No. 44951-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM H. ELLISON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The imposition of a sentence of life without the possibility of parole based upon the trial court's determination that Mr. Ellison had two prior convictions for a "most serious offense" violated his Fourteenth Amendment and Article I, § 3 right to due process.

2. The imposition of a sentence of life without the possibility of parole based upon the classification of Mr. Ellison's alleged prior convictions for a most serious offense as a "sentencing factor" that need be proved by a preponderance of the evidence, rather than as an "element" that must be proved beyond a reasonable doubt, violated Mr. Ellison's Fourteenth Amendment right to equal protection under the law.

3. The court denied Mr. Ellison a meaningful right to allocution at sentencing, in violation of RCW 9.94A.500(1).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant's constitutional right to due process requires the State to prove beyond a reasonable doubt every fact that authorizes an increase in punishment. Did the trial court deprive Mr. Ellison of this right by imposing a sentence of life without the possibility of parole, based on the court's determination that he had two prior convictions for a "most serious offense," in the absence of finding that the prior conviction were proved beyond a reasonable doubt?

2. A statue implicating a fundamental liberty interest violates the Equal Protection Clause of the Fourteenth Amendment when it creates classifications that are unnecessary to further a compelling government interest. The government has a compelling interest in punishing repeat offenders more harshly than first-time offenders. For some crimes, the fact of a prior conviction that elevates the punishment is classified as an "element" that must be proved to a jury beyond a reasonable doubt. For other crimes, however, such as those subject to sentencing pursuant to the Persistent Offender Accountability Act (POAA), the fact of a prior conviction for a most serious offense that elevates the punishment is classified as a "sentencing factor" that need only be proved by a preponderance of the evidence. Does the POAA violate the Equal Protection Clause by providing lesser procedural protections for prior convictions classified as "sentencing factors" than those classified as "elements," even though the same government interest is served in both instances?

3. A defendant has the unqualified right to allocution before a court pronounces sentence. Here, where the court cut off Mr. Ellison during his allocution, without any warning or explanation, did the court deny him a meaningful right to allocution?

C. STATEMENT OF THE CASE

Following a bench trial, William H. Ellison was convicted of rape in the second degree and child molestation in the second degree, and acquitted of child molestation in the first degree. CP 68-75; 1/17/13 RP 580-82. At sentencing, without warning or explanation, the court cut off Mr. Ellison during allocution and sentenced him to a term of life without the possibility of parole pursuant to the POAA. CP 88-92; 5/13/13 RP 16-19. The oral ruling and written Findings of Fact and Conclusions of Law Supporting Persistent Offender Declaration/Sentence are devoid of any reference to the quantum of proof relied upon by the court to support its determination that Mr. Ellison had two prior convictions for a most serious offense.

D. ARGUMENT

1. **The trial court violated Mr. Ellison's right to due process when it imposed a sentence of life without the possibility of parole, in the absence of finding beyond a reasonable doubt that he had two prior convictions for a "most serious" offense.**

   a. A criminal defendant has the constitutional right to proof beyond a reasonable doubt of any fact that increases the maximum sentence.

The Due Process Clause guarantees an accused the right to proof beyond a reasonable doubt of every fact essential to punishment. U.S. Const. amend. XIV; *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151,

2155, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 490-92, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The government must prove beyond a reasonable doubt any "fact" upon which it relies to increase punishment above the maximum sentence otherwise available for the crime charged. *Deschamps v. United States*, __ U.S. __, 133 S.Ct. 2276, 2285-86, 186 L.Ed.2d 438 (2013); *Alleyne*, 133 S.Ct. at 2155.

b. Because two prior convictions were used to increase Mr. Ellison's maximum sentence to life without the possibility of parole, he was entitled to a determination beyond a reasonable doubt that he committed two "strike" convictions.

Based on Mr. Ellison's offender score of 9+, he faced a standard range sentence of 210-280 months for the conviction of rape in the second degree and a standard range sentence of 87-116 months for the conviction of child molestation in the second degree. CP 433. Nonetheless, the court sentenced Mr. Ellison to a term of life without the possibility of parole. based on its finding that he had two prior "strike" convictions for a most serious offense. Absent a finding the strikes were proved beyond a reasonable doubt, the life sentence was imposed in violation of Mr. Ellison's constitutional right to due process.

The so-called "prior conviction exception" to proof beyond a reasonable doubt, based on *Almendarez-Torres v. United States*, 523 U.S.

224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), has been implicitly overruled by subsequent United State Supreme Court decisions.[1] In *Apprendi*, the Court characterized *Almendarez-Torres* as "at best an exceptional departure" from the historic practice of requiring the government to prove beyond a reasonable doubt every fact that exposes the defendant to an increased penalty. 530 U.S. at 487. Thus, although the *Apprendi* Court resolved the issue before it without explicitly overruling *Almendarez-Torres*, it recognized "it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." *Id.* at 489.

Justice Thomas, a member of the five-justice majority in *Almendarez-Torres*, has since retreated from the "prior conviction exception." In *Apprendi*, decided only two years after *Almendarez-Torres*, Justice Thomas extensively reviewed the historic practice of requiring the government to prove every fact "of whatever sort, including the fact of a prior conviction," beyond a reasonable doubt. 530 U.S. at 501 (Thomas,

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[1] Mr. Ellison recognizes that the Washington Supreme Court has declined to apply *Apprendi* in the context of prior conviction enhancements until the United States Supreme Court explicitly overrules *Almendarez-Torres*. *See State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). However, the Court of Appeals is not bound by Washington Supreme Court cases that are inconsistent with United State Supreme Court precedents. *State v. Anderson*, 112 Wn. App. 828, 839, 51 P.3d 179 (2002).

J., concurring). Three years later, in *Shepard v. United States*, Justice Thomas wrote, "A majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J. concurring).

Even if *Almendarez-Torres* retains some precedential value, it is distinguishable from the present case on several grounds. First, in *Almendarez-Torres*, the defendant admitted the prior convictions, whereas Mr. Ellison did not admit the prior convictions. 523 U.S. at 227; *accord Apprendi*, 530 U.S. at 488. Second, the issue in *Almendarez-Torres* was the sufficiency of the charging document, not the right to proof beyond a reasonable doubt at issue here. 523 U.S. at 247-48; *accord Apprendi*, 530 U.S. at 488. Third, *Almendarez-Torres* considered the "fact of a prior conviction." 523 U.S. at 226; *accord Apprendi*, 530 U.S. at 490. Here, however, the simple "fact" of prior convictions did not increase Mr. Ellison's punishment above the standard range; rather, it was the determination that the prior convictions were "most serious offenses" that elevated the punishment. RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the *Almendarez-Torres* Court noted the fact of prior convictions triggered an increase in the maximum permissive sentence only. "[T]he statue's broad permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within

broad statutory ranges." 523 U.S. at 245. Here, by contrast, the finding that the prior convictions are for "most serious offenses," judges must impose 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. Thus, the constitutional issue at issue here is not controlled by *Almendarez-Torres*, but, rather, resembles *Alleyne*, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element. *Alleyne*, 133 S.Ct. at 2155. To the extent *Almendarez-Torres* retains any precedential value, it is inapplicable to the present case.

The United States Supreme Court decisions in *Deschamps*, *Alleyne*, *Shepard*, and *Apprendi* establish that the "prior convictions exception" does not apply to cases where the trial court intends to impose a sentence above the statutory maximum, pursuant to the POAA, absent proof of two prior "most serious convictions" beyond a reasonable doubt.

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

a. Because incarceration implicates a fundamental liberty interest, the classification of prior offenses as either elements of a crime or sentencing factors is subject to strict scrutiny.

The Equal Protection Clause requires that similarly situated persons receive equal treatment with respect to the law. U.S. Const. XIV; *Plyler v. Doe*, 457 U.S. 202, 212, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). When analyzing a classification that implicates fundamental liberty interests, courts apply "strict scrutiny" to determine whether the classification is necessary to serve a compelling governmental interest. *Plyler*, 457 U.S. at 217; *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

The liberty interest at issue here – physical liberty – is the most basic of fundamental rights. "[T]he most elemental of liberty interests [is] being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, any classification that unequally implicates that liberty interest is subject to strict scrutiny. *Skinner*, 316 U.S. at 541; *accord In re Det. Of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (civil commitment statue

subject to strict scrutiny because civil commitment constitutes "a massive curtailment of liberty").

b. The classification of "most serious offenses" as sentencing factors, rather than as "elements," violates the Equal Protection Clause, regardless of the standard of review.

Notwithstanding the above principles, Washington courts have applied only a "rational basis" scrutiny to equal protection challenges in the context of criminal sentencing. *See State v. Manussier*, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this lower level of scrutiny, a law violates equal protections if it is not rationally related to a legitimate governmental interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

Although strict scrutiny is the proper standard of review, the result of the analysis is the same regardless of the lens through which the issue is reviewed. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

c. The classification of the persistent offender finding as a "sentencing factor," rather than as an "element," does not promote any government interest.

Our Legislature has determined that the government has an interest in punishing repeat offenders more severely than first-time offenders. For example, a defendant who twice previously violated a no-contact order is subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Similarly, a defendant who twice previously was convicted of a "most serious" offense is subject to a significant increase in punishment for a third offense, life without the possibility of parole. RCW 9.94A.030(7); RCW 9.94A.570. Yet, courts treat prior convictions that cause a significant increase in punishment differently simply by labeling some prior convictions "elements" and labeling other prior convictions "sentencing factors."

Where prior convictions that increase the maximum sentence are classified by judicial construct as "elements" of a crime, the convictions must be proved beyond a reasonable doubt. For example, communicating with a minor for immoral purposes is punished as a felony, rather than a gross misdemeanor, upon proof beyond a reasonable doubt that the defendant had a prior conviction for a felony sex offense. *State v.*

Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Likewise, violation of a no-contact order is punished as a felony, rather than a gross misdemeanor, upon proof beyond a reasonable doubt that the defendant had two prior convictions for violation of a no-contact order. *Oster*, 147 Wn.2d at 146; *see also State v. Chambers*, 157 Wn. App. 465, 475, 237 P.3d 352 (2010) (DUI punished as a felony, rather than a gross misdemeanor, upon proof beyond a reasonable doubt the defendant had four prior DUI convictions in the previous ten years).

But where, as here, prior convictions that increase the maximum sentence are classified by judicial construct as "sentencing factors," the convictions are proved only by a preponderance of the evidence. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (two prior convictions for a "most serious" offense need only be proved by a preponderance of evidence).

For instance, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction beyond a reasonable doubt to increase the punishment for a current conviction for communication with a minor for immoral purposes, even if the prior conviction increases the sentence by only a few months. *Roswell*, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in

the first degree, the State need only prove the prior conviction by a preponderance of the evidence to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; *Smith*, 150 Wn.2d at 143.

Significantly, the Legislature has never labeled the prior convictions at issue in *Oster*, *Roswell*, and *Chambers* as "elements," nor has it labeled the prior convictions at issue here as "sentencing factors." Instead, the labels are the result of an arbitrary judicial construct, even though the government interest in each instance is exactly the same – to punish recidivists more severely. *See* RCW 9.68.090 ("penalty" for communication with a minor for immoral purposes elevated bases on prior offenses); RCW 46.61.5055 (person with four prior DUI convictions in previous ten years "shall be punished under RCW ch. 9.94A"); *State v. Thorne*, 129 Wn.2d 736, 722, 921 P.2d 514 (1996) (purpose of POAA is to "reduce the number of serious, repeat offenders by toughening sentencing").

Thus, even under rational basis scrutiny, while it might be rational for the Legislature to require greater procedural protections where a person is facing life in prison without possibility of parole than a lesser

sentence, it makes not sense to require greater procedural protections where the necessary facts only marginally increase punishment.

A similar arbitrary classification was invalidated for violation of the Equal Protection Clause in *Skinner*, where, under Oklahoma law, an offender was sterilized upon a third conviction for a specific type of offense. 316 U.S. at 541. The Court applied strict scrutiny to the law, finding that sterilization implicated a "liberty" interest, even though it did not involve imprisonment. *Id.* The Court ruled that statute did not survive strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization whereas three convictions for crimes such a larceny did so result. *Id.* at 541-42. While the Court acknowledged that legislative classification of crimes is due deference, it declined to defer in that instance on the grounds, "[w]e are dealing with legislation which involved one of the basic civil rights of man. ... There is no redemption for the individual whom the law touches. ... He is forever deprived of a basic liberty." *Id.* at 540-41.

The same reasoning applies here. Freedom from physical detention by one's own government is one of the basic civil rights of man. *Hamdi*, 542 U.S. at 529. The legislation at issue here is designed to deprive Mr. Ellison, and similarly situated persons, this basic liberty based only upon proof by a preponderance of the evidence.

As the Supreme Court has explained, "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.

> [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. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner*, 316 U.S. at 542.

In accordance with the principles expressed by the United States Supreme Court, this Court should hold that the imposition of a sentence of life without the possibility of parole based on a finding of the necessary facts by a mere preponderance of the evidence violated Mr. Ellison's constitutional right to equal protection under the laws, and remand this matter for resentencing within the standard range.

3. The trial court denied Mr. Ellison his right to meaningful allocution, requiring reversal and resentencing.

Allocution is defined as:

> Formality of court's inquiry of defendant as to whether he as any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make a statement on his behalf and present any information in mitigation of sentence.

State v. Crider, 78 Wn. App. 849, 860, 899 P.2d 24 (1995), q*uoting Black's Law Dictionary* 76 (6th ed. 1990). Thus, allocution is the defendant's last opportunity to make a statement on his or her behalf and to plead for mercy. *In re Pers. Restraint of Lord*, 117 Wn.2d 829, 897, 822 P.2d 177 (1991).

In Washington, a defendant has the unqualified statutory right to allocution before the court pronounces sentence. "The court shall ... allow arguments from ... the offender." RCW 9.94A.500(1). When a court violates a defendant's right to allocution, the proper remedy is remand for a new sentencing hearing before a different judge. *State v. Aguillar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1999).

> [T]rial courts should scrupulously follow [pre-sentencing procedures] by directly addressing defendants during sentencing hearings, asking whether they wish to say anything to the court in mitigation of sentence, and allowing 'arguments from ... the offender[s] ... as to the sentence to be imposed.' This would unequivocally

> acknowledge the right of allocution as a significant aspect of the sentencing process.

State v. Echeverria, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000); *accord State v. Canfield*, 154 Wn.2d 698, 704, 116 P.3d 391 (2005). Although the right to allocution is statutory, the Washington Supreme Court has held the right to allocution is also required by the Due Process Clause of the federal constitution. *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 200, 814 P.2d 635 (1991), *citing United States v. Behrens*, 375 U.S. 162, 84 S.Ct. 895, 11 Ed.2d 224 (1964).

Contrary to the above precepts, the court here invited Mr. Ellison to make a statement prior to imposition of its sentence, but after several minutes and without warning or explanation, the court cut off Mr. Ellison, thanked the victim's grandmother[2] for appearing, and proceeded to impose a sentence of life without the possibility of parole, over Mr. Ellison's protests.

> THE COURT: Well, let me interrupt because – because there are a couple of things I think we should be clear about. One is that, you know, I'm glad Ms. Ellison came today, because she is a victim as a family member of a victim has a right to be here and to address the court. I'm bound by what I heard at trial –
> THE DEFENDANT: Okay.
> THE COURT: -- in terms of making a decision, the decision has already been made about guilt, and I believe – well, Mr. Quillian has indicated that you're going to appeal

[2] The victim's grandmother was also Mr. Ellison's ex-wife.

> anyway. I think it was a fair trial. I think we struggled real hard to make sure it was a fair trial, and it's always difficult, but that's what we try to do. So I'm not worried about what Ms. Ellison said today. I'm not worried about what Amy said, or A.E. said in the PSI report. I'm just concerned about what happened at trial.
> THE DEFENDANT: Okay. Oh, I'm sorry.
> THE COURT: Hold on a second. The second thing I need to tell you is that at this point under the Persistent Offender Act, under the Sentencing Reform Act as a Persistent Offender, I don't have – that's what this is all about. I don't have – there is no option here.

5/31 RP 16-17. The court then sentenced Mr. Ellison to a term of life without the possibility of parole, after which Mr. Ellison protested:

> THE DEFENDANT: I don't get to speak anymore?
> THE COURT: No.
> THE DEFENDANT: I don't get to say anything?
> [DEFENSE COUNSEL]: Apparently not.
> THE DEFENDANT: Wow. I don't get to say nothing?

5/13/13 RP 19.

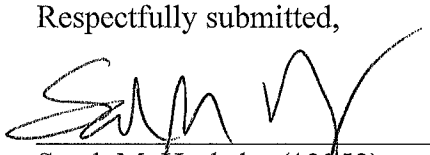
This abrupt and unexplained termination of Mr. Ellison's pre-sentence statement violated his right to allocution. Mr. Ellison retained the right to allocution, even though he was facing a mandatory sentence as a persistent offender. *See State v. Snow*, 110 Wn. App. 667, 669-70, 41 P.3d 1233 (2002). In the absence of any explanation for the termination of his statements, Mr. Ellison's right to meaningful allocution was violated. This matter should be remanded for resentencing before a different judge.

E. CONCLUSION

Mr. Ellison's right to due process of law was violated when he was sentenced to a term of life without the possibility of parole, in the absence of proof beyond a reasonable doubt that he had been twice previously convicted of a "most serious" offense. Mr. Ellison's right to equal protection was violated when he was sentenced to a term of life without the possibility of parole, based on a judicial construct that artificially classifies the fact of a prior conviction for a "most serious offense" as a "sentencing factor" that need be proved by a preponderance of the evidence only, but classifies the fact of a prior conviction used to elevate the punishment of certain crimes as an "element" that must be proved beyond a reasonable doubt. Mr. Ellison's right to meaningful allocution was violated when the court, without warning or explanation, cut off his statement and proceeded directly to sentencing. For the foregoing reasons, this Court should reverse Mr. Ellison's sentence and remand for resentencing before a different judge.

DATED this 19th day of February 2014.

Respectfully submitted,



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DIVISION TWO

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	)	
Respondent,	)	
	)	NO. 44951-0-II
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	)	
WILLIAM ELLISON,	)	
	)	
Appellant.	)	

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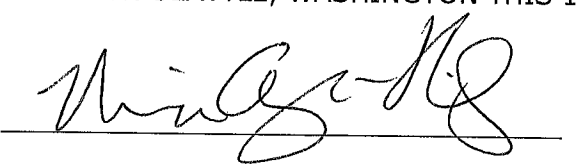
X 

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	)	
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	)	NO. 44951-0-II
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	)	
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	)	
Appellant.	)	

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