Supreme Court No. ____
(COA No. 43167-0-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FARNSWORTH,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Farnsworth, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Farnsworth seeks review of the Court of Appeals decision dated May 31, 2017. A motion for reconsideration was denied on July 28, 2017. Copies are attached as Appendix A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Farnsworth received a sentence of life without the possibility of parole based on a 1984 California conviction the court deemed a "most serious offense" under the three-strikes sentencing laws. The Court of Appeals insisted Mr. Farnsworth's failure to challenge this offense's comparability in a prior sentencing, for a wholly unrelated case, proved the identity of the prior conviction despite later contesting the nature of the conviction in this case. Should this Court review whether the Court of Appeals' unprecedented use of collateral estoppel for unrelated sentencing proceedings conflicts with

the prosecution's obligation to prove the authorized sentence at every sentencing hearing?

2. This Court has repeatedly examined "reliable evidence" including the charging document and guilty plea form to resolve comparability questions for predicate offenses. The Court of Appeals opinion insists it is "forbidden" by case law to look past the face of the California judgment to determine the nature and elements of the out-of-state conviction for the purposes of determining comparability. Does the Court of Appeals' refusal to review documents underlying the guilty plea conflict with this Court's precedent and present an issue of substantial public importance?

3. When a person receives a sentence of life without the possibility of parole based on an out-of-state conviction, the Sixth and Fourteenth Amendments as well as controlling statutes require the State proves the conviction is comparable to a most serious offense in Washington. The State alleged that a 1984 California conviction was comparable to vehicular homicide, but it offered an ambiguous conviction form that did not show the essential factual or legal elements of that prior conviction. Additionally, this State defined vehicular homicide in 1984 to require drunk driving caused the fatality but

California required only a violation of traffic laws, such as a missing headlight, to have caused the fatality, occurring when under the influence of alcohol. Should this Court review the insufficient factual proof and legal incompatibility of the California conviction used for a sentence of life without the possibility of parole?

4. Increasing a person's punishment based on facts not found by the jury violates the rights to due process, trial by jury, and equal protection of the laws as protected by the Sixth and Fourteenth Amendments. Should this Court review the constitutionality of a procedure mandating sentences of life without the possibility of parole based on factual allegations never proven to the jury beyond a reasonable doubt, even though such proof is required for other offenses that increase punishment based on the existence of prior convictions?

D. STATEMENT OF THE CASE

This Court previously granted review of Mr. Farnsworth's life without the possibility of parole sentence but rather than reaching an issue the Court of Appeals had not addressed in its original decision, it remanded the case to the Court of Appeals. *State v. Farnsworth*, 185 Wn.2d 768, 774, 789, 374 P.3d 1152 (2016) (5-4 decision affirming conviction). On remand, the Court of Appeals upheld the sentence

based on several arguments not made by the parties. Slip op. at 4-7. The Court of Appeals denied Mr. Farnsworth's motion for reconsideration without comment.

The sentencing arose after Mr. Farnsworth was convicted of robbery in the first degree, for aiding another person's commission of a bank robbery. In order to impose the persistent offender sentence requested, the prosecution needed to prove the existence and comparability of a 1984 California vehicular conviction, as comparable to Washington's vehicular homicide. 2/24/12RP 4, 9.

The prosecution alleged the California conviction rested on Penal Code § 192(c)(3), and said the citation to "PC 192(3)(c)" in the complaint and judgment was a typographical error. 2/24/12RP 20, 22. It also told the court to disregard the sentencing document's statement that Mr. Farnsworth pled guilty to "count 2" in the charging document, where count 2 was charged under Vehicular Code 23153(a), a different law.

Mr. Farnsworth objected to the lack of legal and factual proof necessary for a life sentence. Legally, neither the penal code nor vehicular code offenses from 1984 had the same causation requirement as Washington had at that time. *Id.* at 50-58. Factually the documents

do not make clear the basis of the conviction. *Id.* The court found the California conviction comparable to vehicular homicide and sentenced him to life without parole, and the Court of Appeals affirmed. CP 695-707, Slip op. at 8.

The facts are further set forth in Appellant's Supplemental Sentencing Brief in the Court of Appeals and Supplemental Brief of Respondent in this Court, S.Ct. No. 91297-1, and attached appendices, incorporated by reference.

E. ARGUMENT

1. The Court of Appeals incongruously relied on a prior, unrelated sentencing hearing to determine the comparability of an out-of-state prior conviction.

By statute, the sentencing court must determine a defendant's criminal history and offender score each time it sentences a person. RCW 9.94A.500(1); RCW 9.94A.525(22). A prior sentencing court's criminal history determination "shall have no bearing on whether it is included in the criminal history or offender score for the current offense." RCW 9.94A.525(22).

The doctrine of collateral estoppel has never been applied in sentencing hearings to incorporate unrelated sentencing proceedings as a concession or bar to re-litigation of the accurate sentence. Generally,

collateral estoppel applies in criminal cases only as a matter of double jeopardy, prohibiting the prosecution from obtaining multiple prosecutions or imposing multiple punishments. *See Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Division One has rejected the notion that a defendant is barred from relitigating the comparability of a prior offense based on another sentencing court's determination of criminal history. *State v. Larkins*, 147 Wn.App. 858, 866-67, 199 P.3d 441 (2008).

Similarly, this Court has long held that "[w]hen a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered." *In re the Personal Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The paramount importance of accurate sentencing allows a court to override the provisions of a plea agreement, because a defendant cannot agree to be punished in excess of that permitted by statue. *In re Personal Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991). The importance of this requirement allows a party to challenge an incorrect sentence even after the time for collateral attack has passed. *In re the Personal Restraint Petition of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

Yet the Court of Appeals opinion repeatedly referenced an unrelated prior appellate decision where Mr. Farnsworth elected not to challenge the use of a California vehicular manslaughter conviction in calculating his offender score. Slip op. at 4, 5 n.6 (citing *State v. Farnsworth*, 133 Wn.App. 1, 130 P.3d 389 (2006)). This unrelated 2006 opinion is irrelevant to Mr. Farnsworth's challenge to the comparability of his prior conviction to a most serious offense in Washington. In the instant case, Mr. Farnsworth objected to the identity and comparability of California conviction at all stages of proceedings.

The 2006 decision merely states Mr. Farnsworth did not challenge his California prior conviction as a point in his offender score. 133 Wn.App. at 10. But in that case, he did not face a life sentence that hinged on the comparability of the California offense and whether it qualified as a most serious offense under the SRA, which is a far different question than whether it may count as a point of criminal history in the offender score.

It would be a gross miscarriage of justice and a deprivation of due process to preclude a person from challenging the comparability of a prior conviction for a three-strike sentence of life without the

possibility of parole simply because he opted not to contest its inclusion in his offender score during a prior unrelated sentencing.

Mr. Farnsworth's failure to contest a prior conviction as a point in his criminal history many years ago has no bearing on this appeal. He is not estopped and this Court should not treat his prior failure to challenge a conviction as binding or even relevant in the future. The Court of Appeals' application of collateral estoppel to Mr. Farnsworth's sentence undercuts the fundamental aims of the SRA that sentences be accurate and correct. This Court should grant review based on the improper reliance on statements made during an unrelated sentencing hearing where different legal standards applied to determine criminal history outside of the persistent offender accountability act.

2. The Court of Appeals opinion fundamentally misconstrues the analysis required to determine the nature of a prior conviction.

Any comparability determination necessarily begins with identifying the offense for which a person was previously convicted. *State v. Bluford*, 188 Wn.2d 298, 317, 393 P.3d 1219 (2017). It "is problematic" when the record does not specifically identify the conviction and statute underlying a conviction. *Id.*

The Court of Appeals opinion mistakenly contends it is "forbidden" from looking beyond the face of the judgment when conducting a comparability determination for a life without the possibility of parole sentence. Slip op. at 5. Comparability determinations necessarily require the court to look at more than the face of the judgment.

To resolve comparability questions for predicate offenses in three-strike cases, a court is "required . . . to examine reliable evidence, *such as an information*." *State v. Thiefault*, 160 Wn.2d 409, 417 n.3, 158 P.3d 580 (2007) (emphasis added). In *Thiefault*, the documents the court examined were a "motion for leave to file information," an affidavit from a prosecutor, and the judgment, for the comparability of a prior Montana conviction. *Id.* at 416 n.2. Because these documents did not prove the Montana conviction was comparable to a most serious offense in Washington, the Supreme Court held that counsel was ineffective for failing to challenge comparability. *Id.* at 417.

In *State v. Lavery*, 154 Wn.2d 249, 256-58, 111 P.3d 837 (2005), this Court looked at what facts were admitted, stipulated to, or proven beyond a reasonable doubt at the time of conviction. *See also State v. Bunting*, 115 Wn.App. 135, 141-42, 61 P.3d 375 (2003) ("the

record contains three documents that provide facts surrounding" a prior conviction, including complaint, indictment, and "official statement of facts"); *State v. Releford*, 148 Wn.App. 478, 482, 200 P.3d 729 (2009) ("explicitly" holding court may look to "foreign charging documents" and other evidence underlying the guilty plea to assess comparability); *In re Lar*, 187 Wash. App. 1009, 20105 WL 1866053 (2015) (unpublished, cited as non-binding authority pursuant to GR 14.1) ("Under the precedents discussed above, then, the only facts properly considered in the comparability analysis are (1) the factual allegations in the charging documents directly relating to elements essential to the prior convictions under this statute, together with (2) the facts to which Lar stipulated as part of the 1997 plea deal.").

Even in *State v. Ammons*, 105 Wn.2d 175, 189, 713 P.2d 719 (1986), the case the Court of Appeals cites to claim it is forbidden to look at documents other than the judgment itself, the court referred to the "guilty plea form" to assess a constitutional challenge to the validity of a prior conviction. Slip op. at 5. *Ammons* involved a constitutional challenge to the validity of a prior conviction – here Mr. Farnsworth challenges the comparability of a prior offense, he is not trying to

withdraw that earlier plea or render it invalid for all purposes, as occurred in *Ammons*.

The Court of Appeals' misguided understanding of its role when assessing the lawfulness of the most serious sentence of life without the possibility of parole conflicts with decisions from this Court and the Court of Appeals, and raises an issue of substantial public importance for which this Court should grant review.

3. The flawed comparability analysis is contrary to this Court's holdings and merits review given the seriousness of a life without parole sentence.

When a prior conviction is from another state, the State must prove it is comparable to a qualifying Washington offense. *Lavery*, 154 Wn.2d at 255; RCW 9.94A.030(36)(a)(ii)[1]; RCW 9.94A.525(3). The court's comparability inquiry is constrained by the Sixth and Fourteenth Amendments. *Descamps v. United States,*__ U.S. __, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013); *Lavery,* 154 Wn.2d at 258. Due to these constitutional restrictions, the only facts a sentencing court can be sure the jury found, or the defendant admitted in a guilty plea, "are those constituting the elements of the offense." *Descamps*, 133 S.Ct. at 2288;

Shepard v. United States, 544 U.S. 13, 25-26, 28, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

As the Supreme Court recently explained in *Mathis v. United States*, _U.S. _, 136 S.Ct. 2243, 2252, 195 L.Ed.2d 604 (2016), "consistent with the Sixth Amendment," a sentencing judge may not make a disputed determination of what the judge and defendant "must have understood as the factual basis of the prior plea." Not only does it "raise serious Sixth Amendment concerns," for a sentencing judge to determine the particular means under which a prior offense occurred, it is unduly unfair to defendants to trigger additional punishment based on a prior conviction when the defendant may not have had any incentive "to contest what does not matter" at the time of the prior conviction. *Id.* at 2253. "Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence." *Id.*

In 1984, Washington's vehicular homicide statute required that "impairment due to alcohol must have been a proximate cause of the fatal accident." *State v. MacMaster*, 113 Wn.2d 226, 235, 778 P.2d

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[1] Citations to the sentencing statutes herein refer to the version in effect at the time of the offense. Some non-substantive numbering changes have

1037 (1989); Former RCW 46.61.520 (1983). *MacMaster* ruled that it was "not a proper statement of the law" to merely show the defendant caused a fatal accident and "coincidently, defendant was also under the influence" of alcohol. *Id.*

For example, if a person was drinking but caused a fatal accident by failing to see a person in the road due to a broken car light, he would not be guilty of vehicular homicide in Washington, as the law was defined in 1984. But he would be guilty under California law.

In California's penal code statute, vehicular manslaughter occurred when a person is driving under the influence of alcohol, commits a traffic law violation (e.g., driving with a broken light), and this traffic violation causes a fatal accident. *See People v. Soledad*, 190 Cal.App.3d 74, 81 (Ct. App. 1987) (explaining "the unlawful act" causing the death required by PC § 192 is not the drunk driving, but an unlawful act "other than" a violation of the drunk driving laws); Former Veh. Code § 23153 (a)[2]; Former Penal Code § 192 (3)(c) (1983).

Under either Penal Code § 192(c)(3), or Vehicular Code § 23153(a), California would permit a conviction when a person

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occurred since then.

[2] The California statutes are attached as Appendix C.

"coincidentally" causes a person's death while driving under the influence. Yet *MacMaster* holds that this coincidence is not enough for a conviction in Washington. The State must prove the alcohol-impaired driving proximately caused the person's death. 113 Wn.2d at 235.

Because neither California statute required proof that intoxicated driving proximately caused the death, they do not satisfy the narrower specific causation required for Washington's 1984 vehicular homicide. This lack of legal comparability ends the inquiry, because the plea statement has no additional facts to show this conviction was based on proof of the same elements as Washington's statute. *Lavery*, 154 Wn.2d at 256; COA App. at 6-11. It would violate the Sixth Amendment to further conclude Mr. Farnsworth's conviction necessarily violated the law in Washington because the prosecution was not required to prove his impaired driving caused the fatality.

Moreover, in Mr. Farnsworth's case, there remains significant ambiguity as to the underlying factual charges and statutes governing his plea and convictions. The judgment says Mr. Farnsworth pled guilty solely to "count 2." COA Sentencing Brief, App. at 5; 2/24/12RP 51. The plea statement does not specify which count. *Id.* at 6-8. Under the charging document, counts 1 and 2 name different victims and set forth

elements of different statutes. *Id.* at 5. Count 2 accused Mr. Farnsworth of "committing the crime of violation of section 23153 (a) of the Vehicular Code," but this vehicular statute required causing "bodily injury," not only death. *Id.*

The "elements of the charged crime must remain the cornerstone of the comparison." *Lavery*, 154 Wn.2d at 255; *Descamps*, 133 S.Ct. at 2285-86; *Mathis*, 136 S.Ct. at 2252. The elements of the statute in effect for count 2 required causing "bodily injury" but not death. COA App. at 3, 5. Based on the elements of the controlling statute as evidence in the judgment, Mr. Farnsworth's conviction must be based on the elements as charged in count 2, which require bodily injury, resulting from a traffic violation, coincidently occurring when a person is under the influence of an alcoholic beverage.

Here the State presented no factual information other than the initial charging document. The guilty plea form contains no factual information. Mr. Farnsworth pointedly did not initial the section agreeing there is a factual basis for the plea, even though he initialed numerous other parts of the form, showing he did not stipulate to the prosecution's rendition of events.

Additionally, the complaint refers to case number 15838, but the guilty plea and judgment forms use case number 18917. COA App. at 5- 6, 12-13. The plea and sentencing documents do not say the date of the incident or any factual basis. *Id.* The facts admitted to are unexplained and this complaint may not be from this plea or sentence.

The prosecution has not satisfied its burden of proof under the controlling statutes or the demands of due process and the Sixth Amendment based on the unreliable and insufficient evidence.

4. The imposition of a life sentence without requiring proof beyond a reasonable doubt or a jury determination violates due process, equal protection, and the right to trial by jury.

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 v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14.

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. 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*, 567 U.S. 343, 358, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012). It further applies to any fact triggering a mandatory minimum because it alters the prescribed range of sentences. *Alleyne v. United States*, _U.S. _, 133 S. Ct. 2151, 2160, 186 L. Ed.2d 314 (2013).

The facts underlying Mr. Farnsworth's California conviction are ambiguous at best and unknown at worst. He did not admit to any particular facts and did not endorse the prosecution's version of them. Yet the court relied on its determination of those facts to increase his punishment. It is incorrect and harmful to simply say due process is sufficiently satisfied to impose a life without parole sentence on a person without demanding clear proof of the underlying conviction's necessary elements.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72

L.Ed.2d 786 (1982); U.S. Const. amend. 14. Courts apply strict scrutiny to laws implicating fundamental liberty interests. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. *Plyler*, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. *Skinner*, 316 U.S. at 541.

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

Where prior convictions that increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. *See State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (prior conviction for sex offense must be

proved to the jury beyond a reasonable doubt when elevating communicating with a minor for immoral purposes to a felony); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002) (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony); *State v. Chambers*, 157 Wn.App. 456, 475, 237 P.3d 352 (2010) (State must beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years for felony DUI). The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence, they have been termed "sentencing factors," and treated as findings for a judge by a preponderance of the evidence. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). Just as the legislature has never labeled the facts at issue in *Oster*, *Roswell,* or *Chambers* as "elements," the Legislature has never labeled the fact at issue here as a "sentencing factor." This judicial construct violates equal protection because the government interest in either case is *exactly the same*: to punish repeat offenders more severely. *See* RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior

offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

Rationally, the greatest procedural protections should apply to the "three strikes" context due to the severity of the punishment. This Court should hold that the judge's imposition of a sentence of life without the possibility of parole violated the equal protection clause, as well as the Sixth Amendment and right to due process. The case should be remanded for resentencing within the standard range.

F. CONCLUSION

Based on the foregoing, Petitioner Charles Farnsworth respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 25th day of August 2017.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES V. FARNSWORTH, JR., Appellant.	No. 43167-0-II UNPUBLISHED OPINION

MELNICK, J. — The Washington Supreme Court affirmed Charles Farnsworth's conviction for robbery in the first degree and remanded the case to us to resolve "the issues of the comparability of Farnsworth's earlier out-of-state conviction."[1] *State v. Farnsworth*, 185 Wn.2d 768, 789, 374 P.3d 1152 (2016). The trial court sentenced Farnsworth as a persistent offender to a term of total confinement for life without the possibility of release.[2]

Farnsworth argues his prior conviction in California for vehicular manslaughter was not comparable to a most serious offense in Washington, the trial court violated his rights to a trial by jury and due process by sentencing him on the basis of facts it found established by the preponderance of the evidence, and his persistent offender sentence violated equal protection. In a statement of additional grounds (SAG), Farnsworth further asserts that the trial court erroneously imposed legal financial obligations (LFOs). We disagree with Farnsworth's arguments and affirm.

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[1] We also address the legal financial obligation issue Farnsworth raised in his statement of additional grounds (SAG) since we did not decide it previously.

[2] RCW 9.94A.570.

FACTS[3]

A jury found Farnsworth guilty of robbery in the first degree. The sentencing court entered findings of fact and conclusions of law determining that Farnsworth was a persistent offender because he had previously committed two most serious offenses. Specifically, Farnsworth had been convicted of vehicular manslaughter in California and robbery in the first degree in Washington. At sentencing, the State presented the court with copies of the abstract of judgment and charging document showing Farnsworth had been convicted of vehicular manslaughter. Accordingly, the court sentenced Farnsworth to a term of total confinement for life without the possibility of release. The sentencing court also imposed LFOs; however, it imposed only mandatory legal financial obligations, including the $500 crime victim assessment, the $100 DNA (deoxyribonucleic acid) fee, and the $200 filing fee.

Upon remand, we analyze Farnsworth's appeal of his sentence.

ANALYSIS

I. COMPARABILITY OF FOREIGN CONVICTION TO A MOST SERIOUS OFFENSE

Farnsworth argues that the State failed to establish that his prior conviction in California was comparable to a most serious offense under Washington law.[4] We disagree.

In Washington, a defendant found to be a "persistent offender" is sentenced to life in prison without the possibility of release. RCW 9.94A.570. A "persistent offender" is one who has been convicted in this state of any felony considered a "most serious offense" (or "strike offense") and,

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[3] More detailed facts of this case can be found in *State v. Farnsworth*, 184 Wn. App. 305, 307-09, 348 P.3d 759 (2014), and *Farnsworth*, 185 Wn.2d at 772-74.

[4] Farnsworth makes the same argument in his SAG.

prior to the commission of such offense, has been convicted of a "most serious offense" on at least two separate occasions. RCW 9.94A.030(38)(a).

An out-of-state conviction may count as a strike if it is comparable to a most serious offense in Washington. RCW 9.94A.030(38)(a)(ii); RCW 9.94A.030(33)(u). Whether an out-of-state offense is considered in a defendant's offender score or as a most serious offense is controlled by RCW 9.94A.525(3), which states that "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."

Washington courts utilize a two-part test to determine the comparability of an out-of-state offense. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the sentencing court determines whether the out-of-state offense is legally comparable—"that is, whether the elements of the [out-of-state] offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. If the elements of the out-of-state offense are broader than its Washington counterpart, the sentencing court then determines "whether the offense is *factually* comparable—that is, whether the conduct underlying the [out-of-state] offense would have violated the comparable Washington statute." *Thiefault*, 160 Wn.2d at 415 (emphasis added).[5] The standard of proof for finding comparability is preponderance of the evidence. *State v. McKague*, 159 Wn. App. 489, 518, 246 P.3d 558 (2011). "A court's determination of whether an out-of-state conviction is legally comparable to a most serious offense in Washington is reviewed de novo." *State v. Bluford*, No. 93668-4, slip op. at ___ (Wash. May 4, 2017), http://www.courts.wa.gov/opinions/pdf/936684.pdf.

[5] "In making the factual comparison, the sentencing court may rely on facts in the out-of-state record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Thiefault*, 160 Wn.2d at 415.

Statutory interpretation is a question of law that we review de novo. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 1 (2002). An unambiguous statute is not subject to judicial construction where the language, taken as a whole, is clear and unambiguous. *Watson*, 146 Wn.2d at 955. In interpreting statutory provisions, our primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. *Watson*, 146 Wn.2d at 954. We discern "legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 33, 384 P.3d 232 (2016). We initially look to the language of the statute; if a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. *Watson*, 146 Wn.2d at 954. A statute is unclear if it can be reasonably interpreted in more than one way, but "it is not ambiguous simply because different interpretations are conceivable." *Watson*, 146 Wn.2d at 955.

A. AMBIGUITY

We first address and reject Farnsworth's arguments that the identity of the California offense for which he was convicted is "ambiguous." Supp. Br. of Appellant at 33-35. We note that in *State v. Farnsworth*, 133 Wn. App. 1, 22, 130 P.3d 389 (2006) (convictions for two counts of robbery in the first degree affirmed), "Farnsworth admitted that he has a prior California conviction for vehicular manslaughter" in 1984. This admission is supported by the record.

Farnsworth asserts that he was convicted not of a Penal Code offense but of a vehicle code offense; however, the abstract of judgment states that Farnsworth was convicted of a "PC [i.e., Penal Code]" offense. Clerk's Papers (CP) at 756. Farnsworth's first assertion fails.

Contrary to his previous argument, Farnsworth next points out that the charging document contained two counts, a Penal Code offense in count 1 and a Vehicle Code offense in count 2. He then notes that although he was convicted of a Penal Code offense, the abstract of judgment refers to count "2." CP at 756. Thus, Farnsworth seeks to rely on the record of the California case hoping to undermine the abstract of judgment. But sentencing courts are forbidden from "go[ing] behind the verdict and sentence and judgment" entered in a prior case when determining whether to sentence the defendant as a persistent offender. *State v. Ammons*, 105 Wn.2d 175, 189, 713 P.2d 719, 718 P.2d 796 (1986). Therefore, we reject this argument.

Farnsworth next argues that an ambiguity exists because the abstract of judgment refers to § "192(3)(c)" and not § 192(c)(3), the correct provision. Supp. Br. of Appellant at 35. We disagree. It is clear that this error is a typographical error because the parties agree that the California Penal Code has never contained a section numbered 192(3)(c). In addition, the abstract of judgment abbreviates the name of the offense committed as "vehic mansl." CP at 756. Based on the foregoing, the identity of the California offense for which Farnsworth was convicted is not ambiguous.

B. Legal Comparability

Farnsworth argues that the legal elements of California's vehicular manslaughter offense are not comparable to those of Washington's vehicular homicide offense. We disagree.[6]

Farnsworth was convicted of vehicular manslaughter under the former California Penal Code. The elements are: "the unlawful killing of a human being without malice" by "[d]riving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an

[6] We note that this argument contradicts Farnsworth's concession in his previous case where he stated that "his California conviction was based on a statute identical to an equivalent Washington criminal statute." *Farnsworth*, 133 Wn. App. at 10.

unlawful act, not amounting to a felony, and with gross negligence." Former Cal. Penal Code § 192(c)(3). In turn, former California Vehicle Code 23153(a) (1984) made it

> unlawful for any person, while under the influence of an alcoholic beverage or any drug . . . to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes death or bodily injury to any person other than the driver.

Under this California statutory scheme, a driver committed vehicular manslaughter when he or she killed another person by driving under the influence, the killing occurred while the driver committed an unlawful act not amounting to a felony, the unlawful act proximately caused the death, and the driver was grossly negligent.

Under Washington law, vehicular homicide by a person under the influence of alcohol or drugs is a most serious offense. RCW 9.94A.030(32)(r). The former vehicular homicide statute provided in relevant part:

> When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, . . . the person so operating such vehicle is guilty of vehicular homicide.

Former RCW 46.61.520(1) (1983).[7] Under this Washington statutory scheme, a driver committed vehicular homicide when he or she caused injuries resulting in the death of another person within three years and the injuries were proximately caused by the driver's driving under the influence.

Farnsworth argues that the statutes are not legally comparable because the causation elements differ.[8] He argues that the California statute requires that the death be caused by an act

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[7] LAWS OF 1983, ch. 164, § 1.

[8] Farnsworth does not argue that Washington's three-year time limit bears on this analysis.

forbidden by law or neglect of a legal duty, while in contrast the Washington statute requires that the drunk driving itself caused the death. We disagree.

Although the California statute contains additional elements, conduct amounting to vehicular manslaughter in California will also amount to vehicular homicide in Washington. The additional elements demonstrate that the California statute is narrower than the comparable Washington statute. The proof of the additional elements is necessary to show a violation of the law in California, but not in Washington. Any breach of the California statute would, therefore, necessarily involve a breach of Washington's statute. Therefore, the elements of the California statute are not broader than those of the Washington statute and the offenses are legally comparable.

Because Farnsworth's California conviction is legally comparable to a most serious offense in Washington, we need not analyze factual comparability. Farnsworth's argument fails.

II. PROOF OF SENTENCING FACTORS

Farnsworth further argues that the sentencing court violated his right to trial by jury and his right to due process of law because it sentenced him as a persistent offender based on the sentencing court's findings of prior convictions by a preponderance of the evidence, and not on the basis of a jury's finding of proof beyond a reasonable doubt. We disagree.

In making this argument, Farnsworth relies on *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But Farnsworth misapprehends the rule of these cases. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Even after *Blakely*, "judges can still find the

existence of prior convictions" to establish sentencing factors. *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 216, 222, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Because Farnsworth's persistent offender sentence rests on the fact of his prior convictions, this argument fails.

III. EQUAL PROTECTION

Farnsworth argues that his persistent offender sentence violated the Equal Protection Clause because Washington law arbitrarily discriminates between persistent offenders and other recidivists by treating "elements" and "sentencing factors" differently. Supp. Br. of Appellant at 47. When the defendant's prior conviction is an element of an offense, the prior conviction must be established beyond a reasonable doubt. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008) (gross misdemeanor raised to felony when defendant has prior sex offense conviction). But when the defendant's prior convictions are sentencing factors that bear on his status as a persistent offender, the prior convictions must be established by a mere preponderance of the evidence. RCW 9.94A.500(1), RCW 9.94A.570; *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001).

We have consistently rejected this exact argument and we do so again. *State v. Reyes-Brooks*, 165 Wn. App. 193, 207, 267 P.3d 465 (2011); *State v. Williams*, 156 Wn. App. 482, 496-98, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010).

IV. LEGAL FINANCIAL OBLIGATIONS

In his SAG, Farnsworth argues the record fails to support the trial court's boilerplate finding of his ability to pay his LFOs. Generally, we may decline to review issues raised for the first time on appeal. RAP 2.5(a). However, we exercise our discretion here and reach the issue. *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015).

The trial court did not impose any discretionary LFOs. It imposed only mandatory fees. For that reason, Farnsworth argument fails. *State v. Mathers*, 193 Wn. App. 913, 918-19, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, P.J.

Johanson, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

July 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHARLES V. FARNSWORTH, JR., Appellant.	No. 43167-0-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moved for reconsideration of the court's May 31, 2017 opinion. Respondent filed a response to the motion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Johanson, Melnick.

Melnick, J.

APPENDIX C

California statutes, 1984

Penal Code 192(3)
Manslaughter is the unlawful killing of a human being without malice. . . .
(3) Vehicular –
. . .
(c) Driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to a felony, and with gross negligence or driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

Vehicular Code 23153(a)

23153. (a) It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

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. 43167-0-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Michelle Hyer, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 25, 2017

WASHINGTON APPELLATE PROJECT

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