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No. 69101-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHERYL RENEE LIDEL,

Appellant.

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

The Honorable Mary Yu

BRIEF OF APPELLANT

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2. The trial court erred in refusing to allow Ms. Lidel to present evidence that she suffered from Dissociative Identity Disorder (DID) rendering her legally insane at the time of the offense.

3. The trial court erred in ruling that the evidence that Ms. Lidel suffered from DID would not assist the jury.

4. The trial court erred in refusing to allow evidence of DID for the purposes of showing Ms. Lidel acted with diminished capacity.

5. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of prior convictions violated Ms. Lidel's right to equal protection.

6. The trial court's imposition of a sentence of life imprisonment without the possibility of parole after a judicial finding of prior convictions violated Ms. Lidel's rights to a jury trial and due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the

defendant has the right to present relevant, admissible evidence on her behalf. Here, the trial court excluded evidence of Ms. Lidel's DID diagnosis which led to her insanity at the time of the offense, despite the fact the evidence was the basis of her entire defense. Did the trial court's exclusion order prevent Ms. Lidel from presenting a defense, thus entitling her to reversal of her convictions?

2. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and where the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections

of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

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

C. STATEMENT OF THE CASE

On February 14, 2010, appellant, Cheryl Lidel, entered the Subway sandwich shop on Howell Street in Seattle. 6/7/2012RP 28-34. Ms. Lidel initially ordered a sandwich, but then went around the counter and put the Subway employee, Myrtle Pederson, in a choke-hold. 6/7/2012RP 34. Ms. Pederson claimed Ms. Lidel intimated she had a gun, and Ms. Pederson gave Ms. Lidel the money from the cash drawer. 6/7/2012RP 38. Ms. Pederson never saw a gun in Ms. Lidel's possession. 6/7/2012RP 40. Ms. Lidel fled but was arrested a short

distance away. 6/7/2012RP 118-21. It was later determined that $370 was missing from the cash drawer. 6/7/2012RP 143. $370 was recovered from Ms. Lidel. 6/7/2012RP 163; 6/11/2012RP 38.

Ms. Lidel was charged with one count of second degree robbery. CP 1. Prior to trial, Ms. Lidel gave notice that she intended to present a defense of insanity and/or diminished capacity. CP 12. In anticipation of presenting this defense, Ms. Lidel was examined by Dr. Richard Adler. Dr. Adler is a licensed psychiatrist, board-certified in Child, Adolescent and Adult Psychiatry, who holds an appointment at the University of Washington School of Medicine in the Department of Psychiatry and Behavioral Sciences. CP 16. Following his examination of Ms. Lidel, Dr. Adler diagnosed Ms. Lidel as suffering from Dissociative Identity Disorder (DID),[1] and as a result, "it is

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[1] The DSM-IV-TR defines DID as:

> Dissociative Identity Disorder reflects a failure to integrate various aspects of identity, memory, and consciousness. Each personality may be experienced as if it has a distinct personal history, self-image, and identity, including a separate name. Usually, there is a primary identity that carries the individual's given name and is passive, dependent, guilty, and depressed. The alternative identities frequently have different names and characteristics that contrast with the primary identity (e.g., are hostile, controlling, and self-destructive). Particular identities may emerge in specific circumstances and may differ in reported age and gender, vocabulary, general knowledge, or predominant affect. Alternate identities are experienced as taking control in sequence, one at the expense of the other, and may deny knowledge of one another, or appear to be in open conflict.

reasonable to conclude that Ms. Lidel (herself) did not understand the nature of the illegal act and/or failed to understand its wrongfulness at the time." CP Supp ___, Sub. No. 179, Exhibit 3 at 2. Thus, Dr. Adler concluded Ms. Lidel was insane at the time of the offense. CP Supp ___, Sub. No. 179, Exhibit 5 at 85.

Dr. Adler identified two alternate personalities (alters); "Debbie" and "Odessa."[2] CP Supp ___, Sub. No. 179, Exhibit 5 at 82. Ms. Lidel did not identify the alternate personalities and Dr. Adler did not know how Ms. Lidel transitioned among the "alters." CP Supp ___, Sub. No. 179, Exhibit 5 at 103-04. Dr. Adler never met either "Debbie" or "Odessa." CP Supp ___, Sub. No. 179, Exhibit 6 at 51. Dr. Adler did feel that "Odessa" was in control at the time of the robbery but when arrested, Ms. Lidel was in control. CP Supp ___, Sub. No. 179, Exhibit 6 at 40-49. Dr. Adler stated he was not rendering an opinion about what "Odessa" knew or didn't know, or whether the host or alter was in control: that issue was for the trier of

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American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 300.14 at 526-27 (4th ed. rev. 2000) (DSM-IV-TR).

[2] In an individual with DID, alternate personality states have control over the individual's actions at different times. Mark E. Hindley, *United States v. Denny-Shaffer and Multiple Personality Disorder: Who Stole the Cookie from the Cookie Jar*, 1994 Utah L. Rev. 961, 985 (1994). Generally, a person cannot control which alter personality is in control of the body. Hindley, 1994 Utah L.Rev. at 965.

fact. CP Supp ___, Sub. No. 179, Exhibit 5 at 106; Exhibit 6 at 48-49. Dr. Adler also stated that, although he diagnosed Ms. Lidel as insane at the time of the robbery, diminished capacity could not be excluded. CP Supp ___, Sub. No. 179, Exhibit 6 at 117.

Prior to trial, the State moved to exclude the not guilty by reason of insanity defense and the defense of diminished capacity. CP Supp ___, Sub. No. 172 at 8-14; 4/2012RP 39. The State argued that there was no method for applying the diagnosis of DID to the legal question of sanity. CP Supp ___, Sub. No, 172 at 12-13.

Following argument by the parties, the trial court agreed with the State and excluded the insanity and diminished capacity defenses. 6/5/2012RP 2, 25. The court concluded the evidence, primarily the testimony of Dr. Adler, would not be helpful to the jury under ER 702.[3] *Id.* The court assumed that Dr. Adler was qualified and DID was generally accepted in the scientific community, thus finding *Frye*[4] had been met. 6/5/201RP 16-17. Nevertheless, relying on the Supreme

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[3] ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[4] *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923).

Court's decision in *State v. Green*,[5] the court found the evidence would not help the jury understand culpability. *Id.* at 25.

Following the jury trial, Ms. Lidel was convicted as charged. CP 168. At sentencing, the court found Ms. Lidel had two qualifying prior convictions and found Ms. Lidel to be a persistent offender. CP 255. Accordingly, the court imposed a sentence of life imprisonment without the possibility of parole. CP 257.

D. ARGUMENT

1. THE EXCLUSION OF DR. ADLER'S TESTIMONY THAT MS. LIDEL SUFFERED FROM DID WHICH RENDERED HER INSANE VIOLATED HER CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE

a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

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[5] *State v. Greene,* 139 Wn.2d 64, 984 P.2d 1024 (1999). The *Greene* Court refused to allow the expert testimony under ER 702 regarding whether the defendant suffered from DID because the Court ruled it would not have been helpful to the jury as there was no legal standard that had been developed to allow reliable assessment of criminal culpability of defendants with DID. 139 Wn.2d at 78-79. Further, the Court refused to adopt a particular legal standard for use in future cases. *Id.*

The right to present witnesses in one's defense is a fundamental element of due process of law. *United States v. Whittington,* 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis,* 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington,* 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.").

Washington defines the right to present witnesses as a right to present material and relevant testimony. Const. Art. I § 22; *State v. Roberts,* 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms

> the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The right to present a defense is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 547 U.S. at 324-25, *citing United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), *quoting Rock v. Arkansas,* 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The evidence sought to be admitted by the defendant need only be "of at least minimal relevance." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *quoting State v. Darden,* 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the State to prove "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Id.*

Expert testimony is admissible if the theory or principle is generally accepted, and whether the information would be helpful to the jury. ER 702; *Frye,* 293 F. at 1014; *State v. Janes,* 121 Wn.2d 220,

232, 850 P.2d 495 (1993). In *Greene*, the Supreme Court determined that DID was generally accepted in the scientific community "as a diagnosable mental condition." 139 Wn.2d at 72. Thus the only remaining issue regarding testimony about DID was whether it would have been helpful to the jury.

Here, the trial court ruled that Dr. Adler's testimony that Ms. Lidel suffered from DID at the time of the incident and was insane as a result would not be helpful to the jury and excluded it. RP 6/5/2012RP 2, 25. This ruling denied Ms. Lidel due process and violated her right to present a defense.

b. Dr. Adler's testimony that Ms. Lidel suffered from DID was relevant and should have been admitted because it would have been helpful to the jury in determining whether Ms. Lidel was insane or acting with diminished capacity. The law presumes that a defendant is sane at the time of the commission of an alleged offense. *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23 (1987). A person may plead and prove insanity as an affirmative defense to a felony. RCW 10.77.030(1).

Washington follows the *M'Naghten* rule for determining insanity. RCW 9A.12.010. *See, e.g., The Opinion of the Judges in*

M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843); *Allstate Insurance Co. v. Raynor,* 143 Wn.2d 469, 475 n.3, 21 P.3d 707 (2001) and *State v. Wheaton*, 121 Wn.2d 347, 352 n.2, 850 P.2d 507 (1993), *citing M'Naghten.* To establish the defense of insanity, it must be shown that:

> (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
>
> (a) He was unable to perceive the nature and quality of the act with which he is charged; or
>
> (b) He was unable to tell right from wrong with reference to the particular act charged.

RCW 9A.12.010 (1).

The insanity affirmative defense must be proven by a preponderance of the evidence. RCW 9A.12.010 (2); *Box*, 109 Wn.2d at 322; *State v. Crenshaw*, 98 Wn.2d 789, 792, 659 P.2d 488 (1983). Thus, a defendant who asserts an insanity defense has the burden of proving by a preponderance of the evidence that he was legally insane at the time of the crime. RCW 10.77.030 (2); *State v. Platt*, 143 Wn.2d 242, 246, 19 P.3d 412 (2001); *State v. Wicks*, 98 Wn.2d 620, 621-22, 657 P.2d 781 (1983).

> [I]nsanity entitles a defendant to an acquittal not because it establishes innocence (i.e., state has failed to prove

> element of criminal intent) but because the state declines to convict or punish one shown to have committed the crime while mentally impaired. . . . In other words, the mental state of "insanity" does not go to the elements of the crime but merely the ultimate culpability of the accused.

Gilcrist v. Kincheloe, 589 F. Supp. 291, 294 (E.D. Wash. 1984), *aff'd*, 774 F.2d 1173 (9th Cir. 1985) (citations omitted).

This defense requires that a defendant connect the claimed mental illness with his capacity to understand the nature and quality of the acts committed, or with his ability to tell right from wrong. *Box,* 109 Wn.2d at 322 ("In Washington . . . to prove that he is legally insane ... the defendant must prove that at the time of the offense he or she was unable to perceive the nature and quality of the act charged or was unable to tell right from wrong with regard to that act."). A defendant generally establishes this connection through expert testimony. *State v. Edmon,* 28 Wn.App. 98, 102-03, 621 P.2d 1310, *review denied*, 95 Wn.2d 1019 (1981).

The Supreme Court has held that the failure to admit expert testimony relating to a mental defense violates a defendant's right to present a defense. *See Ellis,* 136 Wn.2d at 523 (failure to allow expert evidence that defendant suffered from a borderline personality disorder relating to a diminished-capacity defense violated defendant's right to

present defense). Further, the Supreme Court has affirmed a conviction where evidence of DID was admitted on the issue of insanity. *See Wheaton*, 121 Wn.2d at 352, 365 (the trial court admitted evidence of Multiple Personality Disorder, now referred to as DID, under the alter theory).[6]

Regardless of which of the three theories of DID is proffered, Dr. Adler's testimony should have been admitted under ER 702 because it would have been helpful to the jury in evaluating Ms. Lidel's sanity. In analogous cases, the Supreme Court has ruled expert testimony about the defendant's mental condition admissible under ER 702 as helpful to the jury. *See State v. Allery,* 101 Wn.2d 591, 682 P.2d 312 (1984) (allowing expert testimony of battered woman syndrome). Similarly, in *Janes, supra,* expert testimony was admitted regarding Battered Child Syndrome under ER 702 on the issue of the defendant's diminished capacity and self-defense claims. 121 Wn.2d at 236. The Court there determined that:

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[6] Courts in the United States have adopted three approaches to assess criminal responsibility of those with DID. The "alter" theory focuses on the state of mind of the alter personality at the time of the crime. The "host" theory focuses on the host personality's awareness of the actions of the alter personality and the host personality's ability to control the alter personality. The "unified" approach makes no legal distinction between hosts or alters. Mary Ellen Crego, *One Crime, Many Convicted: Dissociative Identity Disorder and the Exclusion of Expert Testimony in State v. Greene*, 75 Wash.L.Rev. 911, 922-23 (2000).

> [w]ithout the aid of expert testimony on the psychology of battered children, the jury would be unable to appreciate the manner in which the abused child differs from the unabused child.

Id. As a result, the Court found that:

> The underlying principles of the battered child syndrome are generally accepted in the scientific community and satisfy the ER 702 requirements by helping the trier of fact to understand a little-known psychological problem.

Id.

Important in *Allery* and *Janes* was that the battered woman and battered child syndrome were novel psychological theories at the time they were proffered as theories by the defense. In both cases, and as was determined here, the Supreme Court determined these theories met the criteria under *Frye* for admissibility. *Janes*, 121 Wn.2d at 235. In both cases, the Court found the evidence of the syndromes helpful to the jury "to understand the reasonableness of the defendant's perceptions[.]" *Id.* at 236.

> We find that expert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person. Where the psychologist is qualified to testify about the battered woman syndrome, and the defendant establishes her identity as a battered woman, expert testimony on the battered woman syndrome is admissible.

Allery, 101 Wn.2d at 597 (internal citation omitted).

As in *Janes*, the trial court's refusal to allow Dr. Adler's testimony regarding DID prevented the jury from hearing relevant information about Ms. Lidel's mental state at the time of the robbery. Further, in *Ellis,* the Supreme Court ruled that it violated the defendant's right to present a defense to exclude expert testimony that would have helped the jury understand the defendant. *Ellis,* 136 Wn.2d at 522-23. The Court reasoned that the integrity of the trial process was adequately protected by cross-examination and the ability of the trier of fact to weigh the evidence. *Id.* at 523.

> The defense expert witnesses - all qualified to give opinions – will testify that Petitioner Ellis experienced diminished capacity at the time he committed the offenses charged. Their testimony should be allowed at trial under ER 702. They would be subject to cross-examination as they were as "hostile witnesses" in the pre-trial proceeding on the motion in limine. The trier of fact – the jury – can then determine what weight, if any, it will give to their testimony. This is fundamentally fair and consistent with due process.

Id. at 522-23.

Dr. Adler conducted a thorough examination of Ms. Lidel and diagnosed her as suffering from DID. Dr. Adler opined that Ms. Lidel was suffering from DID at the time of the alleged offense, which

rendered her incapable of distinguishing between right and wrong. DID is a recognized mental illness that has general acceptance in the scientific community. Dr. Adler's testimony would have been helpful to the jury in determining whether Ms. Lidel was unable to determine right from wrong at the time of the robbery and in helping the jury understand Ms. Lidel. As a consequence, the court's refusal to allow Dr. Adler's testimony violated Ms. Lidel's right to due process and right to present a defense.

c. Dr. Adler's testimony regarding his diagnosis of DID was relevant to the issue of diminished capacity. In addition to the insanity defense, Dr. Adler's testimony was admissible under ER 702 on the alternate defense of diminished capacity.

Where specific intent or knowledge is an element of the offense, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state. *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); *State v. Greene*, 92 Wn.App. 80, 106-07, 960 P.2d 980 (1998). Diminished capacity arises out of a mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one's capacity to achieve the level of culpability required for a given

offense. *State v. Ferrick*, 81 Wn.2d 942, 944, 506 P.2d 860, *cert. denied*, 414 U.S. 1094 (1973), *modified in State v. Griffin*, 100 Wn.2d 417, 418, 670 P.2d 265 (1983).

Diminished capacity allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished. *Box*, 109 Wn.2d at 329. Diminished capacity is treated as an affirmative defense only to the extent that the defendant carries the burden of producing sufficient evidence of diminished capacity to put the defense in issue. *State v. Carter*, 31 Wn.App. 572, 575, 643 P.2d 916 (1982) (voluntary intoxication); *see also State v. Stumpf*, 64 Wn.App. 522, 525 n.2, 827 P.2d 294 (1992) (the diminished capacity defense is more accurately described as a rule of evidence that allows the defense to introduce evidence relevant to subjective states of mind); *State v. Nuss*, 52 Wn.App. 735, 739, 763 P.2d 1249 (1988) (diminished capacity is not an affirmative defense because it merely negates one of the elements of the alleged crime); *State v. James*, 47 Wn.App. 605, 608, 736 P.2d 700 (1987) (diminished capacity, unlike self-defense, is not a "true" defense because it does not raise an issue beyond that of required mental state). Although

diminished capacity raises factual issues regarding the defendant's ability to form the requisite mental state for the charged crime, the State retains the ultimate burden of proving the requisite mental state beyond a reasonable doubt. *James*, 47 Wn.App. at 609.

When diminished capacity is asserted, expert testimony, if "reasonably relate[d] to impairment of the ability to form the culpable mental state to commit the crime charged," is admissible under ER 702 as evidence "to help the trier of fact assess the defendant's mental state at the time of the crime." *State v. Atsbeha,* 142 Wn.2d 904, 917, 16 P.3d 626 (2001), *quoting Greene,* 139 Wn.2d at 74. "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." *Ellis,* 136 Wn.2d at 521. Once the defendant proffers expert testimony regarding his or her mental state, the State retains the ultimate burden of proving the requisite mental state, and the question for the trier of fact is whether the State has proven all essential elements of the charged crime beyond a reasonable doubt. *James*, 47 Wn.App. at 609.

In *Ellis,* the defendant was tried for aggravated first degree murder and faced capital punishment. The defendant's expert sought to testify that the defendant suffered from among other mental conditions, dissociative disorder and was acting in a diminished capacity.[7] *Ellis,* 136 Wn.2d at 508-13. The Supreme Court reversed the trial court's order excluding the expert testimony, ruling that ER 702 is the sole criteria for determining the admissibility of expert testimony to establish the diminished capacity defense. *Id.* at 523.

Here, second degree robbery contains the specific intent to steal as an essential, nonstautory element. RCW 9A.56.190, RCW 9A.56.21; *State v. Sublett,* 176 Wn.2d 58, 88, 292 P.3d 715 (2012); *State v. Kjorsvik,* 117 Wn.2d 93, 98, 812 P.2d 86 (1991). Dr. Adler's testimony regarding DID would have been helpful to the jury in negating Ms. Lidel's intent due to diminished capacity. Thus, the trial court erred in excluding Dr. Adler's testimony regarding DID on diminished capacity as it did in refusing to allow the insanity defense.

[7] DID is one form of dissociative disorder. DSM-IV at 477.

d. The court's error in refusing to admit expert testimony that Ms. Lidel suffered from DID was not harmless error. A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin,* 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Dr. Adler's testimony that Ms. Lidel suffered from DID was the sole basis for her defense. The jury was never allowed to consider Ms. Lidel's mental disease when weighing the other evidence presented by the State in determining her guilt or innocence. As a result, in the absence of any testimony regarding DID, the State cannot prove beyond a reasonable doubt that the outcome of the trial would have been the same. The error in excluding Dr. Adler's testimony was not harmless and Ms. Lidel is entitled to reversal of the conviction.

2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AS AN "ELEMENT," DEPRIVED MS. LIDEL OF THE EQUAL PROTECTION OF THE LAW

Even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, *Smith v. Washington*, 124 S.Ct. 1616 (2004); *State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001).

However, the Washington Supreme Court has held that where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of "much confusion," the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it "actually alters the crime that may be charged," and therefore

the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed "sentencing factors," is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). More recently the Court noted:

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

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

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court found that in the context of this and related offenses,[8] proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. *Id.* at 191-92. Thus, *Roswell* found it significant that the fact altered the maximum possible penalty from one year to five. *See* RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction, in which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to *Blakely*, the "maximum punishment" was five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004). In all other circumstances "maximum penalty" is the top of the standard range. Indeed, a person sentenced for felony CMIP

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

with an offender score of 3[9] would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. *See* Washington Sentencing Guidelines Commission, Adult Sentencing Manual 2008, III-76. The "elevation" in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 171 months to life without the possibility of parole.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the *penalty* for the substantive crime. S*ee* RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in

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

classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. *Thorne*, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore where an equal protection challenge is raised, the court will apply a "rational basis" test. *Id.*

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

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

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act (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.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate a felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an "element" and must be proven to a jury beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an "aggravator" and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable

doubt, even if the prior rape conviction is the person's only felony and thus results in a "maximum sentence" of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. *Roswell* concluded the recidivist fact in that case was an element because it defined the very illegality, reasoning, "if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes." 165 Wn.2d at 192 (italics in original). But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject. *Id.* So too, first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the precise fashion as in *Roswell*, this Court should hold there is no basis for treating the

prior conviction as an "element" in one instance – with the attendant due process safeguards afforded "elements" of a crime – and as an aggravator in another. The Court violated Ms. Lidel's right to equal protection.

3. THE JUDICIAL FINDING THAT MS. LIDEL HAD SUFFERED TWO PRIOR QUALIFYING CONVICTIONS WHICH RENDERED HER A PERSISTENT OFFENDER VIOLATED HER RIGHTS TO A JURY TRIAL AND TO DUE PROCESS

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77.

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. *Blakely*, 542 U.S. at 304. *Blakely* held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge

to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Id.* at 304-05; *see Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (invalidating death penalty scheme where jury did not find aggravating factors). In *Apprendi*, the Court found a statute unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by only the preponderance of the evidence. 530 U.S. at 492-93.

More recently, the Supreme Court recognized that the jury's traditional role in determining the degree of punishment included setting fines, and concluded that under *Apprendi*, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. *Southern Union Co. v. United States*, ___ U.S. ___, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrarily labeling facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S. at 476. A judge may not impose punishment based on additional findings. *Blakely*, 542 U.S. at 304-05.

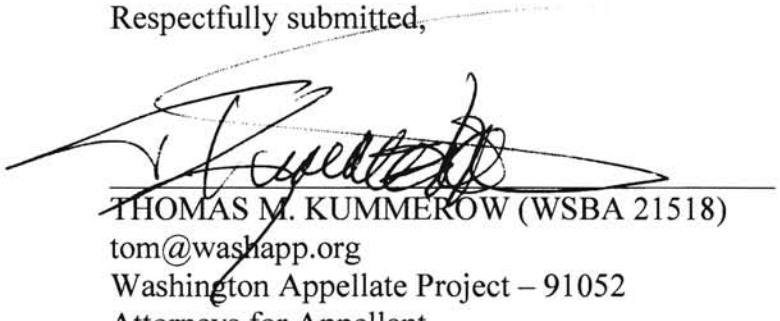
As noted above, the Washington Supreme Court has embraced this principle in *Roswell*: where a prior conviction "alters the crime that may be charged," the prior conviction "is an essential element that must be proved beyond a reasonable doubt." *Roswell*, 165 Wn.2d at 192. And since the prior convictions are elements of the crime rather than aggravating factors, *Roswell* states that the prior conviction exception in *Apprendi* and *Almendariz-Torres* does not apply. *Id.* at 193 n.5. Thus, under *Blakely, Apprendi* and *Roswell,* the judicial finding of Ms. Lidel's prior convictions and the fact she qualified as a persistent offender violated her right to due process and right to a jury trial.

E. CONCLUSION

For the reasons stated, Ms. Lidel requests this Court reverse her conviction and remand for either a new trial or resentencing to a standard range sentence.

DATED this 28th day of March 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69101-5-I
v.	)	
	)	
CHERYL LIDEL,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MARCH, 2013, 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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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MARCH, 2013.

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