

NO. 39428-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RONALD JAMES CHENETTE,

Appellant.

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger Bennett, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove appellant knowingly and voluntarily waived his rights, and his statements should have been suppressed.

2. Imposition of a persistent offender sentence deprived appellant of his Sixth and Fourteenth Amendment rights to a jury trial and due process.

3. Classification of appellant's prior convictions as sentencing factors rather than elements deprived him of equal protection guaranteed by the state and federal constitutions.

Issues pertaining to assignments of error

1. Appellant was apprehended by a police dog and transported to the hospital, where his injuries were treated. At the time of his arrest he was agitated, argumentative, and abusive, and in the ambulance he said he did not understand his rights. After his injuries were sutured and a drain tube inserted, however, he was lighthearted, pleasant, and he agreed to talk to the officer. Where the State failed to prove that appellant's change in demeanor and attendant agreement to waive his rights were not the product of coercion or medication, should appellant's statements have been suppressed?

2. Were appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process 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?

3. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances the prior convictions are labeled "elements," requiring they be proven to a jury beyond a reasonable doubt, and in other instances they are termed "aggravators" or "sentencing factors," permitting the judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, does the arbitrary classification deny appellant equal protection?

B. STATEMENT OF THE CASE

1. Procedural History

On October 25, 2007, the Clark County Prosecuting Attorney charged appellant Ronald James Chenette with one count of harming a police dog, alleging he was armed with a firearm, and one count of unlawful possession of a firearm in the first degree. CP 1-2; RCW 9A.76.200(1); RCW 9.41.040(1)(a). Chenette entered a guilty plea to the firearm charge and the case proceeded to jury trial before the Honorable

Roger Bennett on the remaining count. CP 14-23. The jury returned a guilty verdict and a special verdict finding Chenette was armed with a firearm during the commission of the crime. CP 74-75. The court found Chenette was a persistent offender and sentenced him to life without the possibility of early release. CP 88-89. Chenette filed this timely appeal. CP 153.

2. Substantive Facts

Ronald Chenette suffers from chronic paranoid schizophrenia, the worst and most severe mental disorder. 3RP<sup>1</sup> 334, 345. When not medicated, he experiences delusions, auditory hallucinations, and bizarre ideas about the world around him. 3RP 334-35, 338. He does not know from one minute to the next whether something really happened or he just thought it happened. 3RP 349. A person with schizophrenia has difficulty distinguishing between the internal and external world, his mood becomes detached from normal behavior, and he may express emotions out of context, such as laughing when hearing that someone died. 3RP 347. In addition, Chenette has an alcohol problem, and the use of alcohol makes his symptoms worse. 3RP 353-54.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—11/10/08; 2RP—11/12/08; 3RP—11/13/08; 4RP—11/14/08; 5RP—5/15/09.

Chenette was not taking medication in October 2007. 3RP 451-53. He was unemployed, and he lived with his parents, except when he was drinking. 3RP 438-41.

On October 23, 2007, Chenette spent the morning drinking with Richard Countryman near an abandoned van on Chenette's parents' property. 2RP 249, 260. At one point, Chenette's father saw Countryman leave and return a short time later with a gun. 3RP 445. Chenette and Countryman played with the gun for a while, pretending to shoot cops. 3RP 449. Sometime that afternoon, Countryman called 911 and reported that a mentally unstable person was armed with a handgun and making statements about shooting police. 2RP 85, 140, 189, 251,261.

As Chenette and Countryman walked to the general store to buy more beer, numerous law enforcement officers responded to the area, set up a perimeter, and attempted to locate the subjects. 2RP 76, 85, 140, 189, 251-52. After Chenette and Countryman were seen walking along the railroad tracks, several officers commandeered an unmarked railroad truck and headed in their direction. 2RP 77, 88, 116, 129. The officers in the truck spotted Chenette and Countryman as they walked toward a trailer park and proceeded toward them slowly. When the officers were 300 to 400 yards away, they started shouting commands for the men to stop and get down. 2RP 88-89.

Before the officers were able to make contact, two men came out of the trailer park and started throwing rocks at Chenette. 2RP 89-90, 117. The officers continued to approach and call out commands to get down. 2RP 92, 118. Countryman and the two men from the trailer park understood they were police and immediately got down on the ground, but Chenette ran off into the woods. 2RP 93-94, 118, 193, 254.

Chenette stayed hidden for the most part over the next few hours, despite announcements from the officers that he was surrounded and needed to give up. 2RP 95, 153; 3RP 287, 289. He was spotted twice as he walked to the edge of a clearing, but each time he retreated into the woods. 2RP 121-23. Finally, the SWAT team decided to send Dakota, a police dog, in after Chenette. 2RP 153, 170, 181; 3RP 390. Before releasing Dakota, his handler announced that Chenette had five seconds to make his presence known, or a police dog would be sent to find him. 3RP 396. The handler waited 20 to 25 seconds, received no response from Chenette, and then released the dog. 3RP 394. Dakota ran into a steep gully and disappeared from view. 2RP 163, 171; 3RP 394. Very shortly after Dakota was released, the officers heard a gunshot. 2RP 163-64; 3RP 394. Dakota was later found in the gully with a gunshot wound to the head. 2RP 223; 3RP 277. He wore no markings indicating he was a police dog. 3RP 403.

Deputy Alan Earhart, a K-9 officer, was in a perimeter position with his dog when he heard the gunshot. 3RP 421. A short time later, he saw Chenette come out of the woods. Earhart ordered him to get down, and when he did not, Earhart released his dog. 3RP 422. The dog caught Chenette, bit his right arm, and held him. Earhart waited for several SWAT personnel to arrive before he ordered the dog to free Chenette. 3RP 423. Dakota's handler approached, saw Chenette struggling with the officers and the dog, and decided more force was needed. He kicked Chenette in the shoulder and then in the chest. 3RP 396. Chenette would not put his hands behind his back, and a Taser was applied. 2RP 125. Eventually Chenette was handcuffed, but he continued to struggle against the officers who tried to restrain him, kicking and screaming. 2RP 158, 182. After Chenette was restrained, one of the officers asked about Dakota, and Chenette started to laugh. 2RP 126. The officers retrieved a gun, a set of headphones, and a walkman from Chenette. 2RP 197, 232, 234.

Chenette sustained cuts and abrasions from a dog bite to the back of his upper left thigh, an injury to his abdomen, and a dog bite to his right arm. 2RP 227, 229. Because of his injuries, Chenette was transported to the hospital after he was taken into custody. 2RP 34. The officer who rode with him in the ambulance advised him of his rights, but Chenette

said he did not understand them. 2RP 35. The officer asked Chenette what he did not understand, but when Chenette said “never mind” the officer proceeded to question him rather than further explaining his rights. 2RP 35. During the trip to the hospital, Chenette asked the medical personnel about his blood pressure and comment that it seemed high. 2RP 36.

Earhart questioned Chenette at the hospital after his wounds had been sutured and a drain tube inserted. 2RP 54. Chenette was very agreeable at that point, and when Earhart advised him of his rights Chenette said he understood them and was willing to talk. 2RP 49. They had what Earhart described as a “very lighthearted conversation” in which Chenette followed along and gave appropriate answers, unlike their earlier encounter in the woods when Chenette was agitated, argumentative, upset, and using foul language. 2RP 52-53. Earhart did not know what medication Chenette had been administered, but he noted Chenette’s change in demeanor. 2RP 54.

During this conversation, Chenette told Earhart that a large black dog had bitten him. When Earhart said that was his dog, Chenette responded that Earhart was lucky Chenette did not have a blade, because the dog would have been dead. 3RP 425-26. Earhart then asked Chenette about the injury to his leg, and Chenette asked Earhart what he would do if

he was in someone's yard and the homeowner had their dog attack him. He told Earhart he would protect himself. 3RP 426. When Earhart asked if that was what he did with the dog that got shot, Chenette said he did not know what Earhart was talking about. 3RP 426.

Prior to trial the defense argued that Chenette's statements to Earhart should be suppressed because the State did not prove he knowingly and voluntarily waived his rights. Counsel pointed out that Chenette had said in the ambulance that he did not understand his rights, and no one had attempted to clarify them. Chenette's extreme change in demeanor indicated he had been given medication when his injuries were treated, and the State failed to prove that his willingness to talk after that was not induced by the medication. 2RP 59-60.

The court ruled the statements admissible, however. It found that Chenette was advised of his rights and said he understood them, and he was coherent and cooperative. The court found the evidence did not show Chenette was under the influence of drugs and instead attributed his change in demeanor to the fact that he no longer had a dog attached to him. 2RP 61-62. The court did not enter written findings of fact or conclusions of law.

Chenette's defense was that the State failed to prove he knew Dakota was a police dog or that he acted with malice in shooting him.

4RP 489. The defense presented testimony about Chenette's schizophrenia and the fact that he was not taking medication at the time, and defense counsel cross examined the State's witnesses regarding the likelihood that Chenette did not hear or understand the announcements that a police dog was being released to capture him.

The State relied on Chenette's statements to Earhart to show his knowledge and intent. The prosecutor argued in closing that Chenette had wanted to hurt Earhart's dog like he hurt Dakota, but he was unable to, and Chenette said Earhart was lucky he did not have a knife. 4RP 483. The prosecutor further argued that the jury could look to Chenette's words to show he clearly understood his circumstances, contending Chenette's statement about protecting himself from a homeowner's dog was an analogy for his situation. 4RP 484. Again in rebuttal the prosecutor relied on Chenette's statement that he would have killed Earhart's dog, arguing this showed Chenette knew Dakota was a police dog but just did not care. 4RP 504.

### 3. Sentencing Facts

The jury found Chenette guilty of harming a police dog. CP 74. Because the jury also found Chenette was armed with a firearm during the commission of the crime, his offense is classified as a most serious offense. CP 75; RCW 9.94A.030(29)(t). The State alleged that Chenette

was a persistent offender based on prior convictions of second degree murder and second degree assault. CP 81-83.

At sentencing, the State presented testimony from a fingerprint examiner who compared fingerprints from a booking card in Chenette's name dated October 23, 2007, with fingerprints on certified documents related to the prior convictions. 5RP 9-12. The witness who compared the fingerprints was not the person who had created the booking card, however, and she could not testify that the prints on the booking card were taken from the defendant who was in court. 5RP 13, 20.

The court nonetheless found the State had established by a preponderance of the evidence that Chenette had prior convictions for second degree murder and second degree assault, noting that the booking photographs appeared similar to Chenette, and the fingerprint card was created on the date Chenette was arrested. 5RP 28. Concluding Chenette was a persistent offender, the court sentenced him to life without the possibility of parole. 5RP 34; CP 88-89.

C. ARGUMENT

1. THE STATE FAILED TO PROVE CHENETTE KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHTS, AND HIS STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

Once an individual is in police custody, any incriminating statements obtained from that person are presumed involuntary. The State bears the burden of overcoming this presumption. North Carolina v. Butler, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1978); State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

A person who has been advised of his Miranda rights may waive these rights, provided the waiver is made knowingly and intelligently. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R.3d 974 (1966). But if an interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the State to show the individual knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. Miranda, 384 U.S. at 475.

The mere fact that Miranda warnings are read to the suspect does not prove a subsequent confession is voluntary. Rather, voluntariness is determined by examining the totality of the circumstances in which the confession was made. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571

(1984). A trial court's determination of voluntariness should be reversed on appeal where it is not supported by substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

Factors the court may consider in determining whether the defendant voluntarily waived his rights include the defendant's physical condition, age, experience, mental abilities, and the conduct of police. Rupe, 101 Wn.2d at 679, 692. Further, while drug use alone does not render a statement involuntary, it may be a factor in deciding whether the defendant understood his rights and made a conscious decision to forego them. State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996); State v. Lawley, 32 Wn. App. 337, 345, 647 P.2d 530 (conclusion that juvenile appeared to be on drugs raised circumstances which may conflict with knowing and voluntary waiver), review denied, 98 Wn.2d 1002 (1982).

In this case, the State failed to prove that Chenette's free will was intact at the time he agreed to answer Earhart's questions. He had been in police custody for several hours, and he had been questioned multiple times, despite his initial statement that he did not understand his rights. 2RP 25-26, 37, 40. Custodial interrogation is an inherently coercive situation. The Supreme Court recognized in Miranda, that custodial interrogation, by its very nature, "isolates and pressures the individual," "blurs the line between voluntary and involuntary statements," and thereby

heightens the risk that an individual will be deprived of his privilege against compulsory self-incrimination. Dickerson v. United States, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L.Ed.2d 405 (2000); United States v. Haddon, 927 F.2d 942, 946 (7<sup>th</sup> Cir. 1991) (confession secured from a defendant during custodial interrogation is attended with a presumption of coercion).

Further, a defendant's physical and mental condition at the time he is questioned may well influence his will to resist and render his statements involuntary. Reck v. Pate, 367 U.S. 433, 440, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). And a drug induced statement is not the product of rational intellect and free will and must be suppressed. Townsend v. Sain, 372 U.S. 293, 307, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) (remanding for suppression hearing where defendant had been administered drug which could act as truth serum in sufficient doses), overruled on other grounds, Kenney v. Tomayo-Reyes, 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992).

When Earhart read Chenette his rights at the hospital, Chenette agreed that he understood them and agreed to talk. 2RP 49. It is significant, however, that during the time between Chenette's statement in the ambulance that he did not understand his rights and when he agreed to waive them, his injuries had been treated and his demeanor had changed

dramatically. While Chenette had been agitated, argumentative, and abusive at his arrest and mocking and uncooperative in the ambulance, he was very lighthearted, pleasant, and agreeable when Earhart questioned him. 2RP 35, 52, 53. Although Earhart did not know what medications had been administered, he was aware that medical personnel had been working on Chenette, his injuries had been sutured, and a drain tube had been inserted. 2RP 54. Given Chenette's dramatic change in demeanor and his pre-treatment statement that he did not understand his rights, these circumstances suggest that Chenette's earlier resistance to the inherent coercion of custodial interrogation was lowered by the administration of drugs when his injuries were treated. The State did not prove Chenette understood his rights and made a free and rational decision to waive them, and his statements should have been suppressed.

To find a constitutional error harmless, the appellate court must be convinced beyond a reasonable doubt that the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). This standard "allows the appellate court to avoid reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." Id.

The untainted evidence in this case does not necessarily lead to a finding of guilt. To convict Chenette of harming a police dog, the State had to prove he knew or should have known Dakota was a police dog and that he acted with malice when he shot Dakota. See RCW 9A.76.200(1). The evidence showed, however, that Chenette is a paranoid schizophrenic who, without his medication, has difficulty distinguishing between internal thoughts and external experiences. 3RP 334, 347, 349. He spent the day hiding in very dense woods, at the bottom of a ravine, after being pelted with rocks and threatened with guns. 2RP 117, 253; 3RP 277. There were significant questions as to whether the warnings and announcements made by the surrounding law enforcement personnel carried to his location. 2RP 155, 177, 180, 185; 3RP 277, 400. Moreover, Chenette was carrying headphones and a walkman when he was arrested, which could have prevented him from hearing the announcements, and Dakota wore nothing to indicate he was a police dog at the time he tracked down and bit Chenette. 2RP 232, 234; 3RP 403. In fact, the State relied heavily on Chenette's statements during closing argument to prove he knew Dakota was a police dog and he acted with malice in shooting him. 4RP 483, 484, 504. Because there is a reasonable possibility these inadmissible statements were necessary to the jury's verdict, the court's error cannot be considered harmless, and Chenette's conviction must be reversed.

2. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED CHENETTE OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

a. **Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's maximum possible sentence.**

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of liberty without due process of law. U.S. Const., amend XIV. The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. U.S. Const., amend. VI. 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 with which he is charged, beyond a reasonable doubt.’” Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (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 that this principle applies not just to the essential elements of the charged offense, but also to the facts labeled “sentencing factors,” if the facts increase the maximum penalty faced by the defendant. For example, in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court held that an exceptional sentence imposed under Washington’s

Sentencing Reform Act was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based on facts that were not found by a 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 on aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to impose a sentence above the statutory maximum after making a factual finding by a preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Supreme Court rejected arbitrary distinctions between sentencing factors and elements of the crime. The Ring Court pointed out that the dispositive question is one of substance, not form. “If a State makes an increase in a 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.” Ring, 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based on the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

**b. This issue is not controlled by prior federal decisions.**

In Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Court held that recidivism was not an element of the substantive crime that needed to be pleaded in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. Almendarez-Torres, 523 U.S. at 246. Almendarez-Torres had pleaded guilty and admitted his prior convictions, but he argued that his prior convictions should have been included in the indictment. Id. at 227-28. The Court determined that Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id.

The Almendarez-Torres Court expressed no opinion, however, as to the constitutionally-required burden of proof of sentencing factors used to increase the severity of punishment or as to whether a defendant has the 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 possible penalty. See e.g. 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). Moreover, 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.” Apprendi, 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find beyond a reasonable doubt any fact that increases the statutory maximum sentence for a crime. 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 cannot be read as holding that prior convictions are necessarily excluded from the Apprendi rule, however. 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 the five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that Almendarez-Torres was wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J., concurring). Justice Thomas suggested that, rather than focusing on whether something is a sentencing factor or an element of the crime, the Court should determine if the fact, including a prior conviction, is used as a basis for

imposing or increasing punishment. Id. at 499-519; accord Ring, 536 U.S. at 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 calls 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. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring), cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.3d 799 (2001) (addressing Apprendi). Nonetheless, the Washington Supreme Court has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d at 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, Blakely makes clear that due process protections extend to sentencing factors that increase a sentence above the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

The judicial finding by a preponderance of the evidence of the sentencing factor used to elevate Chenette's punishment to life without the possibility of parole violates due process and Chenette's right to a jury trial. Chenette's sentence must therefore be vacated.

3. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATES CHENETTE'S RIGHT TO EQUAL PROTECTION.

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 prior-conviction-as-aggravator and 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.

In addressing arguments that one act is an element and another merely a sentencing fact, the United States 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, 530 U.S. at 476. 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, 120 S.Ct. 2348 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

In Roswell, the Court considered the crime of communication with a minor for immoral purposes. Roswell, 165 Wn.2d at 191. The Court found that in the context of this and related offenses<sup>2</sup>, proof of a prior conviction functions as an “elevating element,” in that it elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime. Id. at 191-92. But 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 by classifying the crime as a class C felony rather than a gross misdemeanor, as in the case

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<sup>2</sup> 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.

of CWMIP<sup>3</sup>, is not fundamentally different from a recidivist fact which actually alters the maximum punishment from 78 months to life without the possibility of parole<sup>4</sup>, as in Chenette's case.

In fact, the Legislature has expressly provided that the purpose of the additional conviction "element" is to elevate the penalty for the substantive crime. See RCW 9.68.090 ("Communication with a minor for immoral purposes – Penalties"). 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 classifications, therefore, violates equal protection.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. Thorne, 129 Wn.2d at 771. The

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<sup>3</sup> RCW 9.68.090 (communication with minor for immoral purposes is gross misdemeanor unless accused has prior conviction, in which case it is class C felony)

<sup>4</sup> Chenette was convicted of harming a police dog, a class C felony, with an 18 month firearm enhancement. RCW 9A.76.200(3); RCW 9.94A.533(3)(c).

Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore the rational basis test applies. 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 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the Persistent Offender Accountability Act 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 771-72.

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 Class C 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 instance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

The legislative classification which permits this result is wholly arbitrary. The Roswell Court concluded that the recidivist fact 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.” Roswell, 165 Wn.2d at 192 (emphasis in original). But, as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether one has a prior sex conviction or not; the prior offense merely alters the maximum punishment to which the offender is subject. Id. (“If all other elements had been proved he could have been convicted of only a misdemeanor.”). So, too, harming a police dog is a crime whether one has two prior convictions for most serious offenses or not.

Because the recidivist fact here operates in the same 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 Chenette’s persistent offender sentence and remand for entry of a standard range sentence.

D. CONCLUSION

The State failed to prove Chenette knowingly and voluntarily waived his rights, and his statements should have been suppressed. Because the error was not harmless beyond a reasonable doubt, the Court should reverse his conviction. Further, imposition of the persistent offender sentence violated Chenette's rights to due process, a jury trial, and equal protection, and the sentence must be vacated.

DATED this 2<sup>nd</sup> day of November, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Ronald Chenette*, Cause No. 39428-6-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
November 2, 2009

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