No. 90128-7
COA No. 69101-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHERYL RENEE LIDEL,

Petitioner.

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

The Honorable Mary I. Yu

PETITION FOR REVIEW

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STATUTES

A. IDENTITY OF PETITIONER

Cheryl Lidel asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Cheryl Renee Lidel*, No. 69101-5-I (March 3, 2014). A copy of the decision is in the Appendix at pages A-1 to A-10.

C. ISSUES PRESENTED FOR REVIEW

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. Is a significant question under the United States and Washington Constitutions involved where the trial court's exclusion order prevented Ms. Lidel from presenting a defense?

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. Is a significant question under the United States and Washington Constitutions involved where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, this creating a arbitrary classification which violates 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?

D. 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 reasonable to conclude that Ms. Lidel (herself) did not understand the nature of the illegal act and/or failed to understand its wrongfulness at

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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.

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

the time." CP 307, Exhibit 3 at 2. Thus, Dr. Adler concluded Ms. Lidel was insane at the time of the offense. CP 307, Exhibit 5 at 85.

Dr. Adler identified two alternate personalities (alters); "Debbie" and "Odessa."[2] CP 307, 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 307, Exhibit 5 at 103-04. Dr. Adler never met either "Debbie" or "Odessa." CP 307, 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 307, 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 fact. CP 307, 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 307, 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 280-94;

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[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. *Id.* at 965.

4/2012RP 39. The State argued that there was no method for applying the diagnosis of DID to the legal question of sanity. CP 282-83.

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 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

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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).

[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.*

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.

The Court of Appeals affirmed the trial court's exclusion of the evidence of DID and its impact on Ms. Lidel's sanity and mental capacity, ruling the decision in *Greene* precluded its admission. Decision at 5-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

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). 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).

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*, thisCourt 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.

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 Court of Appeals ruled that the decision in *Greene* controlled the outcome in Ms. Lidel's matter. Decision at 4. The Court acknowledged that this Court in *Greene* ruled that DID was generally accepted in the scientific community and met the *Frye* standard for admissibility. *Id.* at 5. But, the Court concluded that *Greene* ruled that the expert testimony proffered would not have been helpful to the jury and therefore, not admissible. *Id.* The Court

was persuaded that there was no consensus in the courts or medical community on the forensic method for determining the DID diagnosis. *Id.*

This Court's continued adherence to the belief that there is no scientific consensus on how to reliably evaluate a defendant who is suffering from DID continues to deny defendant's their constitutionally protected right to present a defense. Other courts have concluded that the scientific community has produced sufficient evidence for a legal standard to be established. *See for e.g. United States v. Denny-Shaffer,* 2 F.3d 999, 1008 n. 7 (10th Cir. 1993) (regardless of which of the theories of DID is proffered, the trial court erred in excluding expert testimony on DID).

This Court should accept review in Ms. Lidel's matter and adopt one of the three recognized standards cited by Ms. Lidel for determining the sanity or mental capacity of defendants suffering from DID. Sufficient evidence of the consensus among the scientific community exists for this determination. *See* 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).

Here, 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.

2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR SENTENCING FACTOR," RATHER THAN AS AN "ELEMENT," DEPRIVES 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. *Id.* at 191. The Court found that in the context of this and related offenses, 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 with an offender score of 3 would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. *See*, Washington Sentencing Guidelines Comm'n, *Adult Sentencing Manual 2008*, III-76. The "elevation" in punishment on which *Roswell* pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the "elements" of the substantive crime remain the same, save for the prior conviction "element." A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist 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: *see* RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). But there is no rational basis for classifying the punishment for recidivist criminals as an 'element' in certain circumstances and an 'aggravator' in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *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 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 prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject to. *Id.* So too,

first degree assault is a crime whether one has two prior convictions for most serious offenses or not.

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. This Court should grant review to determine whether the use of prior convictions here to find Ms. Lidel a persistent offender violated her right to equal protection.

3. MS. LIDEL WAS DEPRIVED OF HER RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WHEN IT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICTIONS THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is axiomatic a criminal defendant has the right to a jury trial and may

only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely*, 542 U.S. at 300-01; *Apprendi*, 530 U.S. at 476-77; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476-77, *quoting United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. In *Blakely*, the Court held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. *Blakely*, 542 U.S. at 304-05. Likewise, the Court found Arizona's death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a

jury. *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in *Apprendi*, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. *Apprendi*, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." *Apprendi*, 530 U.S., at 476. *Ring* pointed out the dispositive question is one of substance, not form. "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602, *citing Apprendi*, 530 U.S. at 482-83. Further, *Blakely* makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Ms. Lidel's maximum punishment to a life sentence without the possibility of parole violates due process. Thus, a judge may only impose

punishment based upon the jury verdict or guilty plea, not additional findings. *Blakely*, 542 U.S. at 304-05.

b. The trial court denied Ms. Lidel her right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. *Almendarez-Torres v. United States*, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), held prior convictions need not be pled in the information for several reasons. First the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 523 U.S. at 243-44. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. *State v. Manussier*, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996), *cert. denied sub nom, Manussier v. Washington,* 520 U.S. 1201 (1997) (Madsen, J., dissenting); *State v. Tongate*, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement); *State v. Furth*, 5 Wn.2d 1, 18, 104 P.2d 925 (1940).

For several reasons, *Almendarez-Torres* does not answer the question whether Ms. Lidel was entitled to have a jury decide beyond a reasonable doubt whether she had two prior convictions for most serious offenses before she could be sentenced as a persistent offender.

The cases cited by *Almendarez-Torres* support not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, *Almendarez-Torres* noted the fact of prior convictions triggered an increase in the maximum *permissive* sentence. "[T]he statute's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. *Id.* Here, in contrast, Ms. Lidel's prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life without the possibility of parole in Washington is reserved for aggravated murder and persistent offenders. This fact is certainly important in the constitutional analysis.

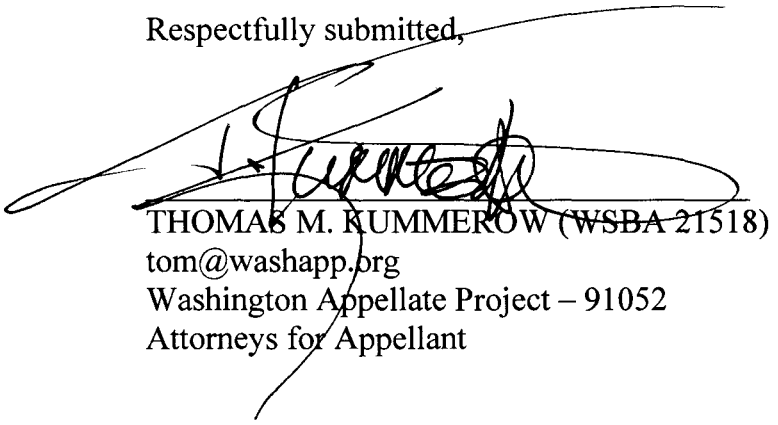
The SRA eliminated a sentencing court's discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge's finding regarding sentencing factors. This Court should grant review to determine whether Ms. Lidel was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase her sentence.

F. CONCLUSION

For the reasons stated, Ms. Lidel asks this Court to grant review and reverse her conviction.

DATED this 2nd day of April 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 69101-5-I
Respondent,	)	DIVISION ONE
v.	)	
CHERYL RENEE LIDEL,	)	UNPUBLISHED
Appellant.	)	FILED: March 3, 2014

Cox, J. – Expert testimony is admissible under ER 702 if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Because Cheryl Lidel made no showing that expert testimony on dissociative identity disorder (DID) would assist the trier of fact in assessing her proposed insanity and diminished capacity defenses, the trial court did not abuse its discretion or violate Lidel's right to present a defense by excluding the evidence as not helpful under ER 702. Lidel's challenge to the constitutionality of the Persistent Offender Accountability Act, RCW 9.94A.570, is also without merit. Accordingly, we affirm.

On the afternoon of February 14, 2010, Lidel entered a Seattle Subway Sandwich Shop and approached the counter. Myrtle Pederson, the sandwich artist, was working alone that afternoon. After initially indicating that she wanted to order a

sandwich, Lidel followed Pederson into an employee-only area and grabbed her in a chokehold. Lidel said she had a gun and threatened to shoot Pederson if she did not give her the money.

After Pederson gave her $370 from the cash register, Lidel left the shop. Pederson's boyfriend saw Lidel leave the store and called 911. The police arrested Lidel a short distance away and recovered $370 from her pocket.

The State charged Lidel with one count of second degree robbery. Prior to trial, Lidel gave notice that she intended to raise insanity and diminished capacity defenses. Psychiatrist Dr. Richard Adler examined Lidel and diagnosed her as suffering from DID, formerly known as multiple personality disorder.[1] Diagnostic criteria for DID include

> A. The presence of two or more distinct identities or personality states (each with its own relatively enduring pattern of perceiving, relating to, and thinking about the environment and self).
>
> B. At least two of these identities or personality states recurrently take control of the person's behavior.
>
> C. Inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness.[2]

Dr. Adler determined that Lidel -- "Cheryl" – was the "host personality" and identified two alternate personalities (alters), "Debbie" and "Odessa." Dr. Adler believed "Odessa" was operative at the time of the robbery, but that the personality had reverted

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[1] See State v. Greene, 139 Wn.2d 64, 68, 984 P.2d 1024 (1999).
[2] Id. (quoting American Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* (4th ed.1994)).

to Cheryl by the time of the arrest. Based on his examination, Dr. Adler determined that "it is 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."

The State disputed Dr. Adler's DID diagnosis and moved to exclude Lidel's proposed insanity and diminished capacity defenses. Relying primarily on the decision in State v. Greene,[3] the State argued that a diagnosis of DID is not currently capable of forensic application and therefore cannot assist the trier of fact in assessing the defendant's mental states. The trial court agreed and excluded Dr. Adler's proposed testimony as not helpful under ER 702.

The case proceeded to trial without Lidel's proposed defenses, and the jury found Lidel guilty as charged. Based on her criminal history, including prior convictions for first degree robbery with a deadly weapon, the trial court found that Lidel was a persistent offender under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, and imposed a mandatory life sentence.

EXPERT TESTIMONY ON DISSOCIATIVE IDENTITY DISORDER

On appeal, Lidel contends that the trial court abused its discretion in excluding Dr. Adler's testimony on his DID diagnosis. She argues that the evidence was relevant and that its exclusion violated her constitutional right to present a defense.

In order to establish the defense of insanity, the defendant bears the burden of demonstrating by a preponderance of the evidence:

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[3] 139 Wn.2d 64, 984 P.2d 1024 (1999).

> (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 or she was unable to perceive the nature and quality of the act with which he or she is charged; or
>
> (b) He or she was unable to tell right from wrong with reference to the particular act charged.[4]

To maintain a diminished capacity defense, the defendant bears the burden of producing evidence that "logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged."[5]

Expert testimony is admissible under ER 702 "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Such testimony is generally helpful to the trier of fact when "it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury."[6] We review the trial court's decision to admit testimony under ER 702 for an abuse of discretion.[7]

Our supreme court's decision in State v. Greene controls our analysis here. In Greene, a prosecution for indecent liberties and first degree kidnapping, the defendant pleaded not guilty by reason of insanity, based on a diagnosis of DID. The trial court ruled that the defense's proposed expert testimony on DID was not admissible to

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[4] RCW 9A.12.010; see RCW 10.77.030.
[5] State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).
[6] State v. Thomas, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).
[7] State v. Roberts, 142 Wn.2d 471, 520, 14 P.3d 713 (2000).

establish the defenses of insanity or diminished capacity. The supreme court held that DID was generally accepted within the scientific community as a diagnosable psychiatric condition and therefore met the Frye[8] standard for admissibility. The court concluded, however, that the proposed expert testimony on DID would not be helpful to the jury and was therefore not admissible under ER 702.[9]

In reaching its decision, the court noted that the relevant question before the trier of fact was whether, at the time of the offenses, DID prevented Greene "from appreciating the nature, quality, or wrongfulness of his actions, or, in the alternative, ... demonstrably impaired Greene's ability to form the [necessary mental intent]."[10] But in order to assist the jury in making this determination, expert testimony, even if based on generally accepted scientific principles, must be capable "of forensic application" by reasonably relating "the defendant's alleged mental condition to the asserted inability to appreciate the nature of his or her actions or to form the required specific intent to commit the charged crime."[11]

More fundamentally, the forensic application of expert testimony presupposes the existence of "a legal standard for culpability in the context of DID."[12]

> That is, when a person suffering from DID is charged with a crime, the question becomes, "who is the proper defendant?" A determination of sanity in this context can be considered only subsequent to the determination of who (which alter personality) should be held responsible

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[8] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
[9] Greene, 139 Wn.2d at 73.
[10] Id. (citations omitted).
[11] Id. at 74.
[12] Id. at 77.

> for the crime - the host, or possibly one or more of the alters. This, in turn, is related to the scientific possibility of identifying the controlling and/or knowledgeable alters at the time of the crime.[13]

The Greene court underscored the difficulty of developing the appropriate standard by noting the competing potential approaches:

> The various approaches primarily differ on which personality (or personalities) any mental examination should focus. Thus, an approach may focus on the mental condition of the host personality at the time of the offense; or, conversely, on the mental condition of the alter in control at the time of the offense; or, possibly, on the mental condition of each and every alter personality at the time of the crime (under this approach, if any significant alter is not aware of or does not acquiesce in the commission of the crime, such innocent "personlike" entities do not deserve to suffer punishment).[14]

None of these approaches has gained acceptance as "reliably helping to resolve questions regarding sanity and/or mental capacity in a legal sense."[15] The court noted its earlier decision in State v. Wheaton,[16] in which it had concluded the record was insufficient to announce a rule "for determining how to assess the legal sanity or insanity of a defendant suffering from [multiple personality disorder],"[17] and acknowledged that "we find ourselves in no better position today than we did [when Wheaton was decided]."[18] Because there was then no consensus in the court or medical community

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[13] Id. at 77-78.
[14] Id. at 77.
[15] Id.
[16] 121 Wn.2d 347, 850 P.2d 507 (1993) (declining to adopt a specific legal standard to assess the sanity of a criminal defendant suffering from multiple personality disorder).
[17] Id. at 357.
[18] Greene, 139 Wn.2d at 74.

as to the proper forensic method for this determination, the Greene court concluded that DID testimony was properly excluded under ER 702 as not helpful to the jury.[19]

Here, Dr. Adler diagnosed Lidel with DID, but he limited his opinion to "Cheryl," the primary personality. He believed that "Odessa," one of Lidel's two alters, was the personality in control during the crime, but that Lidel was in control by the time of the arrest. Dr. Adler was unable to explain how Lidel transitioned from one personality to another.

On appeal, Lidel does not challenge the court's analysis in Greene.[20] Nor has she suggested that the unsettled question in Greene of how to allocate legal liability among multiple personalities has since been resolved. Dr. Adler expressly acknowledged that he was unable to assist the jury in assessing the effect of his DID analysis in light of Lidel's multiple personalities at the time of the crime:

> The issue of DID dissociative states, who's responsible, the host, the alter, is the host responsible for what an alter does right – that's an issue even having read some of the law – it's for a juror or the trier of fact.[21]

In sum, Dr. Adler's testimony provided no basis for assessing the effect of his DID diagnosis on the legal concepts of insanity and diminished capacity. Consequently,

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[19] Id. at 79.

[20] Greene later obtained relief in a federal habeas corpus petition. In affirming the order granting the writ, the Ninth Circuit concluded that Greene should have been able to present his own testimony and the testimony of the victim to establish his mental state at the time of the crime. The court expressly noted that it was not holding that Washington's ER 702 "is defective in any way." Greene v. Lambert, 288 F.3d 1081, 1093 (9th Cir. 2002).

[21] Exhibit 6, at 47-48.

the evidence was not helpful to the jury, and the trial court did not abuse its discretion in excluding it under ER 702.

CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

Lidel contends that the exclusion of Dr. Adler's testimony under ER 702 violated her Sixth Amendment right to present a defense. We disagree.

The defendant's Sixth Amendment right to present a meaningful defense is not unlimited and "must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"[22] A defendant has no constitutional right to present irrelevant evidence.[23]

Under ER 702, expert testimony is helpful only if relevant.[24] "Scientific evidence that does not help the trier of fact resolve any issue of fact is irrelevant and does not meet the requirements of ER 702."[25] Under Greene, Dr. Adler's proposed testimony was neither relevant nor helpful to the jury and therefore properly excluded under ER 702.[26] Moreover, Lidel has not cited any authority suggesting that evidence properly excluded under ER 702 "infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve."[27]

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[22] State v. Donald, ___ Wn. App. ___, 316 P.3d 1081, 1087 (2013), pet. for review filed, (quoting State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)).

[23] State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

[24] Greene, 139 Wn.2d at 73.

[25] Id.

[26] See State v. Atsbeha, 142 Wn.2d 904, 918-19, 16 P.3d 626 (2001) (expert's diminished capacity testimony not relevant and not helpful to trier of fact because it did not relate to defendant's ability to form intent to deliver controlled substance).

[27] Donald, 316 P.3d at 1087 (citing Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

The exclusion of Dr. Adler's testimony did not violate Lidel's right to present a defense.

CONSTITUTIONALITY OF THE PERSISTENT OFFENDER ACCOUNTABILITY ACT

Lidel contends that the POAA's classification of her prior convictions as sentencing factors rather than additional elements of the crime violates her constitutional right to equal protection. She maintains there is no rational basis for requiring the State to prove prior convictions to a jury when they are an element of the crime, but allow judges to find some prior convictions by a preponderance of the evidence as "sentencing factors."

This court rejected an identical argument in State v. Langstead:

> We conclude recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense. We reject Langstead's equal protection challenge.[28]

Lidel has not addressed or even cited Langstead.

Lidel also contends that the State was required to prove the existence of her two prior qualifying convictions to a jury before sentencing her as a persistent offender. Our supreme court has repeatedly held that the State need not prove prior convictions to the jury.[29]

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[28] 155 Wn. App. 448, 456-57, 228 P.3d 799, review denied, 170 Wn.2d 1009 (2010); accord, State v. Salinas, 169 Wn. App. 210, 226, 279 P.3d 917 (2012), review denied, 176 Wn.2d 1002 (2013).

[29] See State v. Thiefault, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); see also, Langstead, 155 Wn. App. at 453; Salinas, 160 Wn.2d at 225.

We reject Lidel's constitutional challenges to the persistent offender statute.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

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 document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69101-5-I**, 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 Erin Becker, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

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Date: April 2, 2014