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A. INTRODUCTION

More than 40 years ago, a Washington State Penitentiary psychiatrist diagnosed James Thorne as suffering from paranoid schizophrenia. In the subsequent 40 years, Mr. Thorne's mental illness has had a profound impact on his life and led to his commission of a number crimes. Mr. Thorne has been committed at various times for both evaluation and treatment. In some instances following his commission of crimes, he was found incompetent to stand trial and/or medicated to the point of competency.

Continuing on this path, Mr. Thorne, then 64 years-old, entered an Everett check-cashing store armed with a grocery bag containing strawberry yogurt and demanded money, telling those present the bag containing yogurt was really a bomb. Mr. Thorne's demands were met with laughter, disbelief and a refusal to comply. When one employee attempted to grab the bag of yogurt, Mr. Thorne became agitated and grabbed the employee's arm. At that point, the remaining employees gave him money and he left. Mr. Thorne was quickly arrested by police and the bag of yogurt was destroyed by bomb technicians.

Following his conviction of two counts of first degree robbery and one count of attempted first degree robbery, Mr. Thorne received a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA). In light of his mental illness and the nature of his offense, that sentence is cruel and unusual.

B. ASSIGNMENTS OF ERROR

1. The imposition of a sentence of life imprisonment without the possibility of parole violated state and federal constitutional prohibitions against cruel and unusual punishment.

2. The trial court violated Mr. Thorne's Sixth and Fourteenth Amendment rights to a jury trial and the due process of law.

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

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. Article I, section 14 provides greater protection in this area. Does the

imposition of a life sentence without the possibility of parole on a individual with a 40-year history of serious mental illness violate the constitutional prohibitions against cruel and unusual punishment?

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

3. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions

'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

D. STATEMENT OF THE CASE

Mr. Thorne was first diagnosed with paranoid schizophrenia in 1968. CP 74, 83. Following that, he was hospitalized, both voluntarily and involuntarily, for his mental illness on multiple occasions; at least two of these commitments arose after court findings that he was incompetent to stand trial for criminal charges. CP 47, 74. In 2006, Mr. Thorne was released from prison following his 1993 conviction of what was then his third "strike" because of concerns that his trial attorney had not properly investigated and presented evidence of his mental illness. 2/9/09 RP 6.

In the present case, on November 20, 2006, Mr. Thorne entered a Dollarwise Store carrying a brown paper bag containing

strawberry light yogurt. 2/9/09 RP 35; 2/10/09 RP 166. Mr. Thorne claimed he had a bomb and demanded the tellers give him money. 2/9/09 RP 35. Jessica Pilon, an employee of the check cashing store, laughed at Mr. Thorne's demands for money. 2/9/09 RP 36. Ignoring Mr. Thorne's demands, Ms. Pilon directed all customers to leave the store, and called the police. Id. at 37. Ms. Pilon then began taking the cash from her drawer and dropping it on the floor below the counter. Id. at 38. Ms. Pilon handed the phone to another employee and began taunting Mr. Thorne to open the bag and show her the bomb. Id.

Frustrated with the lack of response, Mr. Thorne grabbed the arm of Nicole Flynn, another employee, when Ms. Flynn attempted to take the bag from his hand. 2/9/09 RP 39-40, 54. At that point, the tellers gave Mr. Thorne some money and he left. Id. 41.

Mr. Thorne was promptly chased and arrested by Everett police officers. 2/10/09 RP 133-38. In the process, Mr. Thorne dropped the bag of yogurt on the ground. Bomb technicians shot the bag with a water cannon, and upon doing so immediately noticed a "strong odor of strawberries." 2/10/09 RP 166.

The State charged Mr. Thorne with two counts of first degree robbery and one count of attempted first degree robbery. CP 210-

11. Because of concerns regarding his competency, Mr. Thorne was sent to Western State Hospital for evaluation. CP 213-14. Following the evaluation, the court found Mr. Thorne competent to stand trial. 9/13/07 RP 2. Though he was facing a sentence of life without the possibility of parole, Mr. Thorne refused a plea offer that would have allowed him to plead guilty to two counts of first degree theft. 2/5/09 RP 50.

A jury convicted Mr. Thorne as charged. CP 113-15. The court imposed a sentence of life without the possibility of parole. CP 24.

E. ARGUMENT

1. MR. THORNE'S LIFE SENTENCE VIOLATES HIS CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE UNITED STATES AND WASHINGTON CONSTITUTIONS

Mr. Thorne was first diagnosed as suffering from paranoid schizophrenia in 1968. CP 74. That illness resulted in numerous commitments to state hospitals. CP 91. That illness has been inextricably intertwined with his commission of criminal offenses. CP 102 ("his mental illness played a substantial role in his actions in the present case.") That illness has resulted in findings that he

was incompetent to stand trial for prior criminal offenses. CP 74. That illness led to his release from a prior persistent offender sentence. 2/9/09 RP 5-6. That illness led the trial court in the present case to conclude this was a “somewhat marginal case” in terms of finding Mr. Thorne competent. 9/13/07 RP 1. That illness makes his confinement for the rest of his life cruel and unusual.

a. The Washington and United States Constitutions bar cruel and unusual punishments. The Eighth Amendment to the United States Constitution bars cruel and unusual punishment.

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 100-01, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

Similarly, Article I, section 14 of the Washington Constitution prohibits cruel punishment. The state constitutional provision, however, provides greater protection than its federal counterpart regarding cruel punishment. State v. Fain, 94 Wn.2d 387, 392, 617 P.2d 720 (1980).

b. Application of a proportionality review compels the conclusion Mr. Thorne’s life sentence is unconstitutionally cruel. In

State v. Thorne, the Court upheld the POAA under an Eighth Amendment and article I, section 14 challenge. 129 Wn.2d 736, 776, 921 P.2d 514 (1996). But the Court recognized that its decision did not end the inquiry.

Our examination of the Defendant's claim is not intended to resolve all article I, section 14 challenges to sentences imposed under the Persistent Offender Accountability Act. We recognize there may be cases in which application of the Act's sentencing provisions runs afoul of the constitutional prohibition against cruel punishment.

Id. at 773 n.11.

Thorne affirmed the sentence of life imprisonment without the possibility of parole under the Persistent Offender Accountability Act, finding it was not grossly disproportionate. Id. at 776. In so doing, the Court applied the four factors enunciated in Fain but only to the POAA generally, and not to the specific circumstances of Mr. Thorne and his offense. Thus, the Court did not address whether Mr. Thorne's sentence was disproportionate in light of his documented history of mental illness. Application of the Fain factors to Mr. Thorne specifically leads to the conclusion his sentence is unconstitutionally cruel.

The four factors adopted in Fain for analyzing a claim of disproportionate sentences as cruel punishment are: "(1) the nature

of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction.” Fain, 94 Wn.2d at 397.

Addressing Mr. Thorne’s argument, the trial court noted Mr. Thorne had a long and documented history of mental illness but was also a career criminal. Without more, the court concluded “all the Fain factors support the sentence of life without possibility of parole.” 4/7/09 RP 235. But simply relying on the notion that Mr. Thorne has a long history of criminal offenses misses the point of the Fain analysis. Mr. Thorne could not assert the POAA results in a disproportionate sentence for him if he did not have a history serious crimes, as he would not face such a sentence otherwise. Instead, the relevant question is whether a life sentence is cruel and unusual when imposed upon a 66 year-old man where his criminal history is intertwined with or merely a manifestation of his severe mental illness. After a proper application of Fain, the answer is plainly yes.

Mr. Thorne’s crime is characterized as a “violent offense.” RCW 9.94A.030(41)(a). In the spectrum of conceivable robberies,

however, Mr. Thorne's crime is remarkable for evincing a lack of intent to do violence. Armed with yogurt, Mr. Thorne demanded the tellers give him the cash from their tills. 2/9/09 RP 35-36. Jessica Pilon's initial response was to laugh at Mr. Thorne, tell him she did not believe him and demand he show her the claimed bomb. 2/9/09 RP 36, 38. Ms. Pilon refused to comply with Mr. Thorne's demands and dumped her cash drawer under the counter. 2/9/09 RP 38. Ms. Pilon called the police in Mr. Thorne's presence and waved away customers and co-workers. 2/9/09 RP 37. Ms. Pilon directed her coworker, Nicole Flynn, to grab the bag from Mr. Thorne's hand. 2/9/09 RP 54. Only then did Mr. Thorne grab Ms. Flynn's arm, and at that point Ms. Pilon and others complied with his request for money. 2/9/09 RP 39-41. Far from violent, Mr. Thorne's crimes border on pathetic.

“There [is] no question [Mr. Thorne] was mentally ill at [the] time [of the present offense], and this resulted in disturbed thinking and reality testing. His mental illness played a substantial role in his actions. . . .” CP 102. That “diminished ability to understand and process information, to engage in logical reasoning [and] to control impulses” makes him “less morally culpable” than the typical violent offender. Atkins v. Virginia, 536 U.S. 304, 318, 122 S.Ct.

2242, 153 L.Ed.2d 335 (2002). Accordingly, this factor weighs against severe punishment.

The second Fain factor requires the Court to examine the Act's legislative purposes and determine whether they may be equally served by less severe punishment. These purposes include deterring future offenses, segregating dangerous individuals from the community, and restoring public trust in the criminal justice system. RCW 9.94.555(2); State v. Rivers, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996). None of these purposes is advanced by sentencing Mr. Thorne to life imprisonment in a penal institution. The report from Western State Hospital concluded Mr. Thorne is "of low to moderate risk of danger to other persons, [but] of high risk of committing criminal acts jeopardizing public safety or security." CP 96. The POAA is not focused on deterring recidivism generally, but rather violent recidivists. As a result of his mental illness Mr. Thorne might be an irritant to society and society's expectations of behavior, but, as the State's own experts concluded, he does not pose a risk of violence. The POAA purposes are not served by Mr. Thorne's life sentence

The third Fain factor requires the court to consider punishments meted out in other jurisdictions. This factor as well

supports the conclusion Mr. Thorne's sentence was unconstitutionally cruel. States are increasingly recognizing that mentally ill defendants are different from the average recidivist offender and deserve different treatment by the criminal justice system. A movement beginning in the 1970's developed the "guilty but mentally ill" (GBMI) verdict, which was designed to lessen penalties and provide treatment for mentally ill offenders. See, e.g., United States ex. rel. Weismeller v. Lane, 815 F.2d 1106, 1111-12 (7<sup>th</sup> Cir. 1987) (GBMI verdict tends to excuse criminal act, although not provide a complete defense for it); Kirkland v. State, 304 S.E.2d 561, 566 (Ga.App.Ct. 1983) (GBMI verdict reduces penalty and provides treatment); Green v. State, 469 N.E.2d 1169, 1173 (Ind. 1982) (GBMI verdict may be considered as mitigating factor). To date, at least 12 states have already passed legislation authorizing a guilty but mental ill verdict, and as many as 20 may be considering it. Christopher Slobogin, Symposium on the ABA Criminal Justice Mental Health Standards: The Guilty but Mentally Ill Verdict, 53 Geo.Wash.L.Rev. 494, 496 (1985). This verdict typically results in the triggering of a statutory right to receive mental health treatment and/or hospitalization. State v. Baker, 440 N.W.2d 284, 290 (S.D. 1989) ("laudable and legitimate purpose [of

GMBI verdict is to] provide treatment to those convicted but suffering from mental illness); Commonwealth v. Twill, 543 A.2d 1106, 1115-30 (Pa.Sup.Ct. 1988) (purpose is to provide “humane psychiatric treatment”); Cooper v. State, 325 S.E.2d 137, 139 (Ga. 1985) (defendant convicted as guilty but mentally ill will be treated).

The United States Supreme Court found this shift in national thinking significant. Atkins, 536 U.S. at 315 (“It is not so much the number of these States that is significant, but the consistency of the direction of the change.”). Washington has not yet followed this trend of treating the mentally ill with some compassion, resulting in people such as Mr. Thorne being warehoused in prisons for crimes without any meaningful mental health treatment. This is a far cry from the standards of decency that currently prevail of mitigating punishment and providing treatment and hospitalization for mentally ill offenders. This analysis supports a finding Mr. Thorne’s sentence of life imprisonment in prison as opposed to hospitalization with meaningful mental health care is cruel and unusual punishment.

The final Fain factor is the punishment imposed for other offenses in this jurisdiction. Other than the POAA, in Washington,

only one offense guarantees life without the possibility of parole: aggravated first-degree murder. RCW 10.95.020; RCW 9.94A.515.

The imposition of the sentence of life without the possibility of parole constitutes cruel and unusual punishment in Mr. Thorne's case.

c. A sentence of life without the possibility of parole without mental health treatment is cruel and unusual as applied to Mr. Thorne. RCW 9.94A.570, which defines the punishment required for persistent offenders, bars a persistent offender sentence from being served anywhere except within a state correctional facility.

Mr. Thorne's long-standing mental illness problems are well documented in the report prepared by Western State Hospital. CP 75-82 (Detailing forty-year history of diagnosis, medication and treatment). Throughout that period, Mr. Thorne has had numerous commitments to mental health facilities for evaluation and treatment. CP 91. It is clear, Mr. Thorne's criminal offending is inseparable from his mental illness.

In Atkins, the United States Supreme Court recently held that under "evolving standards of decency" it amounted to cruel and unusual punishment to sentence mentally retarded individuals to

death. 536 U.S. at 321. The Court noted, “[w]e are not persuaded that the execution of a mentally retarded criminal will measurably advance the deterrent and retributive purpose of the death penalty.” Id. The Court examined the legislation of a number of states which bars the execution of the mentally retarded and observed that society today “views mentally retarded offenders as categorically less culpable than the average criminal.” Atkins, 536 U.S. at 314-16. The Court also noted that even in those states that permit imposition of death sentences on the mentally retarded, none have carried out an execution of a mentally retarded offender in decades. Id. at 316. The Court concluded “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.” Id. The Court went on to examine the logic behind this change, evaluating the two primary rationales for imposing the death penalty, retribution and deterrence. Atkins, 536 U.S. at 318-19.

Although Mr. Thorne is not mentally retarded but mentally ill, and not facing a death sentence but life imprisonment, the fact he will never receive any meaningful mental health treatment renders him in much the same circumstance as the defendant in Atkins, and the rationale underlying Atkins should apply equally.

i. Atkins found the goals of retribution and deterrence were not advanced by imposition of the death penalty on the mentally retarded. Atkins noted mentally retarded individuals “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” Id at 318. Likewise, the Court noted the possibility of increased punishment could not meaningfully deter retarded offenders because they lack the cognitive skills to learn from experience. Id. Because of these deficiencies, the Court decided the mental impairments at issue lessen a perpetrator’s culpability and only a barbaric system of justice would refuse to recognize this. Recognizing this lesser culpability, the Court acknowledged the mentally retarded do not merit the form of retribution inherent in the death penalty. Id.

Atkins also observed that executing the mentally retarded does nothing to further the goal of deterrence:

The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to

understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.

Atkins, 536 U.S. at 320.

ii. The same analysis applies for those suffering from mental illness, like Mr. Thorne. Mr. Thorne is severely mentally ill. Thus, like the mentally retarded defendant in Atkins, Mr. Thorne suffers the same “diminished ability to understand and process information, to engage in logical reasoning, or to control impulses.” Atkins, 536 U.S. at 320. As a result, Mr. Thorne’s mental illness diminishes his personal culpability. Sentencing Mr. Thorne to a life sentence without the possibility of parole in prison instead of in a mental institution is cruel and unusual punishment. Confinement, as opposed to hospitalization, would result in “nothing more than purposeless and needless imposition of pain and suffering and hence [constitute] unconstitutional punishment.” Atkins, 536 U.S. at 319.

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

a. Due process requires a jury find beyond a

reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is axiomatic a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77 (quoting United

States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

In recent cases, the Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In Blakely, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. “Merely using the label ‘sentence enhancement’ to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S., at 476. Ring pointed out the dispositive question is one of substance, not form. “If a State makes an increase in defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. This issues is not controlled by prior by federal decisions. Almendarez-Torres v. United States held recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant’s prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Mr. Almendarez-Torres pleaded guilty and admitted his prior convictions, but argued his prior convictions should have been

included in the indictment. 523 U.S. at 227-28. The Court determined Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id. The Court concluded the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercised their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. Id. at 244-45.

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

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

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

Apprendi noted “it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

In Blakely, Apprendi, and Jones, the Court stated that, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-

Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring). Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. Id. at 499-519; accord, Ring, 536 U.S. 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring) cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). The Washington Supreme Court, however, has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since

Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, the Blakely decision makes clear that the Supreme Court's protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

Further, the reasons given by Almendarez-Torres to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the POAA. First, Almendarez-Torres looked to the legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not establish the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process.

Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

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

c. The trial court denied Mr. Thorne his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. Almendarez-Torres held prior convictions need not be pled in the information for several reasons. First the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d

751, 613 P.2d 121 (1980) (deadly weapon enhancement); Furth, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

For several reasons, Almendarez-Torres does not answer the question whether Mr. Thorne was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he could be sentenced as a persistent offender. The cases cited by Almendarez-Torres support not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, Almendarez-Torres noted the fact of prior convictions triggered an increase in the maximum permissive sentence. "[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. 118 S.Ct. at 1231-32. Here, in contrast, Mr. Thorne's prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life

without the possibility of parole in Washington is reserved for aggravated murder and persistent offenders. This fact is certainly important in the constitutional analysis.

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

3. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED MR. THORNE'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION

As noted, even though under the Sixth and Fourteenth Amendments all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24.

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

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476. More recently the Court noted:

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

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

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,<sup>1</sup> proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a

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<sup>1</sup> Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

gross misdemeanor unless the person has a prior conviction in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstances the “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3<sup>2</sup> would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See, Washington Sentencing Guidelines Comm’n, Adult Sentencing Manual 2008, III-76. The “elevation” in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five is not fundamentally different from a recidivist

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<sup>2</sup> Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

element which actually alters the mandatory punishment to life without the possibility of parole.

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

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); Thorne, 129 Wn.2d at 770-71. A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The

Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore where an equal protection challenge is raised, the court will apply a “rational basis” test. Id.

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

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

The purpose of the POAA is:

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

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury

beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

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

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” (Italics in original.) 165 Wn.2d at 192. But as the Court recognized in the very next sentence, communicating

with a minor for immoral purposes is a crime regardless of whether one has prior sex conviction or not - the prior offense merely alters the maximum punishment to which the person is subject to. Id. So too, first degree robbery is a crime whether one has two prior convictions for most serious offenses or not.

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

F. CONCLUSION

For the reasons above, the Court must reverse Mr. Thorne’s sentence and remand for imposition of a standard range sentence.

Respectfully submitted this day of November, 2009.



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Washington Appellate Project – 91052  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 63323-6-I
	)	
	)	
JAMES THORNE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | JAMES THORNE<br>118554<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

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