

No. 64012-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SERGIO REYES-BROOKS,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
THOMAS M. KUMMEROW

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

The Honorable Catherine Shaffer

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

 1. THE TRIAL COURT’S INSTRUCTION 24 MISSTATED THE LAW ON JURY UNANIMITY REQUIRING THE FIREARM ENHANCEMENT BE STRICKEN 4

 2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR SENTENCING FACTOR,” RATHER THAN AS AN “ELEMENT,” DEPRIVES MR. REYES-BROOKS OF THE EQUAL PROTECTION OF THE LAW 7

 3. THE TRIAL COURT DEPRIVED MR. REYES-BROOKS OF HIS 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. 15

 a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant’s maximum possible sentence. 15

 b. These issues are not controlled by prior by federal decisions. 18

 c. The trial court denied Mr. Reyes-Brooks his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. 23

E. CONCLUSION25

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI..... passim

U.S. Const. amend. XIV passim

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 12 1, 4, 11

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219,
140 L.Ed.2d 350 (1998) passim

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.2d 435 (2000) passim

Blakely v. Washington, 542 US. 296, 124. S.Ct. 2531, 159 L.Ed.2d
403 (2004) passim

Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388
(2000) 11

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 105
S.Ct. 3249, 87 L.Ed.2d 313 (1985) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 16

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d
311 (1999) 19

McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d
67 (1986) 20

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 Ed.2d 556
(2002) 17, 20

United States v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132
L.Ed.2d 444 (1995) 16

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006) 9

WASHINGTON CASES

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010)..... 5, 6

State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978)..... 4

State v. Furth, 5 Wn.2d 1, 104 P.2d 925 (1940)..... 22, 23

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)..... 4, 5, 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 16

State v. Langstead, 155 Wn.App. 448, 228 P.3d 799 (2010) 11

State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996), *cert. denied sub nom, Manussier v. Washington*, 520 U.S. 1201 (1997) 23

State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)..... 9

State v. Roswell, 165 Wn.2d 186, 196 P.3d 705 (2008).. 7, 9, 11, 14

State v. Smith, 117 Wn.2d 117, 814 P.2d 652 (1991) 12

State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003), *cert. denied, Smith v. Washington*, 124 S.Ct. 1616 (2004)..... 7, 21

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) 4

State v. Thorne, 129 Wn.2d 736, 921 P.2d 514 (1994)..... 12, 13

State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) 23

State v. Wheeler, 145 Wn.2d 116, 34 P.2d 799 (2001) 7, 21

STATUTES

RCW 9.68.090 9, 10

RCW 9.94A.570 24

RCW 9A.20.021	9, 21
OTHER AUTHORITIES	
Washington Sentencing Guidelines Comm'n, <u>Adult Sentencing Manual 2008</u>	10
OTHER STATE STATUTES	
Ind. Code Ann. § 35-50-2-8	23
Mass. Gen. Laws Ann. ch. 278 § 11A	23
N.C. Gen. Stat. § 14-7.5	23
S.D. Laws § 22-7-12	23
W.Va. Code An. § 61-11-19	23
LAW REVIEWS	
Colleen P. Murphy, <u>The Use of Prior Convictions After <i>Apprendi</i></u> , 37 U.C. Davis L. Rev. 973 (2004)	20

A. ASSIGNMENTS OF ERROR

1. Court's Instruction 24 misstated the law on jury unanimity as it applied to the special verdict.

2. The trial court violated Mr. Reyes-Brooks' Sixth and Fourteenth Amendment rights to a jury trial and due process.

3. The trial court deprived Mr. Reyes-Brooks' the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A jury instruction that requires the jury be unanimous to find the State had not proven the special verdict beyond a reasonable doubt is erroneous and the enhancement must be stricken. Here, the trial court instructed the jury using such an improper instruction. Must this Court order the firearm enhancement stricken?

2. The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of

the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

3. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. Reyes-Brooks' Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the

otherwise-available statutory maximum to life without the possibility of parole?

C. STATEMENT OF THE CASE

Sergio Reyes-Brooks was charged with first degree murder and also with being armed with a firearm. CP 1-2. The trial court instructed the jury in Instruction 24 regarding the firearm special verdict:

You will also be given a special verdict form for count 1. If you find the defendant not guilty of either murder in the first degree or murder in the second degree, do not use the special verdict form. If you find the defendant guilty of either murder in the first degree or murder in the second degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.* In order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 407 (emphasis added).

The jury subsequently found Mr. Reyes-Brooks guilty of first degree murder and answered "yes" to the special verdict. CP 408-09. The court imposed a 60-month sentence firearm enhancement based upon the jury's finding. CP 457.

The court also determined by a preponderance of the evidence that Mr. Reyes-Brooks had two prior qualifying convictions, and as a result, found him to be a persistent offender and sentenced him to a term of life imprisonment without the possibility of parole. CP 457, 460; 8/7/2009RP 35.

D. ARGUMENT

1. THE TRIAL COURT'S INSTRUCTION 24 MISSTATED THE LAW ON JURY UNANIMITY REQUIRING THE FIREARM ENHANCEMENT BE STRICKEN

The right to a jury trial includes the right to have each juror reach his or her own verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). The Washington Constitution requires unanimous jury verdicts in criminal cases. Art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Regarding special verdicts, the jury must be unanimous to find the State has proven the special finding beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). But, the jury does not have to be unanimous to find that the State had not proven the special finding

beyond a reasonable doubt. *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

The Supreme Court has held that jury unanimity is not required to answer “no” to a special verdict question. *Goldberg*, 149 Wn.2d at 894. In *Goldberg*, upon discovering that jurors were not unanimous in answering “no” to a special verdict question, the trial court ordered the jurors to resume deliberations until they reached unanimity. *Id.* at 891. The Supreme Court concluded that the trial court erred in doing so, holding that jury unanimity is not required to answer “no” to a special verdict. *Id.* at 894.

Subsequently, in *Bashaw*, the trial court instructed the jury in precisely the same manner regarding the special verdict: “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” 169 Wn.2d at 139. The Court in *Bashaw* found the instruction an incorrect statement of the law and ordered the special verdict stricken:

Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the *presence* of the special finding increasing the maximum penalty, [citation omitted], it is not required to find the *absence* of such a finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147 (emphasis added). Further, the Court ruled such an error can essentially never be harmless even where as in *Bashaw*, the jury was polled and the jurors uniformly affirmed their verdict:

This argument misses the point. The error here was the *procedure* by which unanimity would be inappropriately achieved.

...
The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

The same instruction at issue in *Bashaw* was used in Mr. Reyes-Brooks' trial. CP 37.¹ As in *Bashaw*, the simple use of this improper instruction by the trial court was error. In addition, as in *Bashaw*, the error was not harmless since it is impossible to determine what would have occurred had the jury been properly

¹ While Mr. Reyes-Brooks did not object to Court's Instruction 24, neither the defendant in *Goldberg* nor in *Bashaw* objected to the trial court's instruction or the special verdict form and raised the issue for the first time on appeal. Nevertheless, the Supreme Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94. As a consequence, Mr. Reyes-Brooks may raise this issue for the first time on appeal.

instructed. This Court must vacate the firearm enhancement special verdict.

2. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN “AGGRAVATOR” OR SENTENCING FACTOR,” RATHER THAN AS AN “ELEMENT,” DEPRIVES MR. REYES-BROOKS 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 recently held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-

element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.* While *Roswell* correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which *Roswell* termed “sentencing factors,” is neither persuasive nor correct.

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

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

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

In *Roswell*, the Court considered the crime of communication with a minor for immoral purposes (CMIP). *Id.* at 191. The Court found that in the context of this and related offenses,² 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

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

imposed consistent with the dictates of the Sixth Amendment. *Blakely v. Washington*, 542 US. 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 3³ 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. 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

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

(“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.⁴

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);

⁴ Division One’s decision in *State v. Langstead*, 155 Wn.App. 448, 228 P.3d 799 (2010) is simply inapposite. The question is not whether there is a rational basis to treat recidivist elements differently from other elements of offenses. Instead, the only question is whether there is a rational basis to treat recidivism differently for one class of crimes than another. Division One acknowledged that in *Roswell*, the Supreme Court held that certain offenders are entitled to have prior convictions proven to a jury beyond a reasonable doubt because in some instances, prior convictions are labeled “elements.” *Id.* at 455-56. Yet, in the circumstance of persistent offender sentencing, prior convictions are considered “aggravators” and the State must prove their existence merely by a preponderance of the evidence. In each instance the legislature has plainly and legitimately elected to punish recidivists more harshly. But that common purpose highlights rather than justifies the disparate treatment. The distinction cannot be justified based by an argument that persons with a prior enhancement pose a greater danger and thus longer sentences for those people should be easier to obtain. The same could be said of an effort to eliminate the notice right for person charged with more serious offense on the belief that it will thereby be easier to obtain convictions of people with greater potential culpability. That result would plainly be intolerable and it cannot justify the denial of constitutional protections here. *Langstead* does not address nor justify this distinction among recidivists.

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. Thome*, 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. *Thome*, 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. The Court should strike Mr. Reyes-Brooks’ persistent offender sentence and remand for entry of a standard range sentence.

3. THE TRIAL COURT DEPRIVED MR. REYES-BROOKS OF HIS 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.

The trial court denied Mr. Reyes-Brooks the right to a jury trial when it did not charge the jury with finding beyond a reasonable doubt that Mr. Reyes-Brooks had two qualifying prior convictions for most serious offenses, and instead made that determination on its own and only by a preponderance of the evidence. Mr. Reyes-Brooks' sentence as a persistent offender therefore deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial and must be vacated.

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).

In recent cases, 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. 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. These issues are not controlled by prior by federal decisions. The United States Supreme Court held in *Almendarez-Torres v. United States* that recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Almendarez-Torres* pleaded guilty and admitted his prior convictions, but argued that his prior convictions should have been included in the indictment. 523 U.S. at 227-28. The Court determined Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. *Id.* The Court concluded the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercised their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. *Id.* at 244-45.

Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. *Id.* at 246.

Since *Almendarez-Torres*, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. *Blakely*, 542 U.S. at 301-02; *Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

Apprendi distinguished *Almendarez-Torres* because that case only addressed the indictment issue. 530 U.S. at 488, 495-96.

Apprendi noted “it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated *Almendarez-Torres* as a “narrow exception” to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. *Id.*

In *Blakely*, *Apprendi*, and *Jones*, the Court stated that, “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.”

This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the *Apprendi* rule.

Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under *Apprendi*. Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in *Almendarez-Torres*, wrote in a concurring opinion in *Apprendi* that both *Almendarez-Torres* and its predecessor, *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. 530 U.S. at 499. Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. *Id.* at 499-519; accord, *Ring*, 536 U.S. 610 (Scalia, J., concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing factors, or

Mary Jane – must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the *Almendarez-Torres* decision. *Smith*, 150 Wn.2d 135 (addressing *Ring*); *Wheeler*, 145 Wn.2d at 121-24 (addressing *Apprendi*). The Washington Supreme Court, however, has felt obligated to “follow” *Almendarez-Torres*. *Smith*, 150 Wn.2d at 143; *Wheeler*, 145 Wn.2d 123-24. Since *Almendarez-Torres* only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on other grounds. Moreover, the *Blakely* decision makes clear that the Supreme Court’s protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. *Blakely*, 542 U.S. at 305.

Further, the reasons given by *Almendarez-Torres* to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the POAA. First, *Almendarez-Torres* looked to the

legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not establish the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; *State v. Furth*, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Mr. Reyes-Brooks' maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in *Almendarez-Torres* has been marginalized out of existence. This Court should revisit Washington's blind adherence to that now-disfavored decision and remand for a jury determination of the prior convictions.

c. The trial court denied Mr. Reyes-Brooks his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. *Almendarez-Torres* 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); *Furth*, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt. Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An. § 61-11-19.

For several reasons, *Almendarez-Torres* does not answer the question whether Mr. Reyes-Brooks was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he 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, Mr. Reyes-Brooks’ prior convictions led to a mandatory sentence infinitely 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.

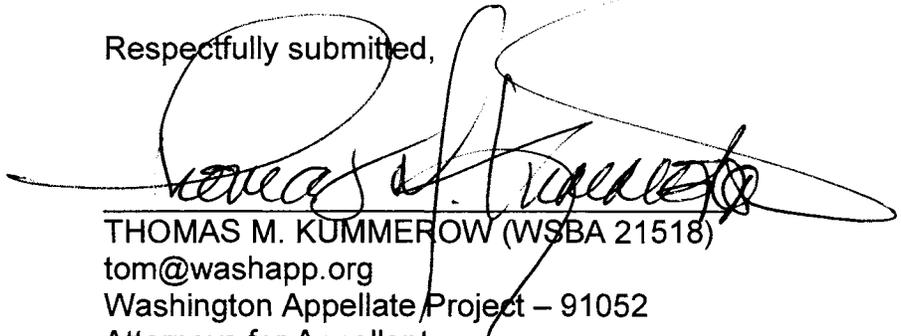
The SRA eliminated a sentencing court’s discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge’s finding regarding sentencing factors. Mr. Reyes-Brooks was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

E. CONCLUSION

For the reasons stated, Mr. Reyes-Brooks submits this Court must order the firearm enhancement stricken, and/or reverse his sentence and remand for resentencing to a standard range sentence.

DATED this 7th day of October 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is highly cursive and extends above and below the line.

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

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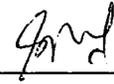
STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.) NO. 64012-7-I
)
 SERGIO REYES-BROOKS,)
)
 Appellant.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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