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STATE OF WASHINGTON  
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Supreme Court No. 79509-6

Court of Appeals No. 33373-2-II

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
Respondent,  
vs.

**Richard Sibert**  
Appellant/Petitioner

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Lewis County Superior Court  
Cause No. 04-1-00284-7  
The Honorable Judge H. John Hall

**PETITIONER'S SUPPLEMENTAL BRIEF**

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## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Rebecca Bridges contracted with law enforcement as a paid informant. RP (4/24/05) 3-5. She also hoped to avoid a prison term for her pending charges. RP (4/24/05) 31-35. She agreed to remain law-abiding while working for the police. RP (4/24/05) 34. She went into Richard Sibert's house three times, and told officers that she bought meth from him. RP (4/24/05) 3-33. Bridges violated her contract, and was convicted of forgery while working as an informant. Despite this, the state charged Mr. Sibert with four drug offenses, relying on her allegation.<sup>1</sup> RP (4/24/05) 34-35; CP 12-14.

At trial, the court's definition of "knowledge" included the following: "Acting knowingly or with knowledge also is established if a person acts intentionally." CP 47, Instruction 18. The four "to convict" instructions did not include the identity of the controlled substance; nor was there a special verdict form identifying the controlled substance. CP 20-26; 40-42, 49; Instructions 11, 12, 13, 20. The jury convicted on all four charges and the two enhancements. CP 20-26. The jury was not asked to make findings on Mr. Sibert's criminal history. CP 20-26.

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<sup>1</sup> Three counts of delivery of a controlled substance and one count of possession with intent to deliver. CP 12-14. Two of the charges carried school zone enhancements.

The court calculated Mr. Sibert's standard range as 20 to 60 months, based on its finding that Mr. Sibert had two prior felonies.<sup>2</sup> CP 5. Mr. Sibert appealed, and the Court of Appeals affirmed. *See* Opinion, Cause No. 33373-2-II.

## ARGUMENT

### **I. THE CONCLUSIVE PRESUMPTION IN WPIC 10.02 VIOLATES DUE PROCESS.**

RCW 9A.08.010 ("General requirements of culpability") defines mental states used in the criminal code. Proof of one mental state can substitute for proof of a lesser mental state.<sup>3</sup> This applies only when the state can prove a higher mental state than required for conviction, and should not be applied if proof of a higher mental state is meaningless.<sup>4</sup>

The pattern instruction defining knowledge (WPIC 10.02) includes an optional provision that seeks to explain this substitution: "Acting knowingly or with knowledge also is established if a person acts

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<sup>2</sup> The priors were Possession of an Explosive Device and Possession of Meth. CP 5, RP (5/25/05) 8-9. The court used the standard range for Level II Drug Offenses, for an offender with 3 to 5 points. CP 5.

<sup>3</sup> "When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally." RCW 9A.08.010(2). Case in point: a person could be found guilty of Assault II if she or he "[i]ntentionally assaults another and thereby [intentionally, knowingly, or recklessly] inflicts substantial bodily harm." RCW 9A.36.021, *modified*.

<sup>4</sup> It would be nonsensical to argue that a person is guilty of leaving a child in the care of a sex offender if she or he "leaves the child in the care or custody of another person... [intending] that the person is registered or required to register as a sex offender..." RCW 9A.42.110, *modified*. Similarly, it makes no sense to argue that a person is guilty of rendering criminal

*(Continued on next page)*

intentionally.” This optional provision is used indiscriminately, and does not limit a jury’s substitution of mental states to relevant evidence; instead, it requires the jury to conclude knowledge is established by proof of *any* intentional act, even if unrelated to the element for which knowledge is required. *See, e.g., State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was tried for assaulting a person he knew to be a law enforcement officer.<sup>5</sup> The court’s “knowledge” instruction included the optional provision quoted above. Division II reversed because the instruction could mean that an intentional assault established Mr. Goble’s knowledge that the victim was an officer, regardless of whether or not he actually knew the victim was a police officer. *Goble*, at 203. When used inappropriately, this flawed portion of WPIC 10.02 creates a conclusive presumption, violating due process, and requiring application of the stringent constitutional harmless error test.

Here, the provision was used even though it did not apply. No effort was made to limit the jury’s consideration to intentional actions related to the element that required proof of knowledge. Thus, the instruction created an unconstitutional conclusive presumption, requiring

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assistance by concealing another person “who he [intends to have] committed a crime or juvenile offense...” *See* RCW 9A.76.050, *modified*.

<sup>5</sup> Although not an element of the charged offense, knowledge was included in the “to convict” instruction, and so was made an element under the law of the case. *Goble* at 201.

application of the stringent constitutional harmless error test and reversal of Mr. Sibert's convictions.

A. Conclusive presumptions are unconstitutional.

Mandatory presumptions “run afoul of a defendant's due process rights if they serve to relieve the State of its obligation to prove all of the elements of the crime charged.” *State v. Deal*, 128 Wn.2d 693 at 699, 911 P.2d 996 (1996), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).<sup>6</sup> They conflict with the presumption of innocence and invade the jury's factfinding function. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *Deal*, at 701.<sup>7</sup>

In *Carella v. California*, the jury was instructed “that a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and that “‘intent to commit theft by fraud is presumed’ from failure to return rented property

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<sup>6</sup> See also *Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989).

<sup>7</sup> See also *Francis v. Franklin*, 471 U.S. 307 at 316, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

within 20 days of demand.” *Carella v. California*, at 266. These instructions violated due process:

These mandatory directions directly foreclosed independent jury consideration of whether the facts proved established certain elements of the offenses... The instructions also relieved the State of its burden of proof... The two instructions violated the Fourteenth Amendment. *Carella v. California*, at 266.

B. The court’s instructions included a conclusive presumption.

The three delivery charges required proof that Mr. Sibert knew the substance delivered was a controlled substance. *State v. DeVries*, 149 Wn.2d 842 at 850, 72 P.3d 748 (2003). The court instructed that “Acting knowingly or with knowledge also is established if a person acts intentionally.” CP 47. Any reasonable juror would interpret this provision as conclusive: the presumed fact (knowledge) “is established” from the predicate fact (intentional action). CP 47. Thus, the instruction contains a mandatory presumption and violates due process. *Deal, supra*.

C. The error prejudiced Mr. Sibert and requires reversal.

Constitutional error is presumed prejudicial. *State v. Gonzales Flores*, \_\_\_ Wn.2d \_\_\_ at \_\_\_, \_\_\_ Wn.App. \_\_\_ (2008). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case.

*Gonzales Flores*, at \_\_\_; *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002). Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions.

The reviewing court must conclude that the error was “unimportant in relation to everything else the jury considered on the issue in question...”

*Yates v. Evatt*, 500 U.S. 391 at 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432

(1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502

U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

[A] court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict... [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone... [I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue... is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

*Yates v. Evatt*, at 403-405, *footnotes and citations omitted*.

A court must examine the proof actually considered, and ask:

[W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said... that the presumption did not contribute to the verdict rendered.

*Yates v. Evatt*, at 403-405, *emphasis added*.

Thus, a reviewing court evaluating harmless-ness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so

narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." *Yates v. Evatt*, at 405-406.<sup>8</sup>

Here, the conclusive presumption required the jury to find Mr. Sibert acted with guilty knowledge upon proof that he acted intentionally. CP 47. The instruction provided no guidance as to what intentional act should be considered a predicate for the presumed fact (that Mr. Sibert acted with guilty knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume guilty knowledge from proof of *any* intentional act. CP 47.

The clearest application of the instruction would require jurors to presume Mr. Sibert acted with guilty knowledge upon proof he intentionally delivered a package (even if ignorant of its contents). Given the absence of any limitation in the instruction, the jury could also have presumed guilty knowledge from evidence he intentionally met with the informant or intentionally made a phone call. The absence of any

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<sup>8</sup> In *State v. Deal*, *supra*, this Court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above.<sup>9</sup>

The lack of any limitation on the presumption makes it impossible for this Court to determine what portions of the record the jury considered in deciding Mr. Sibert knew he was delivering a controlled substance. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Because it is impossible to make the determination required by *Yates v. Evatt, supra*, this Court cannot complete the constitutional harmless error analysis required.

By entering a “not guilty” plea, Mr. Sibert put in controversy the issue of his guilty knowledge.<sup>10</sup> Instruction No. 3, CP 32. The unconstitutional conclusive presumption cannot be said to be harmless beyond a reasonable doubt. First, the instruction is not amenable to the *Yates v. Evatt* analysis. Second, even considering the entire record

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<sup>9</sup> See, e.g., *Sandstrom v. Montana, supra* at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette v. United States, supra* (accused’s intent to steal presumed from the isolated act of taking); *Francis v. Franklin, supra* at 309 (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California, supra* at 266 (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates v. Evatt, supra* at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

(contrary to *Yates v. Evatt*), the state's proof was not so overwhelming that the instruction in no way affected the final outcome of the case.<sup>11</sup>

*Gonzales Flores, supra*. Because of this, Mr. Sibert's delivery convictions must be reversed and the case remanded for a new trial.

**II. A "TO CONVICT" INSTRUCTION FOR DELIVERY OR POSSESSION WITH INTENT MUST INCLUDE THE IDENTITY OF THE CONTROLLED SUBSTANCE.**

A. Automatic reversal is required when a "to convict" instruction relieves the state of its burden to prove each element.

Instructions that relieve the state of its burden to prove every element violate due process. *Thomas, supra. Randhawa, supra*. This rule applies with special force where "to convict" instructions are involved. "To convict" instructions must contain all the elements of a charged crime. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). A "to convict" instruction is the yardstick by which the jury measures evidence to determine guilt or innocence, and thus must be a complete statement of the law. *Lorenz, at 31*. The adequacy of a "to convict" instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). A deficient "to convict" instruction that relieves the state of its burden

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<sup>10</sup> It is irrelevant that Mr. Sibert presented no evidence and no argument addressing the knowledge element, since a defendant never bears the burden to disprove elements of a crime. See *State v. DeRyke*, 149 Wn.2d 906 at 913 n.1, 73 P.3d 1000 (2003).

<sup>11</sup> For example, the informant's credibility was in doubt: she had violated her agreement by committing and being convicted of a forgery. RP (4/24/05) 34-35.

requires automatic reversal, whether the error is prejudicial or harmless. *State v. Seek*, 109 Wn. App. 876 at 883, 37 P.3d 339 (2002).<sup>12</sup> The only exception is when the element is “uncontested.” *Brown*, at 340, citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). An accused need not present evidence or make an argument to “contest” an element; instead, it is enough if the accused does not concede the issue. See *DeRyke* at 913 n.1.<sup>13</sup> In the absence of a concession, automatic reversal is required. *Brown* at 339-340; *DeRyke*. If there is a concession, the reviewing court applies the stringent constitutional harmless error test. *Brown*, at 339-340.

B. The identity of a controlled substance is an element of delivery and of possession with intent.

The identity of a controlled substance is an essential element of a drug crime if it affects the maximum penalty. *State v. Goodman*, 150 Wn.2d 774 at 785-786, 83 P.3d 410 (2004). In *Goodman*, the defendant

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<sup>12</sup>See also *State v. Brown*, *supra*, at 339 (“An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal”); *DeRyke* at 912 (“DeRyke would be eligible for an automatic reversal only if the trial court failed to instruct the jurors on all the elements...”); *State v. Shouse*, 119 Wn. App. 793 at 796, 83 P.3d 453 (2004).

<sup>13</sup>“The State argues the error was harmless because ‘DeRyke did not contest one of the essential elements or even the peripheral elements of the definition of Rape in the First Degree, but instead claimed the victim was making up an allegation.’ ... But that is beside the point.... DeRyke maintains his conviction violated due process because the erroneous instruction allowed the jury to convict him without proof of every element of the crime charged beyond a reasonable doubt.” But see *State v. Jones*, 117 Wn. App. 221 at 231, 70 P.3d 171 (2003) (*Jones* I) (instruction omits knowledge element, but uncontroverted evidence includes videotape of defendant’s statements establishing his guilty knowledge).

was accused of possession of “meth” with intent to deliver; on appeal, he challenged the sufficiency of the Information. The Supreme Court held that “the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant.” *Goodman*, at 785-786, citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Thus, “the prosecution was obligated to allege and prove the substance Goodman possessed was methamphetamine.” *Goodman*, at 786.<sup>14</sup>

Mr. Sibert was charged with four violations of RCW 69.50.401. Depending on the identity of the controlled substance, conviction is either a class B or a class C felony, with a maximum punishment of 10 or 5 years, respectively. RCW 69.50.401(2)(a)-(e). Because of this difference, the identity of the controlled substance is an element of crimes charged under RCW 69.50.401.<sup>15</sup> *Goodman*.

C. The “to convict” instructions omitted the identity of the controlled substance.

Where the identity of a controlled substance is an essential element, it must be included in the “to convict” instruction. *Lorenz, supra*.

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<sup>14</sup> Applying a liberal standard, the Court found the word “meth” sufficient to inform the defendant he was accused of possessing methamphetamine. *Goodman*, at 789-790.

<sup>15</sup> Mr. Sibert does not argue that the state was required to prove that he knew the specific identity of the controlled substance, only that the state was required to prove (and the jury was required to determine) the identity of the substance delivered.

If identity is omitted from the “to convict” instruction, automatic reversal is required except in those instances where the element is “uncontested.”<sup>16</sup>

*Brown, supra.*

Here, the identity of the controlled substance was an element of each offense. *Goodman, supra.* Despite this, the “to convict” instructions omitted the identity of the substances allegedly delivered (Counts I-III) and possessed (Count IV). Instructions Nos. 11, 12, 13, 20; CP 40-42, 49. Instead, each instruction permitted conviction if Mr. Sibert delivered (or possessed with intent to deliver) any “controlled substance.” CP 40-42, 49. Because the “to convict” instructions permitted conviction based on delivery or possession of a generic controlled substance, they violated Mr. Sibert’s constitutional right to due process. *Lorenz, supra.* Reversal is required, and harmless error analysis prohibited, because Mr. Sibert did not concede the element. By entering a “not guilty” plea, Mr. Sibert put in controversy the identity of each controlled substance. Instruction No. 3, CP 32. He did not concede the issue, either through testimony or during closing argument. It is irrelevant that he presented no evidence or argument addressing the issue, since a defendant never bears the burden to disprove elements of a crime. *See DeRyke at 913 n.1.*

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<sup>16</sup> Where the element is uncontested, a reviewing court applies the stringent harmless error test for constitutional error. *Gonzales-Flores, supra.*

Because the “to convict” instructions omit an essential element which Mr. Sibert did not concede, reversal is required. The Court should not engage in harmless error analysis. *Brown, supra; DeRyke, supra.*

**III. A JURY MUST DECIDE THE IDENTITY OF A CONTROLLED SUBSTANCE BEFORE A COURT CAN IMPOSE A SENTENCE AGGRAVATED BY THE IDENTITY OF A PARTICULAR DRUG.**

Any fact that increases the penalty for a crime must be proved to a jury beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428 at 440, 180 P.3d 1276 (2008), *citing* Wash. Const. Article I, Section 21.<sup>17</sup>

Under RCW 69.50.401, delivery or possession with intent to deliver narcotics from Schedule I and II, flunetrazipam, amphetamine, and methamphetamine subjects the accused to punishment for a Class B felony, with a 10-year maximum. RCW 69.50.401(2)(a)-(b). Delivery or possession with intent to deliver all other controlled substances subjects the accused to punishment for a Class C felony, with a 5-year maximum. RCW 69.50.401(2)(c)-(e). The seriousness level and standard range also

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<sup>17</sup> By contrast, harmless error analysis does apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

vary, depending on the identity of the controlled substance.<sup>18</sup> See RCW 9.94A.517 and RCW 9.94A.518.

Here, Mr. Sibert's statutory maximum and standard range relate to the identity of the controlled substance. The jury was not asked to find—and did not find—that Mr. Sibert delivered or possessed with intent to deliver one of the controlled substances listed in RCW 69.50.401(2)(a) and (b) (narcotics from Schedule I and II, flunetrazipam, amphetamine, and methamphetamine). See Instructions 11, 12, 13, 20 and Jury Verdicts; CP 22-26, 40-42, 49. Because the jury did not make such a finding, Mr. Sibert should not have received a sentence enhanced above 6-18 months.<sup>19</sup> See RCW 9.94A.517 and RCW 9.94A.518.

The court's imposition of prison terms in excess of this range was error. *State v. Recuenco, supra*. Accordingly, the sentences must be vacated and the case remanded for sentencing within the 6-18 month standard range. *Recuenco, supra; Blakely, supra*.<sup>20</sup>

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<sup>18</sup> An offender with 3 to 5 points faces 20+ to 60 months for delivery or possession with intent to deliver narcotics from Schedule I and II, flunetrazipam, amphetamine, and methamphetamine. RCW 9.94A.517 and RCW 9.94A.518. By contrast, an offender with 3 to 5 points faces only 6+ to 18 months for all other controlled substances. RCW 9.94A.517 and RCW 9.94A.518.

<sup>19</sup> This is the standard range applicable to drug offenders with 3 to 5 points who deliver or possess with intent to deliver a controlled substance other than those listed in RCW 69.50.401(2)(a) and (b).

<sup>20</sup> See also *State v. Evans*, 129 Wn. App. 211 at 229 n. 15, 118 P.3d 419 (2005), reversed on other grounds at *State v. Evans*, 159 Wn.2d 402, 150 P.3d 105 (2007) and overruled in part on other grounds by *State v. Cromwell*, 157 Wn.2d 529, 140 P.3d 593 (2006).

**IV. FACTS “RELATING TO” PRIOR CONVICTIONS MUST BE PROVED TO A JURY BEFORE THE PRIORS CAN ENHANCE A SENTENCE.**

- A. This Court should limit application in Washington of the *Almendarez-Torres* exception for “the fact of a prior conviction.”

The *Blakely* rule includes an exception for “the fact of a prior conviction.” *Apprendi v. New Jersey*, 530 U.S. 466 at 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).<sup>21</sup> The exception stems from *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The continuing validity of the exception is in doubt.<sup>22</sup> Until the Supreme Court formally reverses *Almendarez-Torres* and until this Court reconsiders its decision in *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003) (holding that the state constitution does not confer a right to a jury determination of prior convictions), it is appropriate to limit the exception.

- B. In Washington, prior convictions are sometimes characterized as elements that must be proved to a jury beyond a reasonable doubt.

In Washington, prior convictions are sometimes treated as facts that must be proved to a jury beyond a reasonable doubt. For example, the existence of prior convictions elevating a misdemeanor to a felony must

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<sup>21</sup> See also *State v. Thieffault*, 160 Wn.2d 409 at 418, 158 P.3d 580 (2007).

<sup>22</sup> See, e.g., *State v. Mounts*, 130 Wn. App. 219, 122 P.3d 745 at 746, n. 10 (2005), quoting Justice Thomas’ observation in *Shepard v. United States*, 44 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres* “has been eroded by this Court’s subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”

be proved to a jury beyond a reasonable doubt.<sup>23</sup> *State v. Oster*, 147 Wn.2d 141 at 148, 52 P.3d 26 (2002).<sup>24</sup> In *State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001), Division III reversed a UPF 1<sup>25</sup> conviction where defense counsel failed to move for dismissal despite the lack of proof of a prior serious offense.

Thus in some cases, prior convictions are viewed as elements of the offense (*see, e.g., Oster, York, Arthur, and Lopez*), while in others prior convictions are viewed as sentencing factors (*Smith, supra*). But the distinction between elements and sentencing factors is no longer viable:

[W]hen the term “sentence enhancement” is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an “element” of the offense. *Apprendi* at 494 n. 19.

This is one reason why a majority of U.S. Supreme Court justices have recognized that *Almendarez-Torres* was wrongly decided. This Court should recognize the inconsistency between cases like *Oster* and *York* on the one hand, and *Smith* on the other, and require the state to prove prior offenses beyond a reasonable doubt to a jury.

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<sup>23</sup> The issue in *Oster* was whether it to remove the existence of the prior convictions from the “to convict” instruction and place them in a separate special verdict form.

<sup>24</sup> See also *State v. York*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_ (2008); *State v. Arthur*, 126 Wn. App. 243, 108 P.3d 169 (2005).

<sup>25</sup> RCW 9.41.040.

- C. The *Almendarez-Torres* exception applies only to the *existence* of a prior conviction, not to other facts “relating to” the conviction.

The exception relates only to “the *fact* of a prior conviction;” that is, its existence: “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.” *In re Lavery*, 154 Wn.2d 249 at 256, 111 P.3d 837 (2005), *emphasis added*. This is because “a certified copy of a prior judgment and sentence is highly reliable evidence.” *Lavery*, at 257. The exception *does not* allow judicial determination of other facts relating to prior convictions.<sup>26</sup> For example, in *Lavery* the state sought to prove that a prior federal bank robbery was equivalent to second-degree robbery in Washington. This Court noted the two offenses were not legally coextensive, and refused to allow judicial determination of the facts underlying the federal conviction. *Lavery*, at 256-258. Similarly, the Supreme Court has refused to extend judicial factfinding to facts beyond the mere existence of a prior conviction:

While the disputed fact here [the underlying evidence supporting a conviction for burglary] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to

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<sup>26</sup> *But see State v. Jones*, 159 Wn.2d 231 at 241, 149 P.3d 636 (2006) (*Jones II*) (“To give effect to the prior conviction exception, Washington’s sentencing courts must be allowed as a matter of law to determine not only the fact of a prior conviction but also those facts “intimately related to [the] prior conviction” such as the defendant’s community custody status.”)

*Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

*Shepard v. United States*, *supra*, at 25, citing, *inter alia*, *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999).

The *Shepard* Court limited the trial court's factual inquiry into the underlying facts to “the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *Shepard* at 26.

The relationship between a prior conviction and the person on trial—that is, the question of “identity”—is a fact beyond the mere existence of the prior conviction. “Identity” is comprised of two parts—the identity of the person previously convicted, and the identity of the person currently on trial. Proof of identity can be through “otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information.” *State v. Huber*, 129 Wn. App. 499 at 503, 119 P.3d 388 (2005), *footnotes and citations omitted*. As these methods of proof demonstrate, proving “identity” requires the kind of fact-based inquiry for which juries are suited; it involves facts beyond mere existence of a prior and is not suitable for judicial factfinding.

Whether a prior conviction is characterized as an element (*see Oster, supra*) or a sentencing factor (as in *Smith, supra*), the identity of the person named in the prior and the identity of the person currently on trial involve facts that must be proved to a jury beyond a reasonable doubt.<sup>27</sup> A judge could not constitutionally remove the “identity” issue from the jury’s consideration in *Oster*; the same must be true of the issue when it is characterized as a sentencing factor.<sup>28</sup>

Here, the state alleged two prior felonies.<sup>29</sup> Despite the absence of a waiver, the “identity” issue—the identity of the offender convicted of the prior offenses and the identity of the person on trial for the current offense—was not submitted to the jury. CP 20-26, 40-42, 49. Instead, the court implicitly found that Mr. Sibert’s identity matched the identity of the person named in the two priors. CP 5. This judicial factfinding violated Mr. Sibert’s constitutional right to a jury trial under the Sixth Amendment. Under *State v. Recuenco, supra*, the error is not subject to harmless error

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<sup>27</sup> Although this Court has not addressed the issue, Division II of the Court of Appeals has ruled that the “fact” of a prior conviction under *Almendarez-Torres* includes the offender’s identity. *See State v. Lewis*, 141 Wn. App. 367 at 393, 166 P.3d 786 (2007); *State v. Rudolph*, 141 Wn. App. 59 at 63, 168 P.3d 430 (2007); *State v. Ball*, 127 Wn. App. 956, 113 P.3d 520 (2005).

<sup>28</sup> *See State v. Womac*, 160 Wn.2d 643 at 662 n. 11, 160 P.3d 40 (2007) (“[F]or Sixth Amendment purposes, elements and sentencing factors must be treated the same as both are facts that must be tried to the jury and proved beyond a reasonable doubt.”)

<sup>29</sup> Although Mr. Sibert’s attorney agreed with the prosecutor’s statement of criminal history, there is no indication in the record that Mr. Sibert personally waived his right to a jury trial. RP (5/25/05) 1-2, 8-9. Such a waiver must be knowing, intelligent, and voluntary, and must

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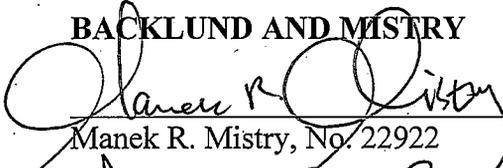
analysis. Accordingly, Mr. Sibert's aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

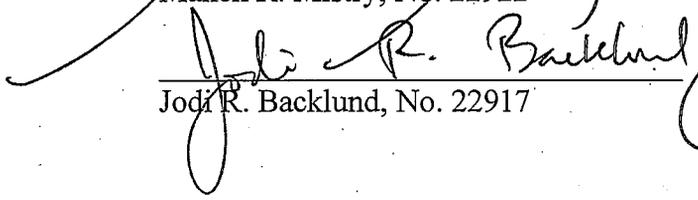
**CONCLUSION**

For the foregoing reasons, Mr. Sibert's convictions must be vacated and the case remanded for a new trial with instructions to use a proper instruction defining knowledge, and to include the identity of the controlled substance in the "to convict" instructions. In the alternative, Mr. Sibert's sentence must be vacated, and the case remanded for resentencing with no criminal history, for a conviction under Drug Offense Seriousness Level I.

Respectfully submitted September 15, 2008.

**BACKLUND AND MISTRY**

  
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be made in writing or orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001).

CERTIFICATE OF MAILING

I certify that I mailed a copy of the Supplemental Brief, postage pre-paid, to:

Richard Sibert, DOC #800328  
Washington Corrections Center  
P. O. Box 900  
Shelton, WA 98584

and to

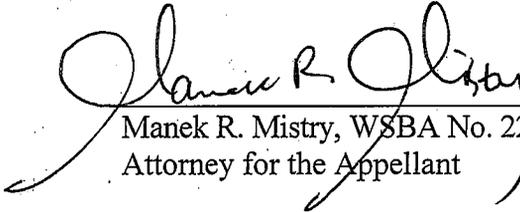
Lewis County Prosecuting Attorney  
360 NW North Street  
Chehalis, WA 98532-1925

And that I delivered the original and one copy to the Supreme Court for filing;

On September 15, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 15, 2008.

  
Manek R. Mistry, WSBA No. 22922  
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