he faced, requiring dismissal.

Initially, Mr. Williams was charged with one count of possession of cocaine in violation of RCW 69.50.401(d). CP 101. More than one year later, the State filed a second amended information, alleging, in pertinent part,

That the defendant, on or about the 4<sup>th</sup> day of December 2003, being charged with Possession of a Controlled Substance, a felony, and having been released by court order with the requirement of a subsequent personal appearance before Snohomish County Superior Court, a court of the State of Washington, for Omnibus Hearing on December 4, 2003, and knowing of the requirement of the subsequent personal appearance, did fail to appear as required, proscribed by RCW 9A.76.170(1), a felony.

CP 92. A third information, filed after the dismissal of Mr. Williams' drug charge provided identical language regarding the bail jumping charge. CP 86. Neither document mentioned RCW 9A.76.170(3), which clarifies the class of bail jumping alleged.

Nor did either of the charging documents addressing Mr. Williams' bail jumping offense specifically identify the underlying charge he faced. CP 92, 86. While both note he was charged with "Possession of a Controlled Substance, a felony," nothing on the documents informed Mr. Williams of the precise underlying charge. Possession of a controlled substance may or may not be a felony offense, and further, some possession charges subject the defendant to higher potential penalties. See RCW 69.50.401. Here, not only did the charging documents fail to specifically identify the precise underlying offense, they failed to inform Mr.

Williams of the classification of bail jumping with which he was charged. CP 92, 86.

Because the precise underlying offense is an essential element of the charge of bail jumping, and the charging documents failed to accurately inform Mr. Williams of that underlying crime, or the classification of his bail jumping charge, even a liberal reading of the charging documents cannot result in adequate notice of all of the elements of the crime charged. Green, 101 Wn.App. at 890. Dismissal is thus required. Ibsen, 98 Wn.App. at 218.

2. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON EVERY ELEMENT OF MR. WILLIAMS' BAIL JUMPING OFFENSE DENIED HIM HIS RIGHT TO DUE PROCESS.

a. The "to convict" instruction must contain all of the essential elements of the crime charged. Due process requires the State to prove, beyond a reasonable doubt, all essential elements of a crime. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Jury instructions which omit essential elements of the charged crime violate due process because they relieve the State of its burden of proof. State v. Davis, 27 Wn. App.

498, 506, 618 P.2d 1034 (1980), disapproved of on other grounds,  
State v. Riker, 123 Wn.2d 351, 357 n.6, 869 P.2d 43 (1994).<sup>4</sup>

Washington courts have long held a “to convict” jury instruction must contain all elements of the crime charged since the instruction “serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing State v. Emmanuel, 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953)); see also Pope, 100 Wn. App. at 629 (“to convict” instruction must contain all essential elements as it “forms a statement of the law in a particular case”). Neither jurors, nor an appellate court, should have to review other jury instructions to supply an omitted element of an offense. Smith, 131 Wn.2d at 262-63.

Thus, unlike other jury instructions, the “to convict” instruction must be complete unto itself. Smith, 131 Wn.2d at 262-633; see also Pope, 100 Wn. App. at 630. A “to convict” instruction lacking an element of the crime charged is never harmless error.

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<sup>4</sup> The omission of an essential element in a “to convict” jury instruction is an error of constitutional magnitude, thus it is properly reviewed for the first time on appeal. RAP 2.5(a)(3); Pope, 100 Wn. App. at 630.

Pope, 100 Wn. App. at 630. Where jury instructions fail to adequately define the crime charged, reversible error occurs. See e.g. State v. Eastmond, 129 Wn.2d 497, 501-03, 919 P.2d 577 (1996); Byrd, 125 Wn.2d at 713-16.

In the instant case, the “to convict” instruction for Mr. Williams’ bail jumping charge omits the essential element of the underlying offense with which he was charged, thus reversal is required. CP 75.

b. In a bail jumping case, the “to convict” instruction must particularly identify the underlying offense. In Pope, the “to convict” instruction given to the jury failed to specify the underlying felony involved. 100 Wn. App. at 629. Division Two found the “to convict” instruction inadequate as it “fail[ed] to inform the jury of the elements necessary” to convict a person of bail jumping. Id. The Pope Court noted,

A “to convict” instruction must include all of the elements of the crime because it is a statement of the law upon which “the jury measures the evidence to determine guilt or innocence.”

Id. (quoting Smith, 131 Wn.2d at 263).

Here, as in Pope, the “to convict” instruction failed to inform the jury of the underlying felony and further failed to inform the jury

of the crime of which it might convict Mr. Williams. Because the instruction omitted an essential element, reversal is required.

c. The “to convict” instruction in this case failed to identify Mr. Williams’ underlying offense. As with the charging document, the “to convict” instruction failed to specifically identify Mr. Williams’ underlying charge. CP 75; see § E. 1., supra. The instruction provides:

To convict the defendant of the crime of bail jumping as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That the defendant was charged with Possession of a Controlled Substance;

(2) That the defendant had been released by a court order or admitted to bail with the requirement of a subsequent personal appearance before that court;

(3) That on or about the 4<sup>th</sup> of December, 2003, the defendant knowingly failed to appear as required by a court; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 75.

As in Pope, “the instruction fails to inform the jury of the elements necessary to convict” under RCW 9A.76.170(3), that Mr. Williams was charged with a class B or class C felony. CP 75; Pope, 100 Wn.App. at 629. As in Pope, “By omitting an element of the crime of bail jumping, the trial court committed an error of constitutional magnitude.” Id. at 630 (citations omitted). Finally, as in Pope, the jury could have misunderstood the elements necessary to convict Mr. Williams of the crime of bail jumping as they received an incorrect instruction which relieved the State of its burden to prove each essential element beyond a reasonable doubt. Id.

d. The faulty “to convict” instruction violated Mr. Williams’ right to due process, requiring reversal. Omission of an essential element of the charged offense deprives the defendant of due process as it allows the jury to convict without proof beyond a reasonable doubt of all essential elements. State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985); State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). Failure to instruct the jury on an essential element is a “fatal defect” requiring reversal.

State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984);

Eastmond, 129 Wn.2d at 503. A harmless error analysis is never applicable where the error is the omission of an essential element in a “to convict” instruction. Pope, 100 Wn.App. at 630.

Because the “to convict” instruction in this case failed to require the jury to find Mr. Williams faced a class B or class C charge when he allegedly failed to appear, the State was improperly relieved of its burden of proof. Because the error is not harmless, reversal is the appropriate remedy. Pope, 100 Wn.App. at 630.

3. THE SENTENCING COURT VIOLATED MR. WILLIAMS’ RIGHT TO A JURY TRIAL AND TO DUE PROCESS OF LAW AND EXCEEDED ITS STATUTORY AUTHORITY IN SENTENCING MR. WILLIAMS BASED ON FACTS NOT FOUND BY A JURY.

a. A defendant has a constitutionally protected right to a jury determination of every element of the charged crime. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a jury trial. This right includes the right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348,

147 L.Ed.2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). Tied closely to the Sixth Amendment right to a jury trial is the Fourteenth Amendment right to due process, which demands that the State must prove every element beyond a reasonable doubt. In re Winship, 397 U.S. at 363; see also Apprendi, 530 U.S. at 477 (reading Sixth and Fourteenth Amendments together).

A fact which “increase[s] the prescribed range of penalties to which a criminal defendant is exposed” constitutes an element of the substantive crime that must be proved beyond a reasonable doubt to the trier of fact. Apprendi, 530 U.S. at 490. In other words, if the State seeks to increase a defendant’s authorized punishment contingent on a finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. Id. at 482-83; Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004).

Whether the State calls the fact that increases the sentence a “sentencing factor” and not an element is irrelevant. “Apprendi repeatedly instructs that . . . the characterization of a fact or circumstance as an ‘element’ or a ‘sentencing factor’ is not

determinative of the question 'who decides,' judge or jury." Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). A fact cannot be used to increase the maximum punishment for an offense unless a jury finds that fact beyond a reasonable doubt. Blakely, 124 S.Ct. at 2537.

b. Mr. Williams' sentence was based on a judicial finding of fact, not on the jury's verdict, requiring remand. In Blakely, the Supreme Court applied Apprendi to Washington's determinate sentencing guidelines scheme and held that a judge could not impose a sentence that necessarily relies upon the finding of some fact beyond those found by the fact-finder. 124 S.Ct. at 2537-38. As the Court explained, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id. at 2537 (emphasis in original). The Blakely Court again underscored the constitutional requirement that a sentence be derived wholly from the jury's verdict or the facts admitted in the guilty plea. Id. at 2537, 2539.

As set forth above, the jury in Mr. Williams' case did not make any finding, beyond a reasonable doubt, as to what Mr.

Williams' underlying offense was when he allegedly failed to appear for a court date. See § E. 2., supra. Because the "to convict" instruction was faulty, the jury's verdict is ambiguous as to what "possession of a controlled substance" charge the jury found prior to convicting Mr. Williams. In order to sentence Mr. Williams as it did, the sentencing court implicitly found that at the time Mr. Williams missed his court appearance, he was charged with a class B or class C felony, rather than a charge of either first degree murder, a class A, or a misdemeanor or gross misdemeanor offense. CP 8; RCW 9A.76.170(3); RCW 9.94A.525(7).

Because the jury's verdict did not authorize the imposition of Mr. Williams' sentence, reversal and remand for resentencing is required.

c. By including juvenile adjudications in the calculation of Mr. Williams' offender score, the trial court violated his rights to a jury trial and due process. In part, Mr. Williams' offender score was based upon two prior juvenile adjudications of guilt. CP 6-8, 17. The inclusion of these adjudications increased his offender score by two points. CP 7, 8, 17.

1. The “narrow exception” to the ruling in *Apprendi* has been marginalized. In *Apprendi*, the Court held that “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.” *Apprendi*, 530 U.S. at 490. The Court, relying on its decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), excepted from its ruling the fact of prior convictions. *Apprendi*, 530 U.S. at 490.

In *Almendarez-Torres*, the Supreme Court considered the appeal of a man who had been convicted for reentering the United States after being deported for a felony. *Almendarez-Torres*, 523 U.S. at 224. *Almendarez-Torres* was sentenced based on the trial court's finding that he previously had been convicted of an aggravated felony, a fact not included in the indictment. *Id.* at 222-23. *Almendarez-Torres* appealed his sentence, arguing that the government violated his rights to indictment and notice. *Id.*; see also *Jones v. United States*, 526 U.S. 227, 249, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (noting limited bases for appeal). In assessing these claims, the Court held recidivism was not an

element of a substantive crime even where recidivism was used to double the sentence otherwise required by statute, citing tradition as a primary reason for the holding. Id. at 245-47. The Almendarez-Torres Court noted that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230.

Two years after deciding Almendarez-Torres, the Supreme Court examined whether New Jersey's hate-crime statute could constitutionally be used to increase the defendant's sentence based on a judicial finding that the defendant's crimes were motivated by bias. Apprendi, 530 U.S. 466. The Court reversed the conviction, abandoning the legal reasoning relied on in Almendarez-Torres. Apprendi, 530 U.S. at 487-89. Instead, the Court concluded a fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" constitutes an element of the substantive crime which thus must be proved beyond a reasonable doubt to the trier of fact. Id. at 490.

In reaching its conclusion, the Apprendi plurality declined to expressly overrule Almendarez-Torres, "[e]ven though it is arguable Almendarez-Torres was incorrectly decided and that a logical

application of our reasoning today should apply if the recidivist issue were contested.” Apprendi, 530 U.S. at 489-90 (footnote omitted). The concurring opinions went further. One of the concurring opinions noted the attempt in Almendarez-Torres to distinguish between traditional and non-traditional enhancements was erroneous; instead, the proper rule is “[i]f a fact is by law the basis for imposing or increasing punishment . . . it is an element.” Apprendi, 530 U.S. 521 (Thomas, J., concurring). The Apprendi Court did not decide whether recidivism is an element of a crime where recidivism leads to a mandatory sentence above the statutory maximum otherwise provided for the crime.

The Supreme Court has continued to apply the reasoning of Apprendi and has not returned to the aberration of Almendarez-Torres. Apprendi, 530 U.S. at 487 (describing Almendarez-Torres as “at best an exceptional departure from the historic practice”). In Ring, the Court applied Apprendi to capital sentencing procedures and concluded the Sixth Amendment requires that where a fact permits the imposition of a death sentence – as opposed to a term of life imprisonment – that fact must be found by a jury beyond a reasonable doubt. 536 U.S. at 609. The Court held “a defendant

may not be ‘expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’” (Italics omitted) 536 U.S. at 602 (citing Apprendi, 530 U.S. at 483 (Scalia, J., concurring)). Ring noted no exception for prior convictions.

The Blakely Court held that a judge could not impose a sentence that necessarily relies upon the finding of some fact beyond those found by the fact-finder. 124 S.Ct. at 2537-38. “[T]he relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” Id. at 2537 (emphasis in original). The Blakely Court reiterated that a sentence must derive wholly from the jury’s verdict or the facts admitted in the guilty plea to comport with constitutional standards. Id. at 2537, 2539.

Finally, as recently recognized by Justice Thomas,

Almendarez-Torres . . . has been eroded by this Court’s subsequent jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided.

Shepard v. United States, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1254, 1264, \_\_\_ L.Ed.2d \_\_\_ (2005) (Thomas, J., concurring). Justice Thomas further noted:

Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of Almendarez-Torres, despite the fundamental “imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Id. (citing Harris v. United States, 536 U.S. 545, 581-82, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (Thomas, J., dissenting)). Finally, Justice Thomas admonished, “[I]n an appropriate case, this Court should consider Almendarez-Torres’ continuing viability.” Id.

The Almendarez-Torres dissent and Justice Thomas’ concurring opinions in Apprendi and Shepard, continue to 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); Shepard, 125 S.Ct. at 1264 (Thomas, J., concurring).

Furthermore, Almendarez-Torres does not necessarily control the question of whether prior convictions are excepted from

the general rule that all facts which increase the penalty for a crime beyond a prescribed statutory maximum must be proven to a jury. First, Almendarez-Torres did not contest whether the procedure violated his right to a jury trial or due process. Almendarez-Torres, 523 U.S. at 222-23; Jones, 526 U.S. at 248. More importantly, the basis for the Almendarez-Torres decision has been consistently eroded by the Supreme Court in subsequent years. See, e.g., Apprendi, 530 U.S. at 487-89; Ring, 536 U.S. at 602; Blakely, 124 S.Ct. at 2536-38; Shepard, 125 S.Ct. at 1264.

In light of the Supreme Court's decisions in Apprendi, Ring, Blakely, and Justice Thomas' concurrence in Shepard it is evident that a sentencing court cannot impose a sentence that exceeds the sentence authorized by the jury's verdict or facts competently admitted by the accused. There is no basis to exempt prior convictions from this rule. Thus, imposition of Mr. Williams' sentence based on the sentencing court's factual findings regarding his juvenile adjudications violated his rights to a jury trial and to due process of law.

2. Even if *Apprendi's* "narrow exception" survives contrary decisional law, it cannot be construed to include juvenile adjudications. As explained by the Blakely Court, the basic rule of Apprendi reflects the fundamental tenet that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'" Blakely, 124 S.Ct. at 2536 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

Under both the state and federal constitutions, juveniles have no right to a jury trial. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); State v. Schaaf, 109 Wn.2d 1, 16, 743 P.2d 240 (1987). But even assuming Almendarez-Torres is still good law, it is precisely the right to a jury trial which provides the basis for the "narrow exception" for the inclusion of prior convictions permitted by Apprendi. Apprendi, 530 U.S. at 489.

The Supreme Court has repeatedly reiterated the importance of the right to a jury trial in distinguishing between prior convictions and other aggravating factors. In Jones, the Court identified the fact that "a prior conviction must itself have been

established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees” as “constitutional distinctiveness.” Jones, 526 U.S. at 249 (emphasis added). In Apprendi, the Court noted,

[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.

530 U.S. at 496 (emphasis added). And in Blakely, the Court again reiterated the importance of the jury trial:

The Framers would not have thought it too much to demand that, before depriving a man of . . . more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to the unanimous suffrage of twelve of his equals and neighbors . . .

124 S.Ct. at 2543 (internal quotations omitted); see also id. at 2539 (“Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

As the Ninth Circuit held in United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001), the difference between adult

convictions and juvenile adjudications is dispositive for purposes of assessing the Appendi exception.

Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof . . . do not fall within Appendi's 'prior conviction' exception.

Id. Because juveniles have no right to a jury trial and because this right is critical to the narrow exception for prior convictions, juvenile adjudications do not fall within the "narrow exception" for prior convictions. Id.; Appendi, 530 U.S. at 489. It is clear under recent caselaw that should the State seek to include them in the calculation of an offender score, juvenile convictions must be pled and proved to a jury. Blakely, 124 S.Ct. at 2537 (holding jury verdict must support judge's sentence).

d. The use of juvenile adjudications violated Mr. Williams' right to a jury trial and to due process. At sentencing, the court considered Mr. Williams' four juvenile adjudications in calculating his offender score. CP 17. By including these prior convictions in Mr. Williams' offender score, the court exceeded its authority at sentencing. RCW 9.94A.510.

Because the punishment was not authorized simply by the facts adduced at Mr. Williams' trial, but required the sentencing

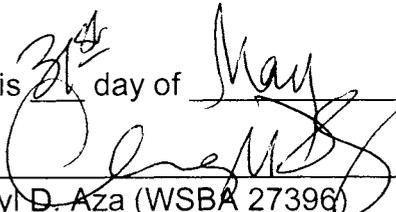
court to make additional findings regarding his criminal history, the court exceeded its constitutional authority when it sentenced Mr. Williams. See Blakely, 124 S.Ct. at 2537 (“When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment”) (internal quotations omitted); see also Ring, 536 U.S. at 609; Apprendi, 530 U.S. at 490.

e. Remand for resentencing is required. Without the impermissible inclusion of the prior adjudications in the calculation of Mr. Williams’ offender score, his offender score would have been decreased by two points. RCW 9.94A.510; RCW 9.94A.515. Moreover, Mr. Williams’ sentence was predicated on a judicial finding of the underlying offense Mr. Williams faced when the bail jumping allegedly occurred. The remedy for the imposition of a sentence that exceeds the jury verdict or the facts admitted by the defendant is reversal of the sentence and remand for resentencing. Apprendi, 530 U.S. at 496-97. This Court should reverse Mr. Williams’ sentence and remand his case for resentencing to meet the sentence authorized by the jury verdict and to exclude his juvenile convictions.

F. CONCLUSION.

For the reasons set forth above, Mr. Williams respectfully requests this Court dismiss his conviction for bail jumping. In the alternative, Mr. Williams asks this Court to remand his case for resentencing in accord with the jury's verdict. If Mr. Williams does not prevail in this appeal, he asks this Court to deny any request for costs.

Respectfully submitted this 31<sup>st</sup> day of May, 2005.

  
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Washington Appellate Project – 91052  
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, | ) |                   |
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| RESPONDENT,          | ) |                   |
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| V.                   | ) | COA NO. 55405-1-1 |
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| DEMETRIUS WILLIAMS,  | ) |                   |
|                      | ) |                   |
| APPELLANT.           | ) |                   |

**DECLARATION OF SERVICE**

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 31<sup>ST</sup> DAY OF MAY, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTING ATTORNEY  
3000 ROCKEFELLER AVENUE, M/S# 504  
EVERETT, WA 98201-4046

[X] DEMETRIUS WILLIAMS  
DOC# 963265  
CLALLAM BAY CC  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF MAY, 2005.

X \_\_\_\_\_ 

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