

64176-0

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No. 64176-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY E. STEEN,

Appellant.

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

The Honorable Laura C. Inveen

2010 JUN 12 PM 1:13
COURT OF APPEALS
DIVISION ONE
CLERK

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Gregory E. Steen's constitutional right to equal protection was violated when the trial court found the facts necessary to sentence him as a persistent offender by a preponderance of evidence, rather than a jury determination of those facts beyond a reasonable doubt.

2. Mr. Steen's constitutional right to due process was violated when the court found the facts necessary to elevate his sentence from the statutory maximum term for robbery in the first degree to a term of life without the possibility of parole by a preponderance of evidence, rather than a jury determination of those facts beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of Article I, section 12 of the Washington Constitution require that similarly situated persons be treated equally with regard to the legitimate purpose of the law. The Washington Legislature has enacted several statutes that authorize increased penalties for specified offenses based on recidivism, with the legitimate purpose of more harshly punishing recidivist offenders. In certain statutes, the

Legislature has classified the fact of a prior conviction as an "element" that must be proven to a jury beyond a reasonable doubt. In other instances, however, the Legislature has classified the fact of a prior conviction as an "aggravator" or "sentencing factor" that may be found by a judge by a preponderance of evidence only. Do these arbitrary classifications violate Mr. Steen's constitutional right to equal protection, where there was no rational basis to deny equal treatment to similarly situated recidivist offenders, and the classification denied him the constitutional protections of a jury trial and proof beyond a reasonable doubt? (Assignment of Error 1)

2. The Sixth Amendment and Fourteenth Amendment to the United States Constitution 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 statutory maximum. Did the court violate Mr. Steen's constitutional right to jury trial and proof beyond a reasonable doubt, where the judge, not a jury, found by a preponderance of the evidence Mr. Steen had two qualifying offenses under the Persistent Offender Accountability Act (POAA) that elevated his punishment from the statutory maximum for robbery in the first degree to life without the possibility of parole? (Assignment of Error 2)

C. STATEMENT OF THE CASE

Gregory E. Steen was convicted by a jury of five counts of robbery in the first degree, in violation of RCW 9A.56.190; 9A.56.200(1)(b). CP 68-72. Robbery in the first degree is a Class A felony and carries a statutory maximum sentence of life with the possibility of parole. RCW 9A.20.021; 9A.56.200(b). Based on his offender score, Mr. Steen faced a standard range sentence of 129-171 months. RCW 9.94.510.

At sentencing, the court did not empanel a jury. Rather, on its own, the court found by a preponderance of the evidence that Mr. Steen had two prior convictions for a "most serious offense" and imposed five concurrent sentences of life without the possibility of parole, pursuant to RCW 9.94A.570. CP 258. Mr. Steen appeals. CP 254.

D. ARGUMENT

1. THE ARBITRARY CLASSIFICATION OF THE FACT OF PRIOR CONVICTIONS AS A "SENTENCING FACTOR," RATHER THAN AS AN "ELEMENT," FOR PURPOSES OF THE POAA, VIOLATED MR. STEEN'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution¹ and of Article I, section 12² of the Washington Constitution guarantee similarly situated persons must receive equal treatment with respect to the legitimate purpose of the law. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *State v. Thome*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). The Washington Supreme Court has held that an equal protection challenge regarding recidivists is reviewed under the "rational basis" test. *Thome*, 129 Wn.2d at 771.

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

¹"No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

²"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

overcome the strong presumption of constitutionality applicable here.

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

In Washington, where the fact of a prior conviction elevates a substantive crime from a misdemeanor to a felony, the State must prove the prior conviction to a jury beyond a reasonable doubt.³ However, where the fact of two prior convictions for a most serious crime elevates the punishment to a mandatory sentence of life without the possibility of parole, Washington courts have declined to require that those prior convictions be proven to a jury beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001). For instance, where a person previously convicted of rape in the first degree is subsequently convicted of communication with a minor for immoral purposes, he could not be punished for recidivism unless the State proves the fact of the prior conviction to a jury beyond a reasonable doubt. RCW 9.68A.090. On the other hand, if that same person was subsequently convicted of rape of a child in the first degree, he could be punished for recidivism based

³For example, the substantive crime of telephone harassment is a gross misdemeanor that may be elevated to a felony upon proof of a prior conviction for harassment against the same victim or member of the victim's family or household or against any person named in a no-contact or anti-harassment order. RCW 9.61.230(2)(a).

merely upon proof to the prior conviction to a judge by a preponderance of the evidence. Yet, the purpose in both scenarios is the same – imposition of harsher sentences on repeat offenders.

The legislative classification that purportedly authorizes this incongruous result is wholly arbitrary. There is no rational basis for treating the fact of a prior conviction as an “element” in the first instance – with the attendant due process safeguards relating to elements of a crime – and as an “aggravator” in the second instance. The proof of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the proof of that same conviction to increase the statutory maximum sentence to life without the possibility of parole share the same purpose of more harshly punishing a recidivist criminal.⁴ But in the former instance, the fact of the prior conviction is classified as an “element” and must be proven to a jury beyond a reasonable doubt. In the latter instance, the fact of that same prior conviction is classified as an

⁴The Washington Supreme Court has described the purpose of the POAA as follows:

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

Thorne, 129 Wn.2d at 772.

“aggravator” and need only be found by a judge by a preponderance of the evidence.

Two years ago, in *State v. Roswell*, the Washington Supreme Court the Court considered the crime of communication with a minor for immoral purposes. 165 Wn.2d 186, 192, 196 P.3d 705 (2008). The Court found that in the context of that offense and other similarly-structured offenses,⁵ the fact of a prior conviction functioned as an “elevating element,” thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92.

The Court conceded that the distinction between classifying the fact of a prior conviction as an aggravator or as an element of the crime is the source of “much confusion.” *Roswell*, 165 Wn.2d at 192. The Court concluded that classifying the fact of a prior conviction as an element “actually alters the crime that may be charged,” and therefore it must be proven to a jury beyond a reasonable doubt. *Id.* Yet, for the substantive offense of communication with a minor for immoral purposes, the Legislature expressly stated that the fact of a prior conviction was to elevate the penalty of the offense, not to create a separate offense entirely.

⁵As another example, violation of a no-contact order is a misdemeanor unless the State proves to a jury beyond a reasonable doubt that defendant has two or more prior convictions for the same offense. *Roswell*, 165 Wn.2d at 196 (discussing *State v. Oster*, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

See RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties).

Recently, in *State v. Langstead*, this Court concluded that there is no equal protection violation where the Legislature elects to classify the fact of a prior conviction as an element of certain offenses but as merely a sentencing factor for purposes of the POAA. 155 Wn. App. 448, 228 P.3d 799 (2010), *petition for review filed June 28, 2010*. This Court distinguished *Roswell, supra*, on the grounds that the substantive crime in that case was a misdemeanor which was elevated to a felony by the fact of the prior conviction whereas Mr. Langstead’s substantive crime was a felony in and of itself. *Id.* at 456.

This distinction is inapt. There is no constitutionally meaningful distinction that flows from labeling a person a felon as opposed to a misdemeanant. Rather, the equal protection analysis is properly focused on the difference in punishment. There is no rational basis to afford offenders such as Mr. Steen less due process than offenders such as Mr. Roswell.

In *Langstead*, this Court also distinguished persons convicted of unlawful possession of a firearm in the first degree from persons sentenced as a persistent offender, on the grounds

that possession of a firearm is unlawful only where there is a prior conviction. *Id.* However, this distinction is inconsistent with to the ultimate conclusion that “recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or similar offense.” *Id.* at 456-57. A person convicted of unlawful possession of a firearm in the first degree must necessarily have a prior felony conviction. See RCW 9.41.040(1). Therefore, an offender convicted for unlawful possession of a firearm in the first degree necessarily engaged in prior conduct that was “inherently culpable enough to incur a felony sanction.” Yet that offender is entitled to have the prior conviction proven to a jury beyond a reasonable doubt.

There is no rational basis for classifying the punishment for recidivist offenders as an “element” in certain circumstances and as an “aggravator” in others. The difference in classification, therefore, violates the Equal Protection Clause of the federal and state constitutions. This Court should hold there is no basis for treating the fact of a prior conviction as an “element” in one circumstance and as an “aggravator” in another. The proper

remedy is to strike the persistent offender finding and remand for entry of a standard range sentence.

2. MR. STEEN'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT IMPOSED A SENTENCE ABOVE THE STATUTORY MAXIMUM TERM BASED ON THE FACT OF TWO PRIOR CONVICTIONS THAT WERE NOT PROVEN TO A JURY BEYOND A REASONABLE DOUBT.

- a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum sentence. The Due Process Clause of the Fourteenth Amendment to the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law.⁶ The Sixth Amendment also provides a criminal defendant the right to a jury trial.⁷ It is axiomatic that a criminal defendant has the right to a jury trial and may be convicted only upon proof of 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); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The

⁶"No State shall ... deprive any person of life, liberty, or property, without due process of law."

⁷"In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury."

constitutional right 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 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).

In recent years, the United States Supreme Court has recognized that the right to a jury trial applies not just to the essential element of the crime charged, but also extends to facts labeled “sentencing factors,” if those facts increase the maximum penalty faced by the defendant. In *Blakely*, the Court held that an exceptional sentence imposed pursuant to Washington’s Sentencing Reform Act was unconstitutional insofar as it permitted the judge to impose a sentence above the standard range based upon facts that were not found by a jury beyond a reasonable doubt. 542 U.S. at 303-05. Likewise, in *Ring v. Arizona*, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive a sentence of death based upon aggravating factors found by a judge by a preponderance of the evidence. 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). And, in *Apprendi*, the Court found New Jersey’s “hate

crime” legislation unconstitutional because it permitted the court to impose a sentence above the statutory maximum based on facts proven by a preponderance of evidence only, rather than a jury finding of those facts beyond a reasonable doubt. 530 U.S. at 492-93.

In each of these cases, the Court rejected arbitrary classification of facts as either “sentencing factors” or “elements” of a crime. As the Court noted in *Ring*, the dispositive question is one of substance, not form. “If a State makes an increase in defendant’s authorized punishment contingent upon the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” 530 U.S. at 602, *citing Apprendi*, 530 U.S. at 482-83. Thus, a judge may impose a sentence solely based upon facts found by the jury or contained in a guilty plea, and not based upon additional findings. *Blakely*, 542 U.S. at 303.

b. This issue is not settled by federal decisions. In *Almendarez-Torres v. United States*, the defendant was charged with illegally re-entering the United States after having been previously deported following three convictions for several felonies. 523 U.S. 224, 227, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The

defendant admitted his prior convictions and pleaded guilty, but argued that his prior convictions should have been included in the information. 523 U.S. at 227-28. The United States Supreme Court expressed no opinion as to the constitutionally-required burden of proof for sentencing factors that increase the severity of a sentence or as to whether a defendant has a right to a jury determination of such factors. 523 U.S. at 246. Rather, the Court held that recidivism was not an element of the substantive crime that needed to be pleaded in the information, even though the defendant's prior conviction was used to double the sentence otherwise provided by federal law. *Id.* The Court determined that 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 that the prior conviction need not be included in the indictment because (1) recidivism was a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding on the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges typically exercise their discretion within a permissive range, and (4) the statute did not change a pre-

existing definition of the crime; thus congress did not try to “evade” the Constitution. *Id.* at 244-45.

Since *Almendarez-Torres* was decided, the Court has not addressed recidivism and has been careful to distinguish the fact of a prior conviction from other facts used to enhance a possible penalty. For instance, in *Apprendi*, the Court has stated, “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 prove beyond a reasonable doubt.” 530 U.S. at 476. The Court has frequently quoted this statement in subsequent cases considering sentencing factors other than recidivism. See, e.g., *Washington v. Recuenco*, 548 U.S. 212, 216, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *Blakely*, 542 U.S. at 301. However, this statement cannot be read as 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*.

Significantly, in *Apprendi*, the Court distinguished *Almendarez-Torres* because the defendant in that case raised only the indictment issue. 530 U.S. at 488, 495-96. The Court went so far as to state, “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.” *Id.* at 489. Justice Thomas, one of the five justices who signed the majority opinion in *Almendarez-Torres*, wrote in a concurring opinion in *Apprendi* that *Almendarez-Torres* and its predecessor, *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. 530 U.S. at 499. Rather than focusing on whether a fact is a sentencing factor or an element of the substantive crime, Justice Thomas suggested the Court should focus on whether the fact, including the fact of a prior conviction, was a basis for imposing or increasing punishment. *Id.* at 499-519. *Accord United States v. O’Brien*, ___ U.S. ___, 130 S.Ct. 2169, 2183-84, ___ L.Ed.2d ___ (2010) (Thomas, J., concurring); *Ring*, 536 U.S. at 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 calls 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 recognized the failure of the United States Supreme Court to embrace its decision in

Almendarez-Torres. See *Smith*, 150 Wn.2d at 142-43 (addressing *Ring*); *Wheeler*, 145 Wn.2d at 121-24 (addressing *Apprendi*).

Nonetheless, the Washington Supreme Court has felt obligated to “follow” *Almendarez-Torres*. See, e.g., *State v. Thieffault*, 160 Wn.2d 409, 418-20, 158 P.3d 580 (2007); *Smith*, 150 Wn.2d at 143; *Wheeler*, 145 Wn.2d at 123-24. Insofar as *Almendarez-Torres* only addressed whether the fact of a prior conviction was an element of a substantive crime that must be pleaded in the indictment, however, it does not control this case, which challenges the use of prior convictions on other grounds. In addition, the *Blakely* decision that construed Washington’s Sentencing Reform Act makes clear that due process protections apply to sentencing factors that increase a sentence above the statutory standard range, not just above the statutory maximum for the offense. 542 U.S. at 303-04 (“Our precedents make clear, however, that the “statutory maximum” for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after *without* any additional findings. 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.” (emphasis in original, citations omitted)).

Moreover, the underlying rationale in *Almendarez-Torres* does not apply to this state’s sentencing scheme. First, the Court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant’s sentence. 523 U.S. at 243. In contrast, however, Washington historically required a jury determination of prior convictions prior to sentencing as a habitual offender. See 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. Manussier*, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).

Second, the cases relied upon in *Almendarez-Torres* support pleading the prior conviction after a conviction; the cases do not address the burden of proof or right to jury trial. 523 U.S. at 243-45.

Third, the *Almendarez-Torres* Court 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. 523 U.S. at 244-45. Here, in contrast, Steen’s prior convictions required imposition of a mandatory sentence much higher than the statutory maximum under the sentencing guidelines. RCW 9.94A.570. A sentence of life without the possibility of parole is reserved for aggravated murder and persistent offenders only. Surely, this disparity is important in the constitutional analysis.

The Persistent Offender Accountability Act eliminates a sentencing court’s discretion and required imposition of a mandatory sentence of life based merely on a judge’s finding of prior convictions by a preponderance of the evidence. Due process requires more – a jury determination beyond a reasonable doubt of any aggravating factors used to increase his sentence. This Court should revisit its interpretation of *Almendarez-Torres*, and conclude that all aggravating factors, including the fact of prior convictions, must be proven to a jury beyond a reasonable doubt.

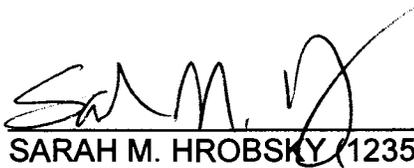
Mr. Steen was entitled to a jury determination beyond a reasonable of the fact of two prior convictions for a most serious offense. This matter must be reversed and remanded for sentencing within the standard range.

E. CONCLUSION

The Equal Protection Clause of the federal and state constitutions prohibit the arbitrary classification of the fact of a prior conviction as either an element of an offense that must be proven to a jury beyond a reasonable doubt or as a sentencing factor that may be found by a judge by a preponderance of evidence. The Due Process clause of the federal constitution requires a jury determination beyond a reasonable doubt of all facts the increase punishment above the standard statutory sentencing range. For the foregoing reasons, Mr. Steen requests this Court reverse his sentence as a persistent offender and remand for sentencing within the standard range for robbery in the first degree.

DATED this 12th day of July 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64176-0-I
v.)	
)	
GREGORY STEEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JULY, 2010, 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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STATE OF WASHINGTON

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