No. 89380-2
(Court of Appeals No. 67572-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GUY ROOK,

Petitioner.

CORRECTED PETITION FOR REVIEW

ELAINE L. WINTERS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Guy Rook, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Rook seeks review of the Court of Appeals decision affirming his conviction for vehicular assault and his sentence of life without the possibility of parole. State v. Guy Rook, No. 67572-9-I.

A copy of the Court of Appeals decision dated June 24, 2013, is attached as Appendix A, and a copy of the August 22, 2013, order denying Rook's motion for reconsideration is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has the due process right to appear at trial without being physically restrained, and the trial court may only restrain a defendant upon finding he poses an imminent risk of escape, intends to injure someone in the courtroom, or cannot behave in an orderly manner. U.S. Const. amends. VI, XIV; Const. art. I § 3. Although Rook did not meet these criteria, the trial court ordered him to be restrained with a stun-belt which a jail guard could use to shock him with 50,000 volts of electricity. Was Rook's constitutional right to appear at trial free from restraint violated where the stun belt and the apprehension it created

interfered with Rook's ability to be present and fully participate in his defense?

2. Article I, section 14 prohibits the State from imposing cruel punishment. Rook was convicted of vehicular assault by means of driving in a rash or heedless manner, and he was sentenced to life in prison without the possibility of parole. Does Rook's sentence violate article I, section 14 where the crime does not involve an intentional act, punishing Rook does not fall within the statutory purpose of punishing violent repeat offenders, Rook would not receive such a severe sentence for similar conduct in any other state of the Union, and the sentence of life without the possibility of parole could not be imposed for the most similar Washington offense?

3. The Eighth Amendment prohibits cruel and unusual punishment. Rook was convicted of vehicular assault by means of driving in a rash or heedless manner, and he was sentenced to life in prison without the possibility of parole. Does Rook's sentence violate the Eighth Amendment because it is grossly disproportionate to his conduct, disproportionate to the sentence received by similar offenders in Washington, and disproportionate to the sentence he would receive for the same conduct in the other 49 states? Does the mandatory imposition of life without the possibility of parole for vehicular assault violate the

Eighth Amendment's categorical ban on sentences that are disproportionate to a class of offenders?

4. The Sixth and Fourteenth Amendments guarantee the rights to a jury trial and to proof beyond a reasonable doubt of every fact that authorizes an increase in punishment. Did the sentencing court violate Rook's constitutional rights by imposing a sentence of life without the possibility of parole based on the court's own finding, by a preponderance of the evidence, that Rook had twice before been convicted of most serious offenses?

5. A statute implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment if it creates classifications that are not necessary to further a compelling government interest. In some circumstance, the existence of prior convictions used to enhance a sentence must be found by a jury beyond a reasonable doubt, but under the Persistent Offender Accountability Act prior convictions need only be found by a judge by a preponderance of the evidence. Does the Act violate the Equal Protection Clause?

6. A defendant may only be convicted based upon proof beyond a reasonable doubt of every element of the crime. U.S. Const. amends. VI, XIV. Must Rook's conviction for vehicular assault be reversed in the

absence of proof beyond a reasonable doubt that he drove in a rash and heedless manner?

7. A criminal defendant has the right to effective assistance of counsel. U.S. Const. amend. VI, XIV. Must Rook's conviction be reversed because he had an irreconcilable conflict with his attorney and his attorney did not call an important defense witness?

8. A criminal defendant has the right to be tried by an impartial decision maker. U.S. Const. amend. XIV. Must Rook's conviction be reversed because the trial court's rulings concerning physical restraint demonstrate unconstitutional bias?

9. The right to due process includes the right to a unanimous jury verdict and the right to have the jury clearly instructed about its responsibilities. Const. art. I, §§ 21, 22; U.S. Const. amend. XIV. Must Rook's conviction be reversed because the court instructed the jury to consider an alternative means of committing vehicular assault as a lesser-included offense and because the instructions were confusing as to the requirement of unanimity?

10. The constitutional right to a fair trial may be violated by the cumulative impact of individual trial errors. U.S. Const. amends. VI, XIV. Must Rook's conviction be reversed based upon the prejudicial impact of the trial court errors addressed above?

D. STATEMENT OF THE CASE

Guy Rook was driving his 1995 Pontiac on the evening of August 25, 2009, with his girlfriend Tracy Rectenwald in the passenger seat. 6/16/11RP 13; 6/29/11RP 14. Rectenwald, who had been drinking, dumped a full cup of liquid onto Rook's lap. 6/29/11RP 18, 31. As Rook neared an intersection, Rectenwald waived her arms, striking him in the face and knocking his glasses off his head. 6/16/11RP 13-14; 6/29/11RP 21; 6/29/11RP 23.

Rook is very near-sighted and could not see. 6/29/11RP 23. He took his foot off the gas as he looked for his glasses, but continued through the intersection because he believed the light was green. 6/29/11RP 21, 23, 32. Rook's car struck the passenger side of a 1997 Geo driven by Christopher Kalalui, which spun and hit a light pole. 6/16/11RP 17, 57; 6/27/11(MT)RP 3, 6.[1] Kalalui had green light and was about half-way through the intersection. 6/16/11RP 54; 6/27/11(MT)RP 5-7.

Mr. Kalalui's pelvis, hips, and buttocks were bruised. 6/28/11RP 28-29, 33, 42, 46. His spleen was lacerated, but it stopped bleeding on its own. 6/28/11RP 47-48. And a small piece of Mr. Kalalui's fourth lumbar vertebra, the "transverse process," was broken off. 6/28/11RP 33, 37-39.

[1] The two transcripts for June 27, 2011, are referred to by date and the initials of the respective court reporters. Michael Townsend Jr. prepared the transcripts that cover the beginning and end of the trial day, and Sheri Reynolds reported the middle of the day.

After the impact, Rook got out of his car with difficulty, stumbled across the street and down an embankment. 6/16/11RP 61-65; 6/27/11(MT)RP 43. He was not wearing eyeglasses. 6/16/11RP 83. Rook soon returned, asked if anyone was hurt, and was arrested. 6/16/11RP 72-74; 6/27/11(MT)RP 48, 50.

The King County Prosecutor charged Rook with vehicular assault, by either operating a motor vehicle in a reckless manner or while under the influence of alcohol, and with hit and run driving. CP 52-53. Prior to trial, the court ordered Rook to wear a "R-e-a-c-t System Band-It" stun-belt in court. CP 102-05, 534-35. He was instructed that he would be subjected to 50,000 volts of electricity if he made any hostile movements, attempted to escape, or tampered with the system. CP 98, 107; 4/6/11RP 43.

The jury convicted Rook of vehicular under the means of operating the motor vehicle in a reckless manner and found him not guilty of committing the crime while under the influence of intoxicating liquor or drugs and not guilty of hit and run driving. CP 191-93. The court imposed the mandatory sentence of life without the possibility of parole based upon prior convictions for first degree robbery in 1985 and rape of a child in the first degree in 1994. CP 489, 491; 8/19/11RP 35-36, 53.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The unwarranted use of a stun belt throughout his jury trial violated Rook's constitution right to due process of law.

Criminal defendants have long been entitled to appear in front of the jury free from bonds and shackles absent extraordinary circumstances. U.S. Const. amends. VI, XIV; Const. art. 1, § 22; Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). Physical restraints denigrate the defendant's constitutional right to a fair trial by reversing the presumption of innocence and prejudicing the jury against him. Deck v. Missouri, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); Allen, 397 U.S. at 344. The use of restraints is also an affront to the dignity accorded to an American courtroom. Deck, 544 U.S. at 631; Allen, 297 at 344. In addition, restraining a defendant restricts his ability to assist counsel during trial, interferes with the right to testify in one's own behalf, and may even confuse or embarrass the defendant sufficiently to impair his ability to reason. Deck, 544 U.S. at 631; Allen, 397 U.S. at 345; State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999).

Given the constitutional rights at stake, courts may order a defendant be restrained only when necessary to protect the safety of others, prevent escape, or ensure an orderly court process. Finch, 137

Wn.2d at 846, 850. Restraints may only be used as a "last resort," when less restrictive alternatives are not possible. Allen, 397 U.S. at 344.

The trial court ordered Rook to be restrained by the use a "Band It" stun belt during the trial. CP 534-35. The court based its decision upon (1) the court's unrevealed concerns about the security of the courtroom, (2) the life sentence Rook was facing, and (3) Rook's agreement to the use of the stun belt. 4/6/11RP 38-39, 45, 52.

These factors do not provide the "manifest need" required to order a defendant to be shackled during trial. Finch, 137 Wn.2d at 849. First, the court's concerns about the security of the courtroom were never placed on the record. 4/6/11RP 39 ("I have some serious concerns that I'm not going to express on the record about the security in this courtroom."). The court's decision, however, "must be founded on a factual basis set forth in the record." State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

The court also opined that "anyone facing a life sentence should be considered a security risk." 4/6/11RP 39. The decision to restraint a defendant for trial, however, must be based upon factors specific to the case that indicate an escape or security risk, not generalizations. Finch, 137 Wn.2d at 850.

Third, the trial court improperly relied upon Rook's agreement to the use of the stun-belt, but Rook's agreement was obtained in response to

the court's threat of more severe forms of restraint or security if he did not agree to wear the Band-It. Rook thus agreed that the stun belt was the least restrictive alternative, not that it was justified. 4/6/11RP 36-37, 45.

Although the reasons cited by trial court do not justify the use of restraints, the Court of Appeals affirmed the decision to restrain Rook on two other grounds, one specifically rejected by the trial court the other unsupported by the record. The Court of Appeals first reasoned that restraints could be justified by the information of Rook's jail infractions. Slip Op. at 7. The trial court, however, refused to base its decision on the jail's evidence and refused to sign the jail's proposed findings of fact. 4/6/11RP 45 ("I don't want any findings that are similar to the ones you have here, I'm not making those findings."); 4/6/11RP 47.

The Court of Appeals also upheld the use of restraints because Rook "continued to be disruptive during trial." Slip Op. at 7. The court, however, could point to only one incident throughout the five-day jury trial, post-trial motions and sentencing. Id. That incident does not support the use of restraints, however, as Rook made only a one-sentence comment out of turn. 6/29/11RP 51.

Rook was not an escape risk, a danger to others, or unable to conduct himself, and the trial court erred by ordering him to be restrained with the stun belt. He was prejudiced by the restraints even though they

were not visible to the jury, and evidence of his guilt was not overwhelming. The Court of Appeals decision conflicts with Finch, and raises an important issue of federal and state constitutional law. This Court should grant review. RAP 13.4(b)(1), (3).

2. **Rook's sentence of life without the possibility of parole violates the cruel punishment clause of the Washington Constitution.**

Rook was convicted of vehicular assault for an automobile accident for driving his car in a rash and heedless manner and causing substantial bodily injury to another person. Rook did not intentionally hurt anyone, and the accident did not cause serious bodily injury or death. Although the maximum sentence for vehicular assault is ten years, Rook was sentenced to life in prison without the possibility of parole based on his prior convictions. Rook's sentence is disproportionate to the sentence he would receive for the same conduct in every other state of the Union, and it is also disproportionate to the sentence he would receive in Washington for analogous offenses. This Court should accept review because the sentence violated the cruel punishment clause of the Washington Constitution. RAP 13.4(b)(3).

Article I, section 14 of the Washington Constitution provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Because of differences in language and intent,

article I, section 14 is more protective of individual rights than the Eight Amendment.[2] State v. Roberts, 142 Wn.2d 471, 505-06, 14 P.3d 713 (2000); State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996); State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980).

The Persistent Offender Accountability Act (POAA), mandated a sentence of life without the possibility of parole in this case because (1) vehicular assault is a "most serious offense" if committed by means of driving a vehicle in a reckless manner, and (2) Rook had prior convictions for two prior "most serious" offense. RCW 9.94A.030(32)(q), (37)(a); RCW 9.94A.570. Life sentences for persistent offender have been upheld by this Court, but in each case the defendant was sentenced for a crime involving greater injury and/or a higher degree of mental culpability than vehicular assault. See State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008) (second degree assault and unlawful imprisonment); Thorne, 129 Wn.2d at 772-76 (first degree robbery and first degree kidnapping); State v. Rivers, 129 Wn.2d 697, 712-15, 921 P.2d 495 (1996) (second degree robbery); State v. Manussier, 129 Wn.2d 652, 912 P.2d 473 (1996) (second degree robbery), cert. denied, 520 U.S. 1201 (1997).

[2] No Gunwall analysis is necessary in light of the established principle that article I, section 14 is interpreted independently from the Eighth Amendment. Roberts, 142 Wn.2d at 505 n.11.

a. The Court of Appeals opinion used the wrong standard of review. The Fain Court found that a sentence of life with the possibility of parole for second degree theft by the fraudulent issuance of several small checks under Washington's former habitual criminal statute violated article I, section 14.[3] Fain, 94 Wn.2d at 389-90, 402. To analyze whether the sentence violated article I, section 14, the Fain Court utilized four factors: (1) the nature of the offense, (2) the legislative purpose behind the sentencing statute, (3) the punishment the defendant would have received in another jurisdiction for the same offense, and (4) the punishment meted out for similar offenses in Washington. Id. at 397; accord, Manussier, 129 Wn.2d at 677 (omitting factor 2); Thorne, 129 Wn.2d at 773.

In Rook's case, the Court of Appeals held that Manussier "narrowed the inquiry to three of the four factors" and determined the punishment for similar offenses in the same jurisdiction was irrelevant in POAA cases. Slip Op. at 11. This Court, however, has never overruled Fain. Nor does Manussier stand for the proposition that no sentence under the POAA can violate article I, section 14. As this Court noted, "We recognize there may be cases in which application of the Act's sentencing

[3] Under Former RCW 9.92.090, the court could sentence the defendant to life in prison, and the defendant would be eligible for parole after 15 years or less. Fain, 94 Wn.2d at 390, 390 n.2, 393; State v. Hennings, 100 Wn.2d 379, 382, 670 P.2d 256 (1983). The court could also suspend the sentence. State v. Gibson, 16 Wn.App. 119, 127-28, 553 P.2d 131 (1976).

provisions runs afoul of the constitutional prohibition against cruel punishment." Thorne, 129 Wn.2d at 773 n.11. By limiting the inquiry under Article I, section 14, to two factors, the Court of Appeals decision conflicts with Fain, Thorne, and Magers and invites this Court to clarify the standard of review under Article I, section 14. RAP 13.4(b)(1), (3), (4).

b. The *Fain* factors demonstrate that Rook's sentence was unconstitutional. The first Fain factor is the nature of the offense. Vehicular assault is a Class B felony with a maximum term of 10 years in prison and/or a $20,000 fine. RCW 46.61.522(2); RCW 9A.20.021(1)(b). Its SRA seriousness level is only 4, in a scheme of seriousness levels ranging from 1 to 16, with 16 reserved for aggravated murder in the first degree. RCW 9.94A.515. If Rook had not been a persistent offender, he would have been sentenced within a standard range of 53 to 70 months. RCW 9.94A.510, .515.

The elements of vehicular assault found by the jury were that Rook (1) drove a motor vehicle in a rash or heedless manner and (2) caused substantial bodily harm to another person. RCW 46.61.522(1)(a); State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005); CP 181-82. The defendant's mental state is a key component in determining his culpability. See Tison v. Arizona, 481 U.S. 137, 156, 107 S. Ct. 1676, 95

L. Ed. 2d 127 (1987) ("Deeply engrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). The jury found Rook acted in a "rash or heedless manner, indifferent to the consequences." CP 206. The nature of this crime does not warrant the imposition of the highest punishment possible short of the death penalty.

The legislative purpose behind the POAA, the second Fain factor, also does not support Rook's sentence. The main purpose of the POAA is "to improve public safety by placing the most dangerous criminals in prison." Thorne, 129 Wn.2d at 771-72. When the voters passed the Initiative and it was adopted by the Legislature, the vehicular assault statute required that the defendant's conduct be the proximate cause of the injury and also required more serious injury than under the current statutes. Former RCW 46.61.522 (2000). These requirements were eliminated when the statute was amended in 2001, but vehicular assault remained on the list of "most serious offenses." 2001 Laws of Washington ch. 300, §§ 1, 2. In light of these changes, the inclusion of vehicular assault as a "strike" offense offends the prohibition against cruel punishment.

Rook would have not have received life without the possibility of parole if he had been prosecuted for his conduct in any other state, and

Factor 3 thus supports his argument. Washington's vehicular assault statute covers significantly less serious conduct than similar statutes in other jurisdictions because it (1) does not require serious bodily injury or death and (2) is satisfied by the lower mental state of driving in a rash and heedless manner. The POA is also one of the few statutes in the country to mandate life without the possibility of parole for all offenders who fall within its purview. Rook reviewed the criminal and sentencing laws of all 49 sister states and proved Washington is alone in providing the penultimate punishment for conduct constituting vehicular assault. Brief of Appellant at 35-38, Appendix.

Based upon its determination that Rook's crime was more serious than the facts found by the jury, however, the Court of Appeals concluded that Rook could have been convicted of assault with a deadly weapon and received a recidivist sentence in California and North Carolina. Slip Op. at 14. Sentencing in Washington, however, is based upon the facts found by the jury or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Suleiman, 158 Wn.2d 280, 288-89, 143 P.3d 795 (2006); RCW 9.94A.530(2); 535(2), (3); 537(3).

Moreover, the Court of Appeals analysis of North Carolina and California law is also incorrect. North Carolina's assault with a deadly

weapon statue requires (1) intent to kill and/or (2) the infliction of serious bodily injury. N.C.Gen.Stat. 14-32(b); State v. Jones, 353 N.C. 159, 538 S.E.2d 917, 922-23 (2000). And in California, an assault requires "the intentional commission of an 'act that by its nature would probably and directly result in the application of physical force on another person.'" People v. Wright, 100 Cal. App. 4th 703, 705, 123 Cal.Rptr. 494 (2002); Cal.Pen.Code § 240. Mere recklessness or criminal negligence is not enough. People v. Williams, 26 Cal.4th 779, 788, 29 P.3d 197, 111 Cal.Reptr.2d 114 (2001). In addition, California's recidivist sentence statute allows for the possibility of parole after 25 years. Cal.Pen.Code § 667.5(d).

The Court of Appeals also noted that some states have recidivist statutes that include relatively minor offenses, referencing Indiana, Nevada and Vermont in a footnote. Slip Op. at 14. The Indiana crimes comparable to vehicular assault do not subject the offender to a life sentence, and life without parole is a discretionary sentence for crimes that do. Ind.Code §§ 35-42-2-2; 35-50-2-2(b)(4); § 35-50-2-8.5(c), (d), (e). Rook would not be subject to Nevada's persistent offender sentencing provisions because he was not driving while under the influence of alcohol. Nev.Rev.Stat. § 484C.430(1)(f). Nevada's habitual criminal statute also gives the sentencing court the discretion to impose life without

the possibility of parole, life with the possibility of parole after 10 years, or a 25-year prison term with parole eligibility after 10 years. Nev.Rev.Stat. § 207.010(b). And life without the possibility of parole is not even a sentencing option in Vermont. 13 Vt.Stat. § 11, 11a.

The Court of Appeals did not consider the final Fain factor, the punishment for similar Washington offenses. Assault by watercraft is similar to vehicular assault but includes more stringent elements - the defendant must act in "willful and wanton disregard" for others, his conduct must be the proximate cause of another's injury, and he must cause serious bodily injury.[4] RCW 79A.60.060; RCW 79A.60.010(25); RCW 46.61.522(1).

Both vehicular assault and assault by watercraft are Class B felonies; they have the same SRA seriousness level and offenders would likely be subject to the same standard range for either offense. RCW 79A.60.060(4); RCW 9.94A.515(Table 2). Yet vehicular assault is a crime for which a defendant may be sentenced to life without the possibility of parole and assault by watercraft is not. RCW 9.94A.030(32). The sentence of life without the possibility of parole for

[4] Like vehicular assault, assault by watercraft is also committed if the defendant operates a vessel under the influence of alcohol or drugs and causes serious bodily injury. RCW 79A.60.060(2)(b).

vehicular assault is disproportionate to the most comparable Washington felony.

c. This Court should accept review. The Fain factors demonstrate that life without the possibility of parole for an automobile accident resulting in bodily harm was a disproportionate sentence that violated article I, section 14. In addition, the Court of Appeals analysis is in conflict with Fain and other decisions of this Court. This Court should address Rook's article I, section 14 argument. RAP 13.4(b)(1), (3), (4).

3. **Rook's sentence of life without the possibility of parole violates the Eighth Amendment's prohibition of punishment that his cruel and unusual.**

The Eighth Amendment prohibits cruel and unusual punishments.[5] "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense." Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825 (2010) (quoting Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)); accord, Miller v. Alabama, __ U.S. ___, 132 S. Ct. 2455, 2463, 183 L. Ed. 2d 407 (2012).

In reviewing challenges to a term-of-years sentence, the Court considers "all of the circumstances of the case to determine whether the

[5] The Eighth Amendment's protection against cruel and unusual punishment applies to the States by virtue of the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

sentence is unconstitutionally excessive." Graham, 130 S. Ct. at 2021. The process begins by "comparing the gravity of the offense and the severity of the sentence." Id. at 2022. If this comparison "leads to an inference of gross disproportionality," the court then compares the defendant's sentence with sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions. Id.

The Court of Appeals did not address Rook's Eighth Amendment argument except to conclude that the Eight Amendment cannot be violated if the Washington Constitution is not. Slip Op. at 10; Brief of Appellant at 43-48; Reply Brief at 24-25. Rook's Eighth Amendment claim should be addressed.

In addition, Graham and Miller have adopted categorical bans on certain sentences based upon "mismatches between the culpability of a class of offenders and the severity of a penalty." Miller, 132 S. Ct. at 2463. Rook is incarcerated for the rest of his life for a crime where drove a car in heedless manner, causing injury. Life without the possibility of parole is grossly disproportionate to the class of offenders who committed vehicular assault. This Court should review whether a mandatory sentence of life without the possibility of parole is categorically violates the Eighth Amendment. RAP 13.4(b)(3), (4).

4. Rook's Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof beyond a reasonable doubt was violated when he received a life sentence without a jury finding of his prior convictions beyond a reasonable doubt.

The Sixth Amendment right to a jury trial, in combination with the Fourteenth Amendment's Due Process Clause, requires that every element of a crime be proved to a jury beyond a reasonable doubt. Alleyne v. United States, __ U.S. ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013); Blakely, 542 U.S. at 298; Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Rook, however, was sentenced to life without the possibility of parole based upon the trial court's findings by a preponderance of the evidence that he had two prior convictions that constituted "strike" offenses

The Court of Appeals rejected Rook's argument that his sentence violated his constitutional right to a jury determination beyond a reasonable doubt of the facts that increased his punishment based upon this Court's precedent. Slip Op. at 15 (citing State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004); State v. Thiefault, 160 Wn.2d 409, 418-20, 158 P.3d 580, cert. denied, 549 U.S. 1354 (2007)). The United States Supreme Court, however, continues to address this constitutional requirement, applying it not just to facts that increase the maximum permissible prison term but also to mandatory

minimum terms and fines. Alleyne, 133 S. Ct. at 2163 (overruling Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002)); Southern Union Co. v. United States, __ U.S. ___, 132 S. Ct. 2344, 2357, 183 L. Ed. 2d 318 (2012).

The rule that prior convictions need not be found by a jury beyond a reasonable doubt is based upon Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). See Thiefault, 160 Wn.2d at 418; State v. Jones, 159 Wn.2d 231, 239-47, 149 P.3d 636 (2006). The Apprendi Court, however, 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," and described the case as "at best an exceptional departure" from the historic practice of requiring the State to prove to a jury beyond a reasonable doubt each fact that exposes the defendant to an increased penalty. Apprendi, 530 U.S. at 487, 489.

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. The defendant in that case admitted his prior convictions. 530 U.S. at 488. In addition, the issue in Almendarez-Torres was the sufficiency of the charging document, not the right to a jury trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 488; Almendarez-Torres, 523 U.S. at 247-48. Third, Almendarez-

Torres dealt with the "fact of a prior conviction," not the type of conviction. Apprendi, 530 U.S. at 490.

Finally, the prior convictions in Almendarez-Torres only triggered an increase in the maximum permissive sentence. Almendarez-Torres, 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Even if Almendarez-Torres were still good law, it does not apply here.

This Court should accept review and hold that the federal constitution required a jury finding beyond a reasonable doubt before the imposition of a mandatory sentence of life without the possibility of parole.[6] This is a significant issue of constitutional law and a issue of substantial public importance. RAP 13.4(b)(3), (4).

5. The classification of the persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. U.S. Const. amend. XIV; Plyler v. Doe, 457 U.S. 202, 216, 102

[6] This issue is before this Court in State v. Witherspoon, 171 Wn. App. 271, 286 P.3d 996 (2012), rev. granted, 177 Wn.2d 1007 (2013). Argument in Witherspoon, No. 88118-9, is set for October 22, 2013.

S. Ct. 2382, 72 L. Ed. 2d 786 (1982). Rook was sentenced to life without the possibility of parole based upon a judicial determination of his prior convictions, whereas defendants are entitled to a jury determination beyond a reasonable doubt of prior convictions in other circumstances. The Court of Appeals rejecting his equal protection challenge in one sentence, relying on prior Court of Appeals decision. Slip Op. at 15 (citing State v. Langstead, 155 Wn. App. 448, 453-57, 228 P.3d 779, rev. denied, 170 Wn.2d 1009 (2010); State v. Salinas, 169 Wn. App. 210, 224-26, 279 P.3d 917 (2012), rev. denied, 176 Wn.2d 1002 (2013)). This Court should address this important issue.

When prior convictions which increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. See State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (jury must find prior convictions for violation of a no-contact order beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony); State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010) (jury must find beyond a reasonable doubt that a

defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony), rev. denied, 170 Wn.2d 1031 (2011). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

But when prior convictions which increase the maximum sentence are classified as "sentencing factors," as in the POAA, they need only be proved to the judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike). This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely.

"Merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. Whether Rook's constitutional right to equal protection is an important issue of constitutional law and an issue of substantial public importance. This Court should accept review. RAP 13.4(b)(3), (4).

6. This Court should accept review of Rook's challenge to the sufficiency of the evidence to support his vehicular assault conviction.

In his Statement of Additional Grounds for Review (SAG), Rook argued the State did not prove vehicular assault beyond a reasonable doubt, but the Court of Appeals disagreed. SAG at 1-5, 12-14; Slip Op. at 15. The Due Process Clause requires the State to prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Apprendi, 530 U.S. at 476-77. On appellate review, the court must determine, after viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

Rook was convicted of vehicular assault for driving in a reckless manner. CP 181-82. "Reckless manner" is defined as "a rash or heedless manner, indifferent to the consequences." Roggenkamp, 153 Wn.2d at 621-22. Rook pointed out that the accident occurred because he was momentarily incapacitated when his passenger knocked his glasses off his face and thus was not driving in a rash and headless manner.

The State thus failed to prove an essential element of vehicular assault beyond a reasonable doubt. This Court should accept review of the Court of Appeals decision affirming the conviction. RAP 13.4(b)(3), (4).

7. This Court should accept review because Rook did not receive effective assistance of counsel.

A criminal defendant's constitutional right to counsel includes the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986); Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel may also be ineffective due to a conflict of interest. Strickland, 466 U.S. at 692.

Rook argued he did not receive effective assistance of counsel because he had a conflict with his trial attorney and because his attorney did not call his passenger to testify on his behalf. SAG at 5-12. The Court of Appeals decision addresses only the second part of this argument. Slip Op. at 15-16. Rook was represented by George Sjursen at trial, but Rook asked for a new lawyer because he believed Sjursen was lying to him and not representing his interests. 10/14/10RP 8-9; 11/22/10RP 24. Sjursen agreed that new counsel should be appointed due to a breakdown in communication, but the motion was denied. 10/14/10RP 9-12. Rook therefore decided to represent himself, but later asked for Sjursen when he realized he was in over his head. 11/22/10RP 24; 4/19/11RP 2-4. Sjursen therefore represented Rook at trial, despite their past conflicts. Later, Sjursen declined to call the passenger as a witness.

Whether an individual criminal defendant received effective assistance of counsel is a constitutional issue of importance to the administration of the criminal justice system. This Court should grant review. RAP 13.4(b)(3), (4).

8. This Court should accept review of Rook's argument that the trial court was not impartial.

The Fourteenth Amendment Due Process Clause requires a defendant be tried and sentenced by an impartial tribunal. In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942 (1955); Witherspoon v. Illinois, 391 U.S. 510, 518, 88 S. Ct. 1770, 1775, 20 L. Ed. 2d 776 (1968). Due process also requires a judge be free from apparent bias. Murchison, 349 U.S. at 136; State v. Post, 118 Wn.2d 596, 618, 826 P.2d 599, 837 P.2d 599 (1992).

Rook argued that the judge in his case was so biased against him when he was representing himself that he had no choice but to ask for the re-appointment of counsel. SAG at 15-16. The judge also threatened him with more severe security if he did not agree to be restrained with a stun belt and even threatened to use the stun belt at one point during the proceedings. SAG at 15-16. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

9. This Court should accept review of Rook's argument that the jury instructions denied him a fair trial.

Instruction 13 informed the jury it need not be unanimous as to which alternative means of reckless driving it was basing a conviction, but Instruction 22 required the jury to be unanimous in answering the special verdict form asking which means a conviction was based. CP 210-11, 224. The "to convict" instruction included two of the alternative means of vehicular assault, and the jury was permitted to examine the third means as a lesser-included offense. CP 210-12, 214. Rook argued the improper jury instructions violated his right to a fair trial. SAG at 17-18.

Rook has the right to due process of law and the right to a unanimous jury determination of his case. U.S. Const. amends. VI, XIV; Const. art. I §§ 21, 22; Apprendi, 530 U.S. at 476-77; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right requires the jury to unanimously agree as to what criminal act constitutes the crime charged in the information. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The jury instructions must also "properly inform the jury as to the applicable law" and not mislead the jury. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The jury instructions could have been applied in a manner that violated Rook's right to a unanimous jury verdict. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

10. **Cumulative error denied Rook the fair trial guaranteed by the state and federal constitutions.**

The Due Process Clause guarantees a fair trial. U.S. Const. amends. VI, XIV. The cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless, may require reversal of a criminal conviction. United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005). This Court, for example reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. State v. Coe, 101 Wn.2d 772, 774-86, 788-89, 789, 684 P.2d 668 (1984). This Court should accept review of Rook's argument that the errors in his SAG violated his constitutional right to due process. RAP 13.4(b)(3).

F. CONCLUSION

Petitioner Guy Rook asks this Court to accept review of the Court of Appeals decision affirming his conviction for vehicular assault and sentence of life without the possibility of parole.

DATED this 5th day of November 2013.

Respectfully submitted,

Elaine L. Winters – WSBA # 7780
Washington Appellate Project
Attorneys for Petitioner

APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

June 24, 2013

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GUY ADAM ROOK, Appellant.	)	No. 67572-9-I DIVISION ONE UNPUBLISHED OPINION FILED: June 24, 2013

GROSSE, J. — A trial court does not violate a criminal defendant's right to appear at trial without physical restraints when, as here, the trial court ordered the defendant to wear a stun belt that was not visible to the jury and there was no showing that it in fact interfered with his ability to participate in the trial. Accordingly, we affirm.

FACTS

On August 25, 2009, at approximately 11:40 p.m., Sergeant Dan Flynn was in his patrol car driving on South 154th Street at the north end of SeaTac Airport. As Flynn drove around a blind corner, he saw a car approaching him from the opposite direction that was traveling at a very high speed and was partially over the center line. The posted speed limit was 35 m.p.h. but Flynn estimated the car's speed at 70 m.p.h. Flynn anticipated a collision and pulled off the road immediately and braced for impact. The car then sped past Flynn and continued around the corner. Flynn activated his emergency lights and began a pursuit of the speeding car. He pursued the car as it accelerated eastbound toward the traffic light at South 154th Street and 24th Avenue South.

At the time, Christopher Kalaluhi was waiting at the traffic light at that intersection, heading south on 24th Avenue South. When the light turned green,

Kalaluhi drove through the intersection and the speeding car crashed into Kalaluhi's car on the passenger side of the car. Kalaluhi's car spun through the intersection and crashed into a power pole.

Kalaluhi's coworker, Lori Partridge, was in the car behind Kalaluhi's car at the intersection and went to help Kalaluhi after the collision. As she approached the scene, she saw a man later identified as Guy Rook emerge from the driver's side of the speeding car. Rook appeared to Partridge as if he was going to fall over, then stumbled across the street and went into some bushes. Just as Partridge began to call 911, Sergeant Flynn arrived. Partridge then approached Kalaluhi's car, which she described as "flat as a pancake" and saw that Kalaluhi's face was bleeding and that he looked frightened. Flynn described Kalaluhi as "basically wrapped in metal," and "bleeding severely from [his] face."

Flynn called for aid and then went to check on the passenger in Rook's car, identified as Tracy Rectenwald.[1] Rectenwald did not have any visible injuries except for a mark from the seatbelt and told Flynn that she was okay. Flynn then saw Rook return to the scene. Flynn handcuffed Rook and had another officer place him in a patrol car. Shortly after, Deputy Andy Conner contacted Rook and noted that he had bloodshot eyes, slurred speech, and an odor of alcohol on his breath. Conner advised Rook of his rights and asked him how much he had to drink. Rook replied, "Too much; I'm drunk." Rook also told Conner that his arm was injured and Conner took him to the hospital.

At the hospital, a physician's assistant examined Rook and noted that Rook smelled of alcohol and appeared intoxicated. Deputy Conner then read Rook the

[1] We note that Tracy Rectenwald's last name is spelled two different ways in the record. For this opinion we use the spelling "Rectenwald."

implied consent warnings for a blood test and asked Rook if he would provide a blood sample. Rook responded, "Fuck that, I'm going to prison, anyway, so I ain't going to help you." Rook was belligerent and verbally abusive to Conner and the hospital staff and eventually insisted on leaving the hospital against medical advice.

Kalaluhi had to be cut out of his car before he could be transported to the hospital. He was initially transported to Highline Medical Center but was then transferred to Harborview Medical Center due to the severity of his injuries. Kalaluhi had suffered a lacerated spleen, a fractured vertebra, and extensive cuts on his face and head. The physician who treated him at Harborview determined that Kalaluhi's splenic laceration was a life threatening injury because of the risk of it breaking open and causing acute internal bleeding. Kalaluhi's spleen eventually healed without surgical intervention. Kalaluhi also suffered nerve damage that continues to affect the functioning of his right arm and he is still in pain on a daily basis.

The State charged Rook with one count of vehicular assault alleged to have been committed by the alternate means of driving under the influence (DUI) and in a reckless manner and one count of felony hit and run. Rook was facing a life sentence under the Persistent Offender Accountability Act (POAA) if convicted of vehicular assault, which would have been his third serious offense. Rook discharged three court appointed attorneys and, after an unsuccessful motion to discharge a fourth, he decided to proceed pro se and waived his right to counsel.[2]

Throughout the protracted pretrial proceedings, Rook was belligerent and verbally abusive to the court and counsel. At one point when the court advised Rook

[2] The court appointed his fourth defense attorney to serve as standby counsel during his pro se representation.

that it was not prepared to address his discovery motions, Rook exclaimed, "Thanks for fucking me again! Piece of --." Rook repeatedly became agitated as the court requested that he show some self control.

Counsel for the King County Jail then brought a motion for the court to order Rook to wear a "Band-It," a fabric band placed under the clothes that delivers an electric shock when activated by a hand held control by a corrections officer. The motion was based on Rook's volatile behavior, his jail infractions, and the fact that he was facing a life sentence. The court held a hearing in which the jail cited several infractions he committed which demonstrated "a lack of deference to authority and frequent and repeated displays of rage and lack of control, not to mention threats and assaults." Rook also testified, denying the infractions and claiming that he would not "act a fool" in the courtroom.

When the trial court asked Rook if he had any alternative suggestions other than wearing the Band-It, Rook noted there were "armed guards in here that are told to kill you if you try to do anything stupid." The trial court then asked for suggestions "[o]ther than having a guard kill you." Rook replied, "I guess the best thing, if you decide that I'm going to be a fool, would be that leg band thing that the jury can't see."

The court confirmed with jail counsel and the jail captain that the Band-It would be placed on Rook's calf under his clothing and would not be visible to the jury, that the officer who had the control device would be seated unobtrusively in another part of the courtroom, and that it would not be activated unless there was an attempted escape or attempted assault. The court also expressed concerns about the ability to maintain security without the Band-It in light of the physical layout of the courtroom. Rook then

agreed to wear the Band-It through the following exchange with the court:

> THE COURT: Okay. So I guess my initial point is, I haven't made any ruling as to whether I will require it or not, but I do know that the security -- the way it looks is going to be much different if you choose to have [the Band-It] or if I order it, even over your objection.
> MR. ROOK: Go ahead and order it, I've got no problem.
> THE COURT: Okay. All right.
> MS. BALIN [counsel for the jail]: Very well, your Honor.
> THE COURT: So we'll do that.

The court granted the jail's motion for Rook to wear the Band-It.

At trial, Rook testified and claimed that he had not been drinking on the night of the accident but that his passenger, Rectenwald, was drinking heavily. According to Rook, they were arguing in the car while he was driving and Rectenwald dumped her drink in his lap as they were rounding the corner past Flynn's police car, which caused him to swerve into the oncoming lane. He further claimed that he crashed into Kalaluhi's car because Rectenwald had hit him in the head and knocked off his glasses. Rook also claimed he left the scene because he was going for help. He denied that he told Deputy Conner that he had too much to drink and that he was asked to take a blood test at hospital.

The jury found Rook guilty of vehicular assault but acquitted him of felony hit and run. The jury also made a finding that Rook was guilty of vehicular assault under the reckless manner alternative means, but not the DUI alternative means. At sentencing, the trial court found that Rook's criminal history included a conviction for first degree robbery and a conviction for first degree rape of a child, both of which carried a statutory maximum penalty of life in prison and qualified as serious offenses under the POAA. Accordingly, because the vehicular assault counted as a third serious offense, the court sentenced Rook to life in prison without the possibility of parole as required by the

statute.

ANALYSIS

Rook first contends that the trial court erred by ordering him to wear a stun belt because there was no basis in the record that such a restraint was necessary. Thus, he claims that the court violated his constitutional right to appear at a jury trial free from restraints and prejudiced his ability to participate at trial. Accordingly, he contends that reversal of his conviction is required. We disagree.

Our courts have long recognized that the use of restraints may affect a criminal defendant's constitutional rights to be presumed innocent, to testify on one's own behalf, and to confer with counsel during the course of a trial.[3] Additionally, keeping the defendant in restraints during trial may deprive him of the full use of all of his faculties.[4] But the trial court also has "broad discretion to determine what security measures are necessary to maintain decorum in the courtroom and to protect the safety of its occupants,"[5] and restraining devices may be used "when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape."[6]

Accordingly, the court may determine that the use of restraints is justified after considering a number of factors, including:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the

[3] State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).
[4] State v. Damon, 144 Wn.2d 686, 691, 25 P.2d 418 (2001).
[5] Damon, 144 Wn.2d at 691.
[6] Hartzog, 96 Wn.2d at 398.

courtroom; and the adequacy and availability of alternative remedies.[7] Before allowing the use of restraints, the trial court should conduct a hearing and enter findings that are sufficient to justify their use.[8]

Here, the trial court conducted a hearing in which the court considered declarations of jail personnel as well as Rook's testimony. The court also asked Rook for input on other alternatives and he agreed to use the Band-It. The court then ordered Rook to wear the Band-It, citing security concerns about the physical layout of the courtroom, the fact that Rook was facing a life sentence, and Rook's express agreement that he would wear it.

While the court did not enter written findings, the record supports the court's ruling. As noted above, the jail presented evidence that demonstrated "a lack of deference to authority and frequent and repeated displays of rage and lack of control, not to mention threats and assaults." While Rook denied these allegations, the trial court was entitled to resolve issues of credibility in making factual findings. The record also shows that Rook continued to be disruptive during trial, even forcing the trial court at one to point to warn him that he was "one comment from [the court] asking the officer to activate [the Band-It]" when he shouted out to the jurors as they were being excused at the close of the evidence. Because the trial court is in the unique position to observe and assess the actual demeanor of the defendant, we accord it due deference in exercising its discretion. The fact that a defendant "cannot behave in an orderly manner while in the courtroom" does provide a reasonable basis upon which a court may

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[7] Hartzog, 96 Wn.2d at 400 (quoting State v. Hartzog, 26 Wn. App. 576, 588-89, 615 P.2d 480 (1980)).
[8] Damon, 144 Wn.2d at 691-92.

exercise its discretion and order restraints.[9] Here, given the evidence presented by the jail and the defendant's conduct during the proceedings, the trial court did not abuse its discretion by ordering the Band-It.

Additionally, the trial court's other concerns—layout of the courtroom and seriousness of the charge—are legally sufficient to support its ruling. The trial court also considered other alternatives and in fact when asked for his input, Rook agreed to use of the Band-It. While Rook argues that standing alone, each of these might not support ordering restraints, they are nonetheless appropriate factors the court properly considered in the determination.

Rook also contends that the trial court erred by considering his consent to wear the Band-It because it was not constitutionally valid consent. Rook asserts that he had a constitutional right not to wear the Band-It and the trial court could not extract a waiver of that right unless it met the constitutional standard of being a knowing, voluntary, and intelligent relinquishment of that right. He argues that the trial court's failure to advise him that he had such a constitutional right invalidates any waiver of the right.

Rook's argument is misplaced. He cites no case law requiring such a waiver on the record, but simply analogizes to the waiver of other constitutional rights, such as the right to counsel and right to remain silent. The right to be free from restraints in front of the jury is not such an absolute constitutional right requiring the waiver he desires. Rather, the trial court has the discretion to order restraints "when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape," so long as they do not offend the constitutional rights to the presumption of

[9] State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999).

innocence, to testify on one's own behalf and to confer with counsel during the course of a trial.[10] Here, the record does not indicate that the Band-It would have interfered with these rights as it was not visible to the jury and did not visibly restrict Rook's movement or ability to participate in the trial. Rather, the evidence presented was that the device would only be activated if Rook tried to escape or commit an assault, neither of which he attempted, and the record fails to show that it otherwise restricted his ability to physically move his body as he testified or conferred with counsel. Thus, Rook's agreement to wear the Band-It did not amount to an invalid waiver of his constitutional rights.

Even if Rook could show that the court's order amounted to an unconstitutional restraint, he fails to show prejudicial error warranting reversal. A claim of unconstitutional shackling is subject to harmless error analysis.[11] The error is harmless unless the defendant shows that "the shackling had substantial or injurious effect or influence on the jury's verdict."[12] A showing of such prejudice "requires evidence that the jury saw the restraints or that the restraints substantially impaired the defendant's ability to assist in his trial defense."[13]

Here, it is undisputed that the Band-It was not visible to the jury, and Rook does not point to any other tangible resulting prejudice. Rather, he simply asserts that it interfered with his mental faculties and constitutional right to defend himself and work with counsel. While he cites case law from other jurisdictions and law review articles

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[10] Hartzog, 96 Wn.2d at 398.
[11] Damon, 144 Wn.2d at 692.
[12] State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998).
[13] State v. Monschke, 133 Wn. App. 313, 336, 135 P.3d 966 (2006), rev. denied, 159 Wn.2d 1010 (2007).

about the possible negative effects of stun belts, he offers no evidence in the record to support his claim. As in Monschke, where the court held that a defendant failed to establish prejudice from the court's decision that he wear a stun belt, Rook "offers only conclusory statements that the belt hampered his participation in his trial defense."[14] And, as the State points out, the record reveals in fact that the Band-It had little effect on his behavior as he continued to be obstreperous and disruptive even after being ordered to wear it.

Rook next contends that his sentence of life without parole violates the Eighth Amendment's proscription against cruel and unusual punishment and article I, section 14 of the Washington State Constitution's proscription against cruel punishment. The state constitutional proscription against "cruel punishment" affords greater protection than its federal counterpart.[15] Thus, if the state constitutional provision is not violated, neither is the federal provision.[16]

Washington courts recognize that article I, section 14 of the state constitution proscribes disproportionate sentencing.[17] In State v. Fain, the court set forth the following factors to be considered in determining whether a punishment is disproportionate to the crime committed: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment imposed for other offenses in the same

[14] 133 Wn. App. at 337.
[15] State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980).
[16] State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113 (2000).
[17] State v. Manussier, 129 Wn.2d 652, 676, 921 P.2d 473 (1996); Fain, 94 Wn.2d at 395-97.

jurisdiction.[18]

In a later case, State v. Manussier, the court narrowed the inquiry to three of these factors: (1) the nature of the offense; (2) the punishment received in other jurisdictions for the same offense; and (3) the punishment imposed for other offenses in the same jurisdiction.[19] The court also noted that as to the third factor, "There is no logical or practical basis for comparison of punishment appellant might receive for other crimes committed in Washington."[20] As the court explained:

> Sentences under the Sentencing Reform Act [of 1981, chapter 9.94A,] vary with each defendant's criminal history and the presence or absence of aggravating or mitigating factors. In appellant's case, however, even without reference to Initiative 593 [POAA], two of his three "most serious offenses" fall into *a class of crimes with a maximum allowable sentence of life imprisonment.* Under Initiative 593, appellant would receive a sentence of life imprisonment upon his conviction for any armed offense, any offense with a finding of sexual motivation, *any class A felony*, or any of the twenty-one offenses enumerated in RCW 9.94A.030(21)(a)-(u).[21]

Similarly here, two of Rook's three most serious offenses are class A felonies with a statutory maximum of life imprisonment. Thus, as in Manussier, this factor has little bearing on the proportionality analysis. Accordingly, our inquiry focuses on the remaining factors.

Rook contends that factor one, the seriousness of the offense, weighs heavily against application of the POAA in this case. He notes that vehicular assault is only a class B felony with a maximum penalty of 10 years in prison and/or a $20,000 fine. He also argues that the mental state ("rash or heedless manner, indifferent to the

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[18] 94 Wn.2d 387, 397, 617 P.2d 720 (1980).
[19] 129 Wn.2d 652, 677, 921 P.2d 473 (1996). As to the second Fain factor, the legislative purpose of a life sentence under the POAA is well established. State v. Thorne, 129 Wn.2d 736, 771-72, 921 P.2d 514 (1996).
[20] 129 Wn.2d at 678.
[21] Manussier, 129 Wn.2d at 678 (footnotes omitted).

consequences") and degree of harm ("substantial bodily harm") required to commit this offense do "not warrant the imposition of the highest punishment possible short of the death penalty." He refers to the legislative purpose of the POAA and notes that when it was adopted, the vehicular assault statute required that the reckless driving result in "serious bodily injury," a higher degree of harm than is required in the current version of the statute.

The current version of the vehicular assault statute, RCW 46.61.522, as amended in 2001 provides:

> (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
> (a) In a reckless manner and causes substantial bodily harm to another; or
> (b) While under the influence of intoxicating liquor or any drug. . . [which] causes substantial bodily harm to another; or
> (c) With disregard for the safety of others and causes substantial bodily harm to another.
> (2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.
> (3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

The former version of the statute read:

> (1) A person is guilty of vehicular assault if he operates or drives any vehicle:
> (a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or
> (b) While under the influence of intoxicating liquor or any drug. . . and this conduct is the proximate cause of serious bodily injury to another.
> (2) "Serious bodily injury" means bodily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body.
> (3) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

Rook contends that because this was the version in effect at the time the POAA

was adopted by the legislature, this was the conduct to which the POAA was intended to apply, not the current version that requires a lesser degree of injury thereby lessening the seriousness of the offense. Thus, he argues, to impose a life sentence for a less serious offense amounts to disproportionate punishment in violation of the state constitution. But such intent cannot be inferred from legislative inaction; rather, the intent to keep vehicular assault as it is currently defined on the list of serious offenses to which the POAA applies must be presumed absent any express intent to the contrary.[22]

In any event, as the State notes, Rook's conduct in fact satisfies the former statute's requirement that his driving caused serious bodily injury. The undisputed evidence established that Kalaluhi's injury was life *threatening*, as testified to by the attending physician, even though it ultimately resolved without emergency surgery. Additionally, the undisputed evidence established that he suffered permanent nerve damage in one of his arms. Thus, Rook fails to show that either the nature of the defense or the legislative purpose warrants a less severe penalty and is therefore disproportionate in violation of the constitutional prohibition against cruel punishment.

Finally, Rook contends that the remaining factor—comparison of punishments in other jurisdictions for similar offense—further demonstrates that imposing a life sentence for the vehicular assault he committed is grossly disproportionate to the crime. Based on a survey of other states' vehicular assault statutes, Rook contends that he would not have received this sentence in any other jurisdiction except Washington, noting that Washington's statute addresses significantly less serious conduct than other states' vehicular assault statutes by requiring a lower mental state and less serious

[22] See State v. Conte, 159 Wn.2d 797, 813, 154 P.3d 194 (2007) ("legislative intent cannot be gleaned from the failure to enact a measure").

resulting injury. The other statutes cited required either driving under the influence of intoxicants or serious bodily injury or both and in only one state is the offense a felony subject to recidivist sentencing.

But as the State contends, this is true only if the crimes considered are those specified as vehicular assault, not those that encompass the same conduct that formed the basis for Rook's conviction. For example, as the State points out, while North Carolina has no statute that would punish him similarly to Washington and has a statute for felony serious injury by vehicle requiring proof of intoxication, Rook's conduct meets the requirements for assault with a deadly weapon under North Carolina law, which is a "strike" offense under that state's violent habitual offender law.[23] Similarly, while reckless driving in California is only punishable up to 180 days in jail, Rook's conduct meets the requirements of assault with a deadly weapon under California law, a crime that would have made him eligible for an indeterminate life sentence under California's "three strikes" law.[24] Additionally, as the State points out, Rook fails to note that there are jurisdictions that subject offenders to potential life sentences under recidivist sentencing statutes for conduct that is less serious than Rook's.[25] Rook therefore fails

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[23] See N.C. Gen. Stat. §§ 14-32, 14-7, 12; State v. Jones, 353 N.C. 159, 164-65, 538 S.E.2d 917 (2000) (holding that driver who operates motor vehicle in criminally negligent manner and causes serious injury is guilty of this crime). Criminal negligence in this context means a thoughtless disregard of consequences or a heedless indifference to the safety of others, which is very similar to the mental element of vehicular assault in Washington. Jones, 353 N.C. at 164-65.

[24] See Cal. Penal Code § 245, 667(e)(2)(A); People v. Wright, 100 Cal. App. 4th 703, 706, 123 Cal. Rptr. 2d 494, 497 (2002) (holding that "any operation of a vehicle by a person knowing facts that would lead a reasonable person to realize a battery will probably and directly result may be charged as an assault with a deadly weapon.")

[25] See Brief of Respondent at 29-30 (citing Indiana statute that includes as "third strike" offenses, selling drugs to minors or a third DUI conviction, and Nevada and Vermont statutes that subjects offender to a life sentence without parole after a fourth felony

to show that there are no other states in which he would be subjected to a similar penalty for this conduct. Accordingly, he has failed to demonstrate that imposition of a life sentence without parole for his conviction for vehicular assault, a third serious offense under the POAA, is grossly disproportionate in violation of the state and federal constitutions.

Rook further contends that his prior convictions must be found by a jury based on proof beyond a reasonable doubt and that the POAA violates the equal protection clause of the United States Constitution because offenders like himself who have three "strikes" are not entitled to a jury determination of their prior convictions. As the State notes, our courts have already considered and rejected these arguments and we are bound by those decisions.[26]

We also reject the claims Rook raises in a pro se statement of additional grounds for review. His challenge to the sufficiency of the evidence that he drove in a reckless manner fails, as determinations about the weight and credibility of the evidence are for the jury alone to make. While he argues that there was an alternative explanation for his driving, the jury was entitled to discount this evidence as not credible and we may not disturb the jury's factual determinations on appeal. Rook's claim of ineffective assistance of counsel also fails because Rook fails to show that counsel's conduct fell below an objective standard of reasonableness. The decision not to call Rectenwald as a witness was a legitimate trial tactic as her credibility was questionable, given that she

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conviction).

[26] State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003); State v. Thiefault, 160 Wn.2d 409, 418-20, 158 P.3d 580 (2007); State v. Langstead, 155 Wn. App. 448, 453-57, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010); State v. Salinas, 169 Wn. App. 210, 224-26, 279 P.3d 917 (2012).

had been drinking that night. Nor has Rook demonstrated that he was actually prejudiced by counsel's conduct as he testified to the facts to which he wanted Rectenwald to testify. We also reject Rook's claim that the trial court erred by failing to instruct the jury on the third alternate means of committing vehicular assault; such an instruction was not appropriate because he was not charged under that means and the charging decision is a matter of prosecutorial discretion. Finally, we reject Rook's contention that that the trial court was unfairly biased, reasserting the arguments above that the stun belt interfered with his ability to participate at trial. For the reasons discussed above, this claim is also without merit.

We accept the State's concession that remand is required to correct the judgment and sentence to reflect the jury's verdict and direct the trial court change the judgment and sentence to state that Rook committed the crime by means of reckless driving, not while under the influence of drugs or alcohol.[27] We affirm.

WE CONCUR:

[27] This court has denied Rook's motion to present additional evidence and further denies his subsequent motion for reconsideration and to present additional evidence in support of the motion for reconsideration.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

August 22, 2013

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

STATE OF WASHINGTON, Respondent, v. GUY ADAM ROOK, Appellant.	No. 67572-9-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Guy Adam Rook, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 22nd day of August, 2013.

FOR THE COURT:

Grosse, J

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original **CORRECTED PETITION FOR REVIEW** to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 89380-2**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrea Vitalich, DPA,
King County Prosecutor's Office – Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: November 5, 2013

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, November 05, 2013 3:59 PM
To: 'Maria Riley'
Cc: PAOAppellateUnitMail@kingcounty.gov; Elaine Winters
Subject: RE: 893802-ROOK-PFR(CORRECTED)

Rec'd 11-5-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Maria Riley [mailto:maria@washapp.org]
Sent: Tuesday, November 05, 2013 3:55 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: PAOAppellateUnitMail@kingcounty.gov; Elaine Winters
Subject: 893802-ROOK-PFR(CORRECTED)

Please accept the attached document for filing in the above-subject case:

Corrected Petition for Review

Elaine L. Winters- WSBA #7780
Attorney for Petitioner
Phone: (206) 587-2711
E-mail: elaine@washapp.org

By
Maria Arranza Riley
Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org