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STATE OF WASHINGTON
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DEPUTY

No. 40772-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Alvin Witherspoon,

Appellant.

Clallam County Superior Court Cause No. 09-1-00496-9

The Honorable Judge Craddock Verser

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490

Olympia, WA 98507

(360) 339-4870

FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. Mr. Witherspoon's robbery conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The prosecution failed to prove "[t]hat force or fear was used by [Mr. Witherspoon] to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking..."
3. The prosecution failed to present independent evidence establishing the corpus delicti of robbery.
4. The trial court erred by admitting Mr. Witherspoon's statements absent sufficient independent evidence proving the corpus delicti of robbery.
5. Mr. Witherspoon's tampering conviction violated his right to a unanimous jury under Wash. Const. Article I, Section 21.
6. The trial court erred by instructing the jury on three alternative means of committing Tampering with a Witness.
7. The trial court erred by giving Instruction No. 16.
8. The trial court erred by giving Instruction No. 17.
9. Mr. Witherspoon's robbery conviction violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charge against him.
10. Mr. Witherspoon's robbery conviction violated his state constitutional right to notice of the charge against him, under Wash. Const. Article I, Sections 3 and 22.
11. The Second Amended Information was deficient because it failed to outline specific facts describing Mr. Witherspoon's alleged conduct.
12. Judge Verser violated the appearance of fairness doctrine.
13. Judge Verser provided some evidence of his own potential bias.

14. Judge Verser should have recused himself from presiding over Mr. Witherspoon's trial and sentencing.
15. Mr. Witherspoon was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
16. Defense counsel was ineffective for failing to object to the admission of Mr. Witherspoon's statements under the corpus delicti rule.
17. Defense counsel was ineffective for failing to propose instructions on the lesser-included offense of theft.
18. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Witherspoon and his court-appointed attorney.
19. The trial judge erred by ignoring Mr. Witherspoon's request for appointment of new counsel.
20. The trial court erred by sentencing Mr. Witherspoon to life in prison without possibility of parole.
21. Mr. Witherspoon's life sentence violates the state constitution's prohibition against cruel punishment.
22. Mr. Witherspoon's life sentence is grossly disproportionate to his conduct.
23. Mr. Witherspoon's life sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment.
24. The evidence was insufficient to prove that Mr. Witherspoon had two prior strike convictions.
25. Mr. Witherspoon's life sentence was imposed in violation of his Fourteenth Amendment right to equal protection.
26. Mr. Witherspoon's life sentence was imposed in violation of his state constitutional right to equal protection.
27. Mr. Witherspoon's life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to a jury trial.

28. Mr. Witherspoon's life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to proof beyond a reasonable doubt.

29. Mr. Witherspoon's life sentence was imposed in violation of his state constitutional right to due process.

30. The trial court erred by entering Finding of Fact No. 2.1 in the Judgment and Sentence.

31. The trial court erred by entering Finding of Fact No. 2.2 in the Judgment and Sentence.

32. The trial court erred by entering Finding of Fact No. 2.3 in the Judgment and Sentence.

33. The trial court erred by entering Finding of Fact No. II in support of its Persistent Offender Sentence.

34. The trial court erred by entering Finding of Fact No. III a, b, and c in support of its Persistent Offender Sentence.

35. The trial court erred by entering Conclusion of Law No. II in support of its Persistent Offender Sentence.

36. The trial court erred by entering Conclusion of Law No. III in support of its Persistent Offender Sentence.

37. The trial court erred by entering Conclusion of Law No. IV in support of its Persistent Offender Sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for first-degree robbery requires proof that the accused person used or threatened to use force, violence, or fear of injury to accomplish the alleged crime. Here, the prosecution relied on Pittario's testimony that Mr. Witherspoon said he had a gun as evidence that Mr. Witherspoon used or threatened to use force, violence, or fear of injury to commit the robbery. Did Mr. Witherspoon's conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

2. When multiple alternative means of committing a crime are submitted to the jury, the accused person is constitutionally entitled to explicit juror unanimity as to the means, unless substantial evidence supports each alternative. Here, the state introduced sufficient evidence to establish only one of the three alternative means of Tampering with a Witness submitted to the jury. Was Mr. Witherspoon's state constitutional right to a unanimous verdict infringed by the lack of express juror unanimity as to the means of committing the charged crime?

3. An accused person is constitutionally entitled to be informed of the charges against him. The Second Amended Information in this case did not outline any specific facts describing Mr. Witherspoon's alleged conduct. Was Mr. Witherspoon denied his constitutional right to adequate notice of the charge of robbery under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22?

4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Witherspoon's defense counsel unreasonably failed to request instructions on the lesser-included offense of theft. Was Mr. Witherspoon denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. An accused person has a right to be represented by conflict-free counsel. When Mr. Witherspoon asked for the appointment of new counsel and described problems in the attorney-client relationship, the trial court discouraged him from explaining the problem further and ignored his request. Did the court's refusal to inquire into Mr. Witherspoon's relationship with his attorney violate his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

6. An accused person is guaranteed the right to a jury determination beyond a reasonable doubt of any fact necessary to increase punishment above the otherwise-available statutory maximum. The trial judge, using a preponderance standard, found that Mr. Witherspoon had two prior strike offenses, elevating his sentence to life without possibility of parole. Does the life sentence violate Mr. Witherspoon's Sixth and Fourteenth Amendment right to due process and to a jury trial?

7. Equal protection prohibits discrimination between similarly situated people. In a variety of circumstances, the legislature increased the penalties for offenders with certain prior convictions. Does the arbitrary classification of prior convictions as “elements” in some circumstances and as “sentencing factors” in other circumstances violate equal protection under the Fourteenth Amendment and Wash. Const. Article I, Section 12?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Alvin Witherspoon and his pregnant fiancée Violet Conklin went for a drive up Blue Mountain Road, ending up at the home of Rebecca Pittario. RP (4/12/10) 18; RP (4/13/10) 55, 60. Once there, Mr. Witherspoon decided to break in and steal some items. RP (4/13/10) 56, 71. Pittario came home from work and parked next to Mr. Witherspoon’s car, with Conklin still inside his vehicle. RP (4/12/10) 21-22. Mr. Witherspoon came around from the side of the house and asked Pittario about an address. RP (4/12/10) 22; RP (4/13/10) 74.

Mr. Witherspoon held one or both hands behind his back. RP (4/12/10) 23; RP (4/13/10) 75-76. The three people present said different things about whether they talked about his hands behind his back. Pittario said she asked Mr. Witherspoon what he had behind his back, and he said, “A pistol.” RP (4/12/10) 23. She did not see any guns, and she was not afraid. RP (4/12/10) 40, 46. According to Conklin, Pittario asked what was behind his back and he said “Nothing.” RP (4/13/10) 57, 63. Mr. Witherspoon said that Pittario did not ask about why his hands were

behind his back, but that he held them there so she would not see his gloves and become suspicious. RP (4/13/10) 75-76, 80.

Mr. Witherspoon got into his car and drove away. As he did so, Pittario noticed her shoe boxes in the back of his car. RP (4/12/10) 24. Pittario followed him, chasing him at high speeds down a curvy hill while on the phone with 911. RP (4/12/10) 25-27. Mr. Witherspoon removed his latex gloves and Conklin threw them out the window. RP (4/13/10) 58.

Pittario owned guns, and all of them were still in her home after the burglary. RP (4/12/10) 44. Not long after the burglary, police surrounded Mr. Witherspoon's trailer, arrested him and Conklin, and obtained a search warrant. RP (4/12/10) 73-80; RP (4/13/10) 10-23. They found multiple items that Pittario later identified as hers. RP (4/12/10) 34-36, 83-91. They did not find any firearms – either in the trailer or in Mr. Witherspoon's car. RP (4/12/10) 99; RP (4/13/10) 25.

The state charged Mr. Witherspoon with Robbery in the Second Degree, Residential Burglary, and Tampering with a Witness. CP 21-23.

The robbery count included the following language:

On or about the 12th day of November, 2009, in the county of Clallam, State of Washington, the above-named Defendant, with intent to commit theft thereof, did unlawfully take personal property that the Defendant did not own from the person of another, to-wit: B. Pittario, or in said person's presence against said person's will by the use or threatened use of immediate force, violence or fear of injury to said person or the property of the said person or the person or property of another; contrary to Revised

Code of Washington 9A.56.210(1) and 9A.56.190, a Class b felony...
CP 21.

Regarding the Tampering charge, the state alleged that Mr. Witherspoon called Conklin from the jail to urge her to lie about what they had done.
CP 22.

At a pretrial hearing on December 30, 2009, Mr. Witherspoon's attorney Loren Oakley moved to withdraw, citing a conflict of interest. Conklin had contacted the attorney, but they had not discussed the case, and the concern was that Mr. Oakley might need to testify about this contact. Letter from Defendant, Motion to Withdraw, Supp. CP; RP (12/30/09) 3-12. The court denied the motion, indicating that another attorney in the public defender's office could take over the case if there was a conflict. RP (12/30/09) 4-6. Mr. Witherspoon asked the court to appoint a new attorney, noting that his attorney was not ready for trial and he wanted an investigator appointed. The court made no further comment. RP (12/30/09) 6-12; Letter from Defendant, Motion to Withdraw, Supp. CP.

On the first day of trial, the state raised an objection regarding late discovery. Apparently, an investigator had been appointed and found a pair of gloves by the side of the road as described by Mr. Witherspoon. RP (4/12/10) 3-4. Mr. Oakley said the notice to the prosecutor had slipped his

mind due to his other responsibilities. RP (4/12/10) 4. When the court declined to exclude the evidence, the state requested a continuance so that they could test the gloves for DNA evidence. RP (12/30/10) 5. The court denied that motion, finding that there could be no prejudice since the gloves did not represent important evidence. RP (4/12/10) 6-9.

Just prior to bringing in the prospective jurors, Judge Craddock Verser said that he had represented a “Witherspoon” maybe fifteen years ago when a public defender in Clallam County. RP (4/12/10) 15-216. Mr. Witherspoon objected, and without response, Judge Verser had the jury panel enter the courtroom for jury selection. RP (4/12/10) 16.

During the trial, Pittario testified that Mr. Witherspoon did not threaten her and she was not afraid of him. RP (4/12/10) 46, 48. She said she did not fear injury, but only feared she would lose some of her property. RP (4/12/10) 48. When she testified that Mr. Witherspoon told her he had a pistol, the defense did not object. RP (4/12/10) 23.

The state played a recording alleged to be a call between Mr. Witherspoon and Conklin over defense objection. RP (4/13/10) 32-42. In the call, the man asked the woman not to talk to the sheriff any more, telling her that he would rather take a sentence than have her do one, and that he told them she was just his passenger. They discussed where she could stay if the man got a prison sentence and mentioned a person named

“Burl,” who would let her use his trailer. The man urged the woman to tell Burl about the hitchhiker. The man reminded the woman that the hitchhiker had asked for a ride, and had told them about problems his girlfriend was having. The man talked about accompanying the hitchhiker to a residence, in order to retrieve what they thought were his belongings. He also talked about being surprised when the hitchhiker fled after a woman arrived at the residence. Exhibit 40, Supp. CP.

Mr. Witherspoon moved to dismiss the charge of Robbery in the Second Degree after the state rested, arguing that there was no proof of use of force or fear. RP (4/13/10) 43. The court denied the motion, citing Pittario’s testimony that Mr. Witherspoon claimed to have a gun. The court noted that Pittario’s lack of fear and the absence of an actual gun did not defeat the robbery charge. RP 94/13/10) 47. Mr. Witherspoon also moved to dismiss the charge of Tampering with a Witness, since there was no proof that Mr. Witherspoon knew Conklin would be called as a witness. This motion was also denied. RP (4/13/10) 44, 46.

Mr. Witherspoon testified in his own defense, telling the jury he used no force or threats, and that his goal once Pittario arrived was to avoid any kind of confrontation. RP (4/13/10) 75, 81-82. The defense investigator testified that he had driven the route that Mr. Witherspoon drove away from the burglary, and found two blue latex gloves in the

grass. RP (4/13/10) 87-102.

Mr. Witherspoon's attorney did not propose any jury instructions regarding lesser included alternatives.

The court instructed the jurors that one element of robbery was "that the taking [of the property] was against that person's will by the Defendant's use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of another..." Instruction No. 11, Supp. CP. The court gave an elements instruction regarding the tampering charge which included "that the Defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation..." Instruction No. 17, Supp. CP.

The jury voted to convict for the charges of Robbery in the Second Degree, Residential Burglary, and Tampering with a Witness. CP 5.

The state alleged Mr. Witherspoon had two prior strike offenses, and recommended a life sentence. The Department of Corrections filed a PreSentence Investigation Report. Upon reviewing it, Judge Verser noted:

I read the presentence report I got faxed to me on Friday and I want to indicate that the whole – the first page of that – I guess it's page 5, sentencing consideration, is inaccurate as is the presentence investigation

reports assertion that Mr. Witherspoon was convicted of robbery while armed with a deadly weapon. There are a lot of inaccuracies in the presentence report and I wanted to clarify for the record that that's not what I'm relying on at all.

RP (5/24/10) 2.

The prosecutor called Officer Wright to testify about fingerprint comparisons he had done. RP (5/24/10) 10-27. The state offered Exhibit 1, which they averred was Mr. Witherspoon's booking card. Mr.

Witherspoon raised a foundation objection, and confirmed that Officer Wright had not been present when the card was completed. RP (5/24/10) 14, 22. The objection was overruled, and Exhibit 1 was admitted. RP (5/24/10) 21. The name listed on the card was "Alvin Leslie Witherspoon," with a date of birth of 7/22/1974. Sentencing Exhibit 1, Supp. CP.

Exhibit 2 consisted of documents relating to a Snohomish County conviction for Third Degree Assault from 1992. Officer Wright compared Exhibit 2's "poor quality" photocopy of fingerprints to Exhibit 1, and was unable to conclude that the prints from the Judgment and Sentence matched the prints on Exhibit 1. RP (5/24/10) 20, 26-27. The Judgment and Sentence used the name "Alvin Leslie Witherspoon," but did not list a date of birth. Sentencing Exhibit 2, Supp. CP.

Exhibit 3 related to an alleged conviction for Residential Burglary, with a firearm enhancement. The name on the document was "Alvin

Leslie Witherspoon”.¹ Officer Wright reviewed the photocopied prints on the last page of the Judgment and Sentence, and opined that the prints were from the same person as on the print card, Exhibit 1. RP (5/24/10) 20, 23.

The prosecutor also offered Exhibit 4, documents regarding a 1994 Burglary in the First Degree conviction. “Alvin Leslie Witherspoon” was the name on the documents. No date of birth was listed on the Judgment and Sentence; however, the charging document listed a DOB which differed from the date on Exhibit 1. The prosecutor did not ask Officer Wright if he had compared fingerprints from Exhibit 4, and presented no additional evidence tying Exhibit 4 to Mr. Witherspoon. RP (5/24/10) 10-27.

Over defense objection, the court admitted all of the proposed exhibits. RP (5/24/10) 12-21; Sentencing Exhibits 1-4, Supp. CP. The state argued that they had no obligation to prove that Mr. Witherspoon was the person in the exhibits, since he had not sworn under oath that he was not the person at issue in the documents. RP (5/24/10) 30-33. The defense argued that the state had the burden to prove that Mr. Witherspoon had the prior convictions that would require a life sentence, noting that they had

¹ The Judgment and Sentence did not list a date of birth. Exhibit 3, Supp. CP.

only proven he was the person in one of the prior cases. RP (5/24/10) 32.

Judge Verser found that Exhibit 3 related to Mr. Witherspoon and consisted of a strike offense. RP (5/24/10) 33-34. He said that with respect to Exhibit 4, the dates of birth were different and there was no print comparison done, but that he would “take [the prosecuting attorney] at her word” and concluded: “I believe that it is the same person in light of the presentence investigation as well as the certified copy that’s entered.” RP (5/24/10) 34-35. He did not acknowledge his earlier statement that he would disregard the PSI because of its many inaccuracies. RP (5/24/10) 34-35.

Based on these findings, the court sentenced Mr. Witherspoon to a life sentence without the possibility of parole. RP (5/24/10) 35; CP 5-17. Mr. Witherspoon timely appealed. CP 4.

ARGUMENT

I. MR. WITHERSPOON’S ROBBERY CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the

crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove beyond a reasonable doubt “[t]hat force or fear was used” to obtain or retain possession of property.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

Under the court’s “to convict” instruction, the prosecution was obligated to establish, *inter alia*, “[t]hat force or fear was used by the Defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking...” Instruction No. 11, Supp. CP. The plain language of the instruction required the state to prove that Mr. Witherspoon used “force or fear” to meet this element; the state did not have the option of proving a “threatened use” of force or fear (as it did with the preceding element in the instruction).² See Instruction No. 11, Supp. CP. In other words, the

² It is not clear that actual “force or fear” is required under the statute. The statute uses the phrase “such force or fear,” referring back to the “use or threatened use of immediate force,
(Continued)

instruction obligated the prosecution to demonstrate that actual force or actual fear allowed Mr. Witherspoon to obtain or retain possession of the stolen property.

The prosecution did not introduce evidence establishing “[t]hat force or fear was used by [Mr. Witherspoon],” as required under Instruction No. 11, Supp. CP. He did not touch Pittario, and his alleged claim that he had a gun was not sufficient to frighten her, as demonstrated by her testimony and by her decision to chase him as he left her property. RP (4/12/10) 25-27, 40, 46-48.

Under these circumstances, the prosecution failed to establish “[t]hat force or fear was used by [Mr. Witherspoon] to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking.” Instruction No. 11, Supp. CP. The evidence was insufficient to prove robbery under the court’s instructions; accordingly, the robbery conviction must be reversed and the charge dismissed with prejudice. *Smalis, supra*.

violence, or fear of injury.” RCW 9A.56.190. However, the word “such” is missing from the phrase in Instructions Nos. 10 and 11, Supp. CP. An instruction that adds to the government’s burden becomes the “law of the case,” unless the prosecution objects. *State v. Atkins*, 156 Wash.App. 799, 807-811, 236 P.3d 897 (2010). The prosecution did not object to Instructions Nos. 10 and 11; accordingly, they are the law of the case. *Id.*

C. The prosecution failed to establish the *corpus delicti* of robbery by proof independent of Mr. Witherspoon's statements.

An accused person's statements may not be used to prove a criminal offense unless the prosecution establishes the *corpus delicti* of the charged crime by evidence independent of those statements. *State v. Dow*, 168 Wash.2d 243, 227 P.3d 1278 (2010); *State v. Brockob*, 159 Wash.2d 311, 328, 150 P.3d 59 (2006). The rule "requires independent evidence sufficient to establish every element of the crime charged." *Dow*, at 251.

The prosecution must

present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged... The State's evidence must support an inference that *the crime with which the defendant was charged* was committed... [This standard] requires that the evidence support not only the inference that *a crime* was committed but also the inference that *a particular crime* was committed.

Brockob, at 329 (emphasis in original). The independent evidence must support each element of the charged crime. *Id.*; *Dow*, at 254 (noting that the prosecution must "prove every element of the crime charged by evidence independent of the defendant's statement") (citing *Brockob* at 328). The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.³ *Brockob*, at 329. If the

³ In this context, "innocence" refers to innocence of the charged crime, rather than blamelessness. *Brockob*, *supra*.

independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id.*, at 329-330.

In this case, the independent evidence was insufficient to establish the *corpus delicti* of robbery. When taken in a light most favorable to the state, the independent evidence only proved that Mr. Witherspoon had completed a burglary at the time he allegedly claimed to have a firearm. Apart from his statement, nothing suggested that he took property “by the use or threatened use of immediate force, violence, or fear of injury,” or that “[s]uch force or fear [was] used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking.” RCW 9A.56.190. Instead, the sole proof relating to this element consisted of his alleged statement that he had a pistol.⁴ RP (4/12/10) 23. Considering only the independent evidence, the prosecutor’s proof was insufficient.

Brockob, supra.

Accordingly, the prosecution failed to prove the *corpus delicti* by independent evidence. Mr. Witherspoon’s conviction must be reversed, his statements suppressed, and the case dismissed with prejudice. *Dow, supra.*

⁴ Even under the state’s version of events, Mr. Witherspoon’s alleged statement was an assertion of fact in response to a question, not a threat. Thus it was unlike the explicit threats (made prior to the commission of the crime) which the court considered to be part of the independent proof establishing the *corpus delicti* in *State v. Zuercher*, 11 Wash.App. 91, 521 P.2d 1184 (1974).

II. MR. WITHERSPOON’S TAMPERING CONVICTION INFRINGED HIS RIGHT TO A UNANIMOUS JURY UNDER WASH. CONST. ARTICLE I, SECTION 21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler*, at 282.

B. An accused person has a state constitutional right to juror unanimity as to the means of committing the charged crime.

An accused person has a state constitutional right to a unanimous jury verdict.⁵ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wash.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wash.2d 509, 511, 150 P.3d 1126 (2007).

The right to a unanimous verdict also includes the right to jury unanimity on the means by which the defendant is found to have committed the crime. *State v. Ortega-Martinez*, 124 Wash.2d 702, 707, 881 P.2d 231 (1994). In certain circumstances, “the right to a unanimous jury trial also includes the right to *express* jury unanimity on the means by which the defendant is found to have committed the crime.” *State v. Lobe*, 140 Wash.App. 897, 903, 167 P.3d 627 (2007) (emphasis added).

If the evidence is sufficient to support each of the alternative

⁵ The federal constitutional guarantee of a unanimous verdict does not apply in state court.
(Continued)

means submitted to the jury, a particularized expression of unanimity as to the means is unnecessary because the jury is presumed to have rested its decision on a unanimous finding as to the means. *Id.*, at 707-708. On the other hand, if the evidence is *insufficient* as to any one of the means submitted to the jury, the conviction will be reversed absent a particularized expression of unanimity.⁶ *Id.*, at 708.

C. The evidence was insufficient to establish that Mr. Witherspoon tampered with witness testimony under two of the three alternative means on which the jury was instructed.

A person is guilty of Tampering with a Witness if s/he attempts to induce a witness, potential witness, or person with information relevant to a criminal investigation to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent himself or herself from [official proceedings]; or
- (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation...

RCW 9A.72.120(1). The statute creates three alternative means of committing the offense. *Lobe*, at 903.

Here, the prosecution presented some evidence suggesting that Mr. Witherspoon committed tampering under alternative (a), by hinting that

Apodaca v. Oregon, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

⁶ The sole exception is where all of the evidence and argument were directed at one of the alternative means, so that there is no possibility that jurors were not unanimous. *Lobe*, at 905.

Conklin should help him by telling a third party (“Burl”) what was apparently a fabricated story involving a hitchhiker. Exhibit 40, pp. 3-6, Supp. CP. The prosecutor focused on this evidence during closing. RP (4/13/10) 120, 134.

Mr. Witherspoon also arguably asked Conklin not to talk to law enforcement: “I don’t want you to talk to them no more... To the Sheriff.” Exhibit 40, pp. 3-4, Supp. CP. This statement could have been considered by some jurors as a violation under alternative (c); however, it is not sufficient to support a finding of guilt beyond a reasonable doubt for several reasons. First, Mr. Witherspoon did not attempt to induce her not to talk to law enforcement; instead, he simply voiced his preference. Exhibit 40, pp. 3-4, Supp. CP. Second, even if his statement were taken as instructions not to talk to law enforcement, he did not seek to have her withhold information (since she’d apparently already provided a statement to the investigating officers). Exhibit 40, Supp. CP. Third, Conklin, who was present during the charged incident, arguably faced criminal liability and thus was entitled to remain silent; Mr. Witherspoon expressed his concern that talking to the Sheriff might get Conklin into trouble personally. Exhibit 40, Supp. CP.

Since the evidence was insufficient to support conviction under alternatives (b) and (c), the absence of a special verdict requires reversal.

Lobe, supra; Ortega-Martinez, at 708. Upon retrial, the jury may not be instructed under alternatives (b) and (c).

III. MR. WITHERSPOON WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also *State v. Pittman*, 134 Wash.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance, though it is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, "[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

C. Defense counsel provided ineffective assistance by failing to seek instructions on the lesser-included offense of theft.

Defense counsel's failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Breitung*, 55 Wash.App. 606, 615, 230 P.3d 614 (2010); *In re Crace*, 57 Wash.App. 81, 109-110, 236 P.3d 914 (2010); *see also State v. Grier*, 150 Wash.App. 619, 635, 208 P.3d 1221 (2009) *review granted*, 167 Wash.2d 1017, 224 P.3d 773 (2010). Counsel's failure to request appropriate instructions on a lesser offense constitutes ineffective assistance if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel pursue an "all or nothing" strategy.⁷ *Grier*, at 635.

RCW 10.61.006 guarantees the "unqualified right" to have the jury pass on a lesser-included offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker*, 102 Wash.2d 161, 163-164, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)). The appellate court views the evidence in a light most favorable to the accused person.

⁷ This latter determination hinges on the difference in potential penalties, whether the defense theory can apply to both greater and lesser offense, and the overall risk to the defendant,

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State v. Fernandez-Medina, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

The instruction should be given even if there is contradictory evidence, or if other defenses are presented. *Id.* The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

Defense counsel’s failure to request instructions on Theft in the First Degree deprived Mr. Witherspoon of the effective assistance of counsel. Mr. Witherspoon was entitled to the instructions, and it was objectively unreasonable to pursue an “all or nothing” strategy. *Breitung*, at 615; *Crace*, at 109-110, *Grier*, at 635.

1. Mr. Witherspoon was entitled to instructions on theft.

An accused person is entitled to an instruction on a lesser-included offense if (1) each element of the lesser offense is a necessary element of the charged offense, and (2) the evidence supports an inference that only the lesser crime was committed.⁸ *State v. Nguyen*, 165 Wash.2d 428, 434, 197 P.3d 673 (2008). In evaluating whether a lesser-included instruction is appropriate, the trial judge takes the evidence in a light most favorable to the defendant. *State v. Smith*, 154 Wash.App. 272, 278, 223 P.3d 1262

given the developments at trial. *Breitung*, at 615.

⁸ This two-part legal/factual test is often referred to as the *Workman* test. See *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978).

(2009) (*Smith I*) (citing *Fernandez-Medina*, at 461).

Under the legal prong of the *Workman* test, theft is a lesser-included offense of robbery. This is so because every element of theft is a necessary element of robbery: the former crime involves unlawfully taking property of another, the latter crime requires that the taking be from the person of another by the use or threatened use of force. *See State v. Shcherenkov*, 146 Wash.App. 619, 630 n. 4, 191 P.3d 99 (2008) (treating first-degree theft as a lesser-included offense of first-degree robbery, but rejecting appellant's factual basis for a lesser-included instruction); *State v. O'Connell*, 137 Wash.App. 81, 95, 152 P.3d 349 (2007) (same).⁹

Mr. Witherspoon was also entitled to instructions on theft under *Workman's* factual prong. Taking the facts in a light most favorable to him, the evidence suggests that he committed only theft: he admitted to burglarizing Pittario's home but denied using force or the threat of force when she confronted him. His version of events was confirmed by Conklin. RP (4/13/10) 54-87. This evidence suggests that he was not guilty of robbery but guilty of theft. Accordingly, Mr. Witherspoon was

⁹ The only published opinion reaching the opposite conclusion was based on reasoning that has since been overruled. *Compare State v. Roche*, 75 Wash.App. 500, 878 P.2d 497 (1994) (noting that a person can be guilty of robbery without also being guilty of certain alternative means of first-degree theft) with *State v. Berlin*, 133 Wash.2d 541, 947 P.2d 700 (1997) (rejecting the idea that all alternative means must be considered in determining whether a

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entitled to instructions on the lesser-included offense of theft. *Nguyen*, at 434.

2. It was objectively unreasonable for defense counsel to pursue an “all or nothing” strategy.

It was objectively unreasonable for Mr. Witherspoon’s attorney to pursue an acquittal without hedging against possible conviction. First, the disparity in penalties was extreme. Had Mr. Witherspoon been convicted of first-degree theft instead of robbery, his standard range would have been only 43-57 months incarceration, with a maximum of 10 years in prison. Instead, he was sentenced to a mandatory term of life without possibility of parole.¹⁰ *See* Sentencing Guidelines Commission, *Adult Sentencing Manual* 2008, p. III-208.

Second, outright acquittal on the robbery charge rested on the testimony of Mr. Witherspoon and his fiancée, Conklin. His credibility was impaired by his interest in the outcome of the case, by his admission that he had burglarized the house, by his prior burglary conviction, and by his apparent attempt to influence Conklin’s testimony. Her credibility was damaged by her affection for him, by her acquiescence in the apparently fabricated hitchhiker story, and by her role in the burglary itself.

one offense is included within another).

¹⁰ A similar disparity led the Court to reverse in *Crace*, *supra*.

(Continued)

As in *Breitung, Crace, and Grier*, defense counsel's failure to pursue the lesser-included offense was objectively unreasonable and prejudiced Mr. Witherspoon. Because he was denied his right to the effective assistance of counsel, his convictions must be reversed and the case remanded to the trial court for a new trial. *Breitung, supra; Crace, supra; Grier, supra.*

D. If the *corpus delicti* argument is not preserved for review, Mr. Witherspoon was deprived of the effective assistance of counsel. As noted above, the *corpus delicti* must be proved by evidence sufficient to establish the charged crime. *Brockob, at 329.* Where the *corpus delicti* is not established by independent evidence, failure to object to admission of an accused person's statements constitutes ineffective assistance. *State v. C.D.W.*, 76 Wash.App. 761, 764-765, 887 P.2d 911 (1995). Under such circumstances, "the failure to raise the issue of the *corpus delicti* rule... cannot be characterized as a trial strategy;" instead, it is "simply an inexcusable omission on the part of defense counsel." *Id.*, at 764. Furthermore, such deficient performance necessarily prejudices the defendant: in the absence of sufficient independent evidence, the defendant's statements are excluded and the defendant is acquitted. *Id.*, at 764-765.

The independent evidence was insufficient to establish the *corpus delicti* of robbery. Even when taken in a light most favorable to the state, the independent evidence only established that Mr. Witherspoon was interrupted during a burglary. It did not establish a use or threatened use of force.

Had defense counsel properly objected to the admission of Mr. Witherspoon's statements, the state would have been unable to proceed with a charge of robbery. *Brockob, supra*. Counsel's failure to object deprived Mr. Witherspoon of the effective assistance of counsel. *C.D.W., supra*. His conviction must be reversed and his case remanded for a new trial. *Id.*

E. The trial judge infringed on Mr. Witherspoon's right to effective assistance when he failed to adequately inquire into the nature and extent of the conflict and erroneously ignored his request.

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wash.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)). Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *State v. Cross*, 156 Wash.2d 580, 607, 132 P.3d 80 (2006). To compel an accused to "undergo a trial with the assistance of an

attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.”
United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion. *Cross*, at 607. The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court’s inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.* A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248 -1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wash.App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, at 607-610; *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Id.*, at 610. The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ... The inquiry must also provide a

‘sufficient basis for reaching an informed decision.’” *Id.*, at 776-777 (citations omitted). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Id.*, at 777-778. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*, at 778-779.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict. In his letter to the court, Mr. Witherspoon requested new counsel for two reasons: first, he believed his attorney might be a defense witness on the tampering charge, and second, he believed he was “not being [properly] represented in this matter” because his attorney had not yet had an investigator “talk to all involved.” Letter from Defendant, Supp. CP.

The trial judge addressed Mr. Witherspoon’s first concern, but never addressed his second concern. RP (12/30/09) 4-10.

Because the trial court failed to adequately inquire into the conflict, Mr. Witherspoon was denied the effective assistance of counsel. *Cross, supra*. His conviction must be reversed and the case remanded for a new trial. *Craven, supra*. In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel.

See, e.g., Lott, at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

IV. MR. WITHERSPOON'S ROBBERY CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

A. Standard of Review.

A challenge to the sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. Mr. Witherspoon was constitutionally entitled to notice that was both legally and factually adequate.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as Article I, Section 3 and Article I, Section 22 of the Washington State Constitution. The right to a constitutionally sufficient Information is one that must be "zealously guarded." *State v. Royse*, 66 Wash.2d 552, 557, 403 P.2d 838

(1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts. The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to ‘state every *statutory element* of’ the crime charged.

State v. Leach, 113 Wash.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original).¹¹ Following *Leach*, the Supreme Court elaborated further:

There are two aspects of this notice function involved in a charging document: (1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime... [T]he “core holding of *Leach* requires that the defendant be apprised of the elements of the crime charged and the conduct of the defendant which is alleged to have constituted that crime.”

Auburn v. Brooke, 119 Wash.2d 623, 629-630, 836 P.2d 212 (1992)

(footnotes omitted, emphasis in original).

C. The Second Amended Information was factually deficient because it did not include specific facts supporting the allegation that Mr. Witherspoon used or threatened to use force to obtain or retain possession of property.

A conviction for robbery requires proof that the accused person

¹¹ The *Leach* court explained that this rule applies to charging documents other than citations issued at the scene: “Complaints must be more detailed since they are issued by a prosecutor who was not present at the scene of the crime. Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers... [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts*”
(Continued)

unlawfully took property from another “by the use or threatened use of immediate force, violence, or fear of injury.” RCW 9A.56.190. In this case, the Second Amended Information alleged that Mr. Witherspoon used or threatened force, but did not provide any facts outlining the underlying conduct that formed the basis for the allegation. CP 21.

In the absence of any details outlining the alleged conduct, the charging document was factually deficient, because it did not provide “a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Brooke*, at 629-630 (emphasis in original). Nor can the underlying facts be inferred from the language used in the Second Amended Information. CP 21. Accordingly, Mr. Witherspoon need not demonstrate prejudice. *Kjorsvik*, *supra*. His conviction must be reversed, and the case dismissed. *Id.*

V. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS DOCTRINE UNDER THE FOURTEENTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 3.

Due process secures for an accused person the right to a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L. Ed. 2d 97 (1997). Furthermore, “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” *In re Murchison*, 349 U.S.

underlying [the] charges.” *Leach*, at 699.

133, 36, 75 S. Ct. 623, 99 L. Ed. 942 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)). “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” *State v. Madry*, 8 Wash. App. 61, 70, 504 P.2d 1156 (1972). “The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *Id.*, at 70; *Brister v. Tacoma City Council*, 27 Wash. App. 474, 486, 619 P.2d 982 (1980), *review denied*, 95 Wash.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party...” *Buell v. City of Bremerton*, 80 Wash.2d 518, 524, 495 P.2d 1358 (1972), *quoted with approval in OPAL v. Adams County*, 128 Wash.2d 869, 890, 913 P.2d. 793 (1996). To prevail, a claimant must only provide *some* evidence of the judge’s actual or potential bias. *State v. Dugan*, 96 Wash.App. 346, 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to the judge’s integrity. *See, e.g., Dimmel v. Campbell*, 68 Wash.2d 697, 414 P.2d 1022 (1966).

In this case, the trial judge made comments providing “some evidence” of a potential for bias. First, he announced that he may have

represented Mr. Witherspoon in the past, and ignored Mr. Witherspoon's objection to his continuing to preside over the case. RP (4/12/10) 15-16. Second, at sentencing, he announced that he would impose a life sentence because he trusted the prosecutor. RP (5/24/10) 34. Under these circumstances, Judge Verser should not have presided over Mr. Witherspoon's trial and sentencing hearing. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Dugan, supra*.

VI. MR. WITHERSPOON'S LIFE SENTENCE VIOLATES THE STATE CONSTITUTION'S PROHIBITION AGAINST CRUEL PUNISHMENT (AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST PUNISHMENT THAT IS CRUEL AND UNUSUAL).¹²

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at 282*.

B. The federal and state constitutions proscribe punishment that is grossly disproportionate to the offense.

The Eighth Amendment bars punishment that is both cruel and unusual; the Washington State Constitution bars punishment that is cruel (even if not unusual). U.S. Const. Amend. VIII; Wash. Const. Article I, Section 14. Both prohibit the infliction of punishment that is disproportionate to the crime; however, Washington's prohibition against disproportionate punishment is broader than the corresponding federal

¹² Eighth Amendment argument provided for purpose of exhausting state remedies, just in case the U.S. Supreme Court ever overturns its decision in *Rummel v. Estelle*, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

ban. *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980); *see also State v. Roberts*, 142 Wash.2d 471, 506, 14 P.3d 713 (2000) (citing the Court’s “repeated recognition that the Washington State Constitution’s cruel punishment clause often provides greater protection than the Eighth Amendment”).

In Washington, whether or not a particular sentence is disproportionate depends on (1) the nature of the offense, (2) the legislative purpose behind the statute authorizing the sentence, (3) the punishment the offender would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in the same jurisdiction.¹³ *Fain*, at 397.¹⁴ In this case, all four factors suggest that Mr. Witherspoon’s sentence of life without parole inflicts disproportionate punishment in violation of Wash. Const. Article I, Section 14 and the Eighth Amendment.

C. Mr. Witherspoon’s life sentence is grossly disproportionate to the

¹³ A similar analysis applies in the Eighth Amendment context. *Graham v. Florida*, ___ U.S. ___, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (citing *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)).

¹⁴ Although these four factors do not include the offender’s criminal history, as a practical matter the Supreme Court often mentions prior offenses when evaluating proportionality. *See, e.g., State v. Magers*, 164 Wash.2d 174, 194, 189 P.3d 126 (2008) (“We conclude, after reviewing the *Fain* factors and observing that Magers had past convictions for second degree assault and first degree burglary, that the sentence imposed on Magers of life imprisonment without the possibility of parole is not grossly disproportionate to the offenses committed.”)

offense.

Although the Persistent Offender Accountability Act (POAA) is not unconstitutionally cruel in the abstract, the Supreme Court has recognized that “there may be cases in which application of the Act’s sentencing provision runs afoul of the constitutional prohibition against cruel punishment.” *State v. Thorne*, 129 Wash.2d 736, 773 n. 11, 921 P.2d 514 (1996). This is such a case.

1. Mr. Witherspoon’s current offense was relatively minor.

Although second-degree robbery is classified by statute as a violent offense,¹⁵ Mr. Witherspoon’s conduct included neither overt violence nor explicit threats. RP (4/12/10) 22-26. The robbery here was not the sort of offense that creates public outrage or calls out for harsh punishment. *See Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (overturning life sentence as grossly disproportionate for nonviolent offense).

2. The POAA was not intended for small-time offenders like Mr. Witherspoon.

The stated purposes of the POAA are to:

(a) Improve public safety by placing the most dangerous criminals in prison.

¹⁵ *See* RCW 9.94A.030(53).

- (b) Reduce the number of serious, repeat offenders by tougher sentencing.
- (c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand.
- (d) Restore public trust in our criminal justice system by directly involving the people in the process.

RCW 9.94A.555. By its terms, the statute was intended to apply to “the most dangerous criminals” and “serious, repeat offenders.” *Id.*

Although Mr. Witherspoon’s criminal conduct is not trivial, he has never engaged in criminal activity involving actual violence or harm against persons. CP 7. Thus he is not the kind of person at whom the POAA is directed.

3. Mr. Witherspoon would have received a lighter punishment in other jurisdictions.

A 2005-2006 survey of state laws (including the District of Columbia) shows that Mr. Witherspoon would have received a lighter sentence for his current offense almost anywhere else in the U.S.

Washington is one of only four states that require a sentence of life without parole when robbery in the second degree is the third strike.¹⁶

Appendix, p. 1. Nevada and the District of Columbia authorize a maximum sentence of life without parole for a third-strike; however, imposition of such a sentence is discretionary with the sentencing judge.

¹⁶ The others are Louisiana, Mississippi, and Montana.

Appendix, p. 1. The vast majority of the remaining states authorize a determinate term of years, and in twenty states, the maximum term is 15 years or less. Appendix, p. 2-3. Nationally, only one percent of robbery offenders sentenced in state court received a life sentence 2006. Table 1.4, U.S. Department of Justice – Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006-Statistical Tables* (2009).

4. Mr. Witherspoon would have received a lighter punishment in Washington, but for the action of the POAA.

Robbery in the Second Degree is a Class B felony, with a maximum penalty of ten years in prison. RCW 9A.20.021. An offender with Mr. Witherspoon's offender score who was not sentenced as a persistent offender would have been subject to a standard sentencing range of only 63-84 months. CP 8. The average sentence imposed for Robbery in the Second Degree remains less than 20 months in Washington. *See* Table 2, Sentencing Guidelines Commission, *Statistical Summary of Adult Felony Sentencing* (2010).¹⁷

Thus, Mr. Witherspoon received a significantly higher sentence than other offenders convicted of Robbery in the Second Degree.

D. Mr. Witherspoon's case is not controlled by Supreme Court precedent conducting proportionality analysis on other persistent offenders

¹⁷ Reports from previous years show that the average sentence has been consistent.

convicted of second-degree robbery.

The Washington Supreme Court has twice conducted a proportionality review for persistent offenders convicted of second-degree robbery. *State v. Manussier*, 129 Wash.2d 652, 921 P.2d 473 (1996); *State v. Rivers*, 129 Wash.2d 697, 921 P.2d 495 (1996). Mr. Witherspoon's case differs significantly from both of those cases. Furthermore, subsequent developments in the law call into question the Court's proportionality analysis.

First, the underlying conduct in *Manussier* and *Rivers* was more serious than Mr. Witherspoon's. *Manussier* involved a bank robbery in which the defendant passed a note to a teller, demanding money and claiming to have a gun. *Rivers* involved a robbery committed while the victim walked from an espresso stand to the bank to deposit the business's cash. The defendant claimed to have a gun, struggled physically with the victim, and threatened to "blow [his] head off" while claiming to point the concealed gun at the victim. *Rivers*, at 696. In this case, by contrast, Mr. Witherspoon allegedly made fleeting reference to a pistol as he fled the scene, in an effort to avoid all confrontation.

Second, the defendants in both cases had committed more serious prior offenses. In *Manussier*, the defendant had two prior convictions for first-degree robbery, which the Court noted "were based upon facts which

represented a particularly significant risk of danger to others.” *Manussier*, at 677. In *Rivers*, the defendant had prior convictions for Robbery in the Second Degree, attempted Robbery in the Second Degree, and Assault in the Second Degree. *Rivers*, at 704. Unlike the *Manussier* and *Rivers* defendants, Mr. Witherspoon’s criminal history included no prior offenses involving violence or threats of violence.

Third, neither defendant in the earlier cases provided the Court with information regarding sentencing in other jurisdictions. Instead, the Court noted a general trend toward the enactment of three-strikes legislation, and speculated that the defendants would receive harsh sentences in the majority of jurisdictions. *Manussier*, at 678 n. 109; *Rivers*, at 427. The Court’s assumption (that other jurisdictions would impose similar sentences) is suspect, given its failure to conduct a state-by-state comparison. As outlined above, the vast majority of other states do not penalize second-degree robbery by automatically imposing life without possibility of parole, even when the offense is a person’s third strike.

The ruling in *Rivers* also rested on the Court’s finding that there is little distinction between life sentences with and without the possibility of parole. *Id.* This perspective has since been abandoned: the difference between the two sanctions has been held to be constitutionally significant.

See State v. Thomas, 150 Wash.2d 821, 83 P.3d 970 (2004).

For all these reasons, Mr. Witherspoon's sentence of life without possibility of parole is unconstitutionally cruel under Wash. Const. Article I, Section 14.¹⁸ The sentence must be vacated, and the case remanded to the trial court for a new sentencing hearing.

VII. THE PROSECUTION PRODUCED INSUFFICIENT EVIDENCE TO PROVE THAT MR. WITHERSPOON IS A PERSISTENT OFFENDER.

A. The prosecution must present more than identity of names to establish a prior conviction when seeking a life sentence under the POAA.

An offender has a constitutional right to remain silent pending sentencing, and the prosecution bears the burden of proving any prior convictions. *In re Detention of Post*, 145 Wash.App. 728, 758, 187 P.3d 803 (2008); *State v. Mendoza*, 165 Wash.2d 913, 920, 205 P.3d 113 (2009); *State v. Knippling*, 166 Wash.2d 93, 206 P.3d 332 (2009). If the offender objects to the sufficiency of the evidence, the prosecution is held to the existing record on remand. *In re Cadwallader*, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

Generally, identity of names is insufficient to prove that a document relates to the person before the court. *See, e.g., State v. Huber*, 129 Wash. App. 499, 502, 119 P.3d 388 (2005). After the SRA was

¹⁸ And under the Eighth Amendment.

enacted, the Supreme Court created an exception to this general rule, holding that identity of names is sufficient to establish an offender's criminal history to determine the standard range. *State v. Ammons*, 105 Wash.2d 175, 190, 713 P.2d 719 (1986). The *Ammons* rule required additional proof at sentencing (beyond mere identity of names), but only if the offender states under oath that s/he was not the person convicted.¹⁹ *Id.* This common-law rule predated the POAA (which was enacted in 1993). The context in which the *Ammons* case was decided suggests that the balance struck by the court was not meant to apply where a sentence of life without parole is at issue.

At the time *Ammons* was decided, career offenders could be sentenced as “habitual criminals” following a jury finding beyond a reasonable doubt that they qualified for such treatment. *See Manussier*, at 682 (outlining procedures under former RCW 9.92.080). The *Ammons* Court recognized that the relaxed procedures used for determining the presumptive standard range—including its own rule regarding identity of names—could not constitutionally be applied in habitual criminal proceedings: “[T]he SRA recognizes and relies upon the fundamental distinction between the more rigid procedural protections necessary in

¹⁹ According to the Court, “[t]hese requirements achieve the proper balance.” *Ammons*, at (Continued)

using a prior conviction to prove an element of a crime or of habitual criminal status on the one hand, and in using a prior conviction to help determine a presumptive standard sentence range on the other.” *Petition of Williams*, 111 Wash.2d 353, 367, 759 P.2d 436 (1988).

There is no indication that the *Ammons* Court intended identity of names to be sufficient proof of persistent offender status under the POAA. Furthermore, prior convictions are not used in persistent offender sentencing proceedings “to help determine a presumptive standard sentence range;” instead, they are used to eliminate judicial discretion, resulting in mandatory punishment more severe than any other punishment short of death. RCW 9.94A.570; *See Graham v. Florida*, ___ U.S. ___, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentences of life without parole “share some characteristics with death sentences that are shared by no other sentences.”)

Because of the parties’ shared interest in an accurate determination of persistent offender status, the identity-of-names standard should not apply where the state seeks to incarcerate a person for life without the possibility of parole. Nor should an offender be required to state under oath that s/he is not the person named in a prior conviction. Instead, the

190.

state should be required to prove identity by independent evidence, such as by fingerprints or eyewitness testimony. *See, e.g., Ammons, at 190* (outlining acceptable means of proving identity).

B. The prosecution failed to produce sufficient evidence to connect alleged prior convictions to Mr. Witherspoon.

In this case, the prosecution failed to produce evidence, beyond mere identity of names, that Mr. Witherspoon had two prior qualifying convictions. RP (5/24/10) 10-39. Instead, the state's fingerprint expert was unable to confirm that Mr. Witherspoon was the person named in Exhibit No. 2, and made no effort to tie him to Exhibit 4. RP (5/24/10) 10-33.

Because the evidence was insufficient, Mr. Witherspoon's life sentence must be vacated and the case remanded for sentencing within the standard range. *Cadwallader, supra*.

VIII. THE ARBITRARY CLASSIFICATION OF PRIOR CONVICTIONS AS "ELEMENTS" IN SOME CIRCUMSTANCES AND AS "SENTENCING FACTORS" IN OTHER CIRCUMSTANCES VIOLATES EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AND WASH. CONST. ARTICLE I, SECTION 12.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at 282*.

B. Equal protection guarantees like treatment for people who are similarly situated with respect to the law's purpose.

Equal protection requires that people who appear to be similarly situated must be treated alike. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 12; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Thorne, at*

770-71. A statutory classification that implicates physical liberty is subject to rational basis scrutiny. *Thorne*, at 771.

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. A classification which is “purely arbitrary” violates equal protection. *State v. Smith*, 117 Wash.2d 117, 263, 279, 814 P.2d 652 (1991) (*Smith II*).

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 Wash.2d 186, 192, 196 P.3d 705 (2008). If a prior conviction elevates an offense from one offense category to another (i.e. from a misdemeanor to a felony), it “actually alters the crime” charged. *Id.* Under such circumstances, the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. *Id.*

In *Roswell*, the defendant was charged with Communication with a Minor for Immoral Purposes under RCW 9.68A.090. The offense is a gross misdemeanor, unless the accused person has a prior conviction for a felony sex offense, in which case the charge is elevated to a felony. *Roswell*, at 190. Accordingly, the prior conviction is an element which the

state must prove beyond a reasonable doubt. *Id.*, at 192-194.

C. Equal protection requires that Mr. Witherspoon be provided the same procedural protections as the defendant in *Roswell*.

Mr. Witherspoon and the defendant in *Roswell* are similarly situated. First, as in *Roswell*, Mr. Witherspoon's prior convictions elevated his offense from one category (a class B felony with a maximum punishment of ten years in prison) to another (a "super-felony" with a mandatory penalty of life in prison without the possibility of parole). Second, as in *Roswell*, the purpose of proving prior convictions is to punish persistent offenders more harshly and to protect the public for a longer period of time.

There is no rational basis to provide greater procedural protections to offenders whose crimes are elevated from misdemeanor to felony (such as the defendant in *Roswell*), than to those offenders whose crimes are elevated from a class B felony to a "super-felony" (punished by imposition of a mandatory life sentence without the possibility of parole). *Smith II(?)*, at 263. Nor is there a rational basis for classifying an offender's recidivism as an 'element' in certain circumstances and an 'aggravator' in others. *Id.*

Despite being similarly situated, Mr. Witherspoon did not receive the same treatment guaranteed those offenders impacted by the *Roswell* case. That is, he was not afforded a jury trial and the requirement of proof

beyond a reasonable doubt, prior to being sentenced for the more serious crime of being a persistent offender. Mr. Witherspoon's prior strike offenses operate in the precise fashion as the prior felony sex offense in *Roswell*. There is no basis for treating the prior conviction as an "element" in *Roswell*— with the attendant due process safeguards afforded "elements" of a crime – and as an "aggravator" in this instance. *Smith II, supra*.

Mr. Witherspoon was denied the equal protection of the law. Accordingly, his persistent offender sentence must be vacated, and the case remanded for a new sentencing proceeding. *Roswell, supra; Smith II, supra*.

D. This Court should not follow Division I's decision in *Langstead*. Division I's recent opinion *Langstead* was wrongly decided, and should not be followed by Division II. *State v. Langstead*, 155 Wash.App. 448, 453-457, 228 P.3d 799 (2010). In *Langstead*, Division I concluded that persistent offenders "are not situated similarly to recidivists like Roswell." *Id, at 456*. The distinguishing characteristic, according to Division I, is that any crime that qualifies as a 'most serious offense' is a felony regardless of the offender's criminal history, while the communication charge in *Roswell* became a felony only upon proof of a prior conviction. *Id, at 456-457*. Because of this, Division I concluded, "recidivists whose conduct is inherently culpable enough to incur a felony

sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.” *Id.*

This approach erroneously prioritizes the label assigned to offenses (misdemeanor or felony) over the actual, substantial difference in penalty. The penalty difference between a misdemeanor and a class C felony is constitutionally less significant than the difference between a class B felony and a “super-felony” with a mandatory punishment of life in prison with no possibility of parole. Furthermore, under the *Langstead* approach, the legislature could circumvent the constitutionally-based rule in *Roswell* simply by redefining the term ‘misdemeanor’ to include crimes punishable by up to 5 years (or 10 years, or life) in prison, and reclassifying some—or even all—felony offenses as misdemeanors.

As with the defendant in *Roswell*, Mr. Witherspoon’s prior convictions “alter[ed] the crime that may be charged.” *Roswell*, at 192. In *Roswell*, the crime was elevated from a misdemeanor communication to a felony communication charge; for Mr. Witherspoon, the crime was elevated from robbery (felony) to robbery (“super-felony”). *Id.*

Accordingly, he should have been afforded a jury trial and the requirement of proof beyond a reasonable doubt. The life sentence, imposed without these procedural safeguards, violated his right to equal protection of the

law. Accordingly, the sentence must be vacated and the case remanded for a new sentencing proceeding, with instructions to impanel a jury and require the prosecution to prove his prior offenses beyond a reasonable doubt.

IX. MR. WITHERSPOON’S LIFE SENTENCE VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT THAT HE HAD TWO PRIOR QUALIFYING CONVICTIONS.

A. Any fact which increases the penalty for a crime must be found by a jury beyond a reasonable doubt.

The Sixth and Fourteenth Amendments guarantee an accused person the right to a trial by jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Any fact which increases the penalty for a crime must be found by a jury. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This principle extends to facts labeled “sentencing factors” if those facts increase the maximum penalty. *Blakely, supra*; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *see also Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). Arbitrary distinctions between sentencing factors and elements of the crime do not diminish the accused person’s constitutional rights: “Merely using the label ‘sentence enhancement’... does not provide a principled basis for treating [sentencing factors and

elements] differently.” *Apprendi*, at 476. 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.” *Ring*, at 602 (citing *Apprendi*, at 482-83).

B. The U.S. Supreme Court has retreated from the *Almendarez-Torres* exception allowing judicial fact-finding where recidivism is concerned.

Prior to the Supreme Court’s decision in *Apprendi*, the existence of prior convictions did not need to be pled, even if used to increase a sentence. *Almendarez-Torres v. United States*, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The *Almendarez-Torres* decision was based on four factors: (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, allowing for the exercise of judicial discretion, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to “evade” the Constitution. *Almendarez-Torres*, at 244-45.

Almendarez-Torres addressed a sentencing scheme in which the standard range was doubled upon proof of certain prior convictions. It was not concerned with a qualitative change in the sentence. Here, by contrast,

Mr. Witherspoon was subject to a sentence that was not merely increased, but that changed from one type (a determinate period of time, with the possibility of early release) to another type (a life term, with no possibility of parole).

Since *Almendarez-Torres*, the Supreme Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. *Blakely*, at 301-02; *Apprendi*, at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In *Apprendi*, the Court noted that the possibility “that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” *Apprendi*, at 489. The Court has not yet considered the issue of prior convictions under *Apprendi*. See Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. Davis L. Rev. 973, 989-90 (2004).

C. *Almendarez-Torres* does not preclude application of *Blakely* to Mr. Witherspoon’s case.

The Washington Supreme Court has made note of the U.S. Supreme Court’s failure to embrace the *Almendarez-Torres* decision in the wake of more recent decisions. *State v. Smith*, 150 Wash.2d 135, 75 P.3d 934 (2003) (addressing *Ring*) cert. denied sub nom *Smith v. Washington*, 124 S.Ct. 1616 (2004) (*Smith III*); *State v. Wheeler*, 145 Wash.2d 116, 121-24, 34 P.2d 799 (2001) (addressing *Apprendi*). The Washington

Supreme Court, however, has felt obligated to “follow” *Almendarez-Torres*. *Smith III*, at 143; *Wheeler*, at 123-24.

Almendarez-Torres does not control under the circumstances here. First, it does not address an offender’s rights when the government seeks to change a crime from one punished by a determinate term with the possibility of early release to one punished by life in prison without the possibility of parole.

Second, Washington has historically required a jury determination of prior convictions, prior to sentencing as a habitual offender. *Manussier*, at 690-91 (Madsen, J., dissenting); *State v. Furth*, 5 Wn.2d 1, 18, 104 P.2d 925 (1940).

Third, *Almendarez-Torres*, the cases cited therein, and its progeny address only the requirement that elements be pled in the charging document; it does not address the burden of proof or jury trial right. *Almendarez-Torres*, at 243-45. It is solely a Fifth Amendment charging case, and the Court explicitly reserved ruling on whether or not an offender had a right to a jury trial or to proof beyond a reasonable doubt. *Id.*, at 248 (“we express no view on whether some heightened standard of proof might apply” at sentencing). Thus *Almendarez-Torres*’s applicability is limited in Mr. Witherspoon’s case.

Fourth, the statute at issue in *Almendarez-Torres* (which expanded

the permissive sentencing range) did “not itself create significantly greater unfairness” for the offender because judges traditionally exercise discretion within broad statutory ranges. *Id.*, at 245. Here, by contrast, Mr. Witherspoon’s prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Under the POAA, judicial discretion is eliminated for people with Mr. Witherspoon’s criminal history.

For all these reasons, *Almendarez-Torres* does not apply to Mr. Witherspoon’s case. Under the logic of *Blakely*, he was entitled to a jury determination of his qualifying prior convictions, with proof beyond a reasonable doubt. Accordingly, his sentence must be vacated and the case remanded for a new sentencing hearing. *Blakely, supra.*

X. THE IMPOSITION OF A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE VIOLATED MR. WITHERSPOON’S STATE CONSTITUTIONAL RIGHT TO DUE PROCESS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Schaler, at 282.*

B. Under a due process balancing test, the imposition of a life sentence is unconstitutional unless the prosecution proves to a jury, beyond a reasonable doubt, that the offender qualifies as a persistent offender.

Wash. Const. Article I, Section 3 provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” To determine whether existing procedures are constitutionally adequate to

protect the interest at stake, courts consider three factors. *Post v. City of Tacoma*, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These include (1) the private interest at stake, (2) the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

Under the federal constitution, *Mathews v. Eldridge* does not provide the appropriate framework for analyzing state criminal procedures. *State v. Heddrick*, 166 Wash.2d 898, 904, n. 3, 215 P.3d 201 (2009) (citing *Medina v. California*, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)). This is primarily a result of federalism: the U.S. Supreme Court has no desire to become “a rule-making organ for the promulgation of state rules of criminal procedure.” *Medina*, at 444 (quoting *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 653, 17 L.Ed.2d 606 (1967)). This concern about intruding too heavily into a state arena persuaded the court to adopt a far more deferential standard when evaluating state criminal procedures.²⁰ *Medina*, at 445-446 (citing

²⁰ Under that test, a federal court will not invalidate a state criminal procedure on due process grounds “unless ‘it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Patterson*, at 201-202 (citations
(Continued)

Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

Although the state and federal rights to due process are generally coextensive, the Washington Supreme Court has, on occasion, found differences between the two. *See, e.g., State v. Bartholomew*, 101 Wash.2d 631, 639-640, 683 P.2d 1079 (1984). Because Article I, Section 3 does not implicate federalism concerns, the *Patterson* standard is not an appropriate vehicle for Washington courts to test state criminal procedures against the state constitution's due process clause. Instead, the traditional balancing framework set forth in *Mathews v. Eldridge* should be applied in criminal cases under the state constitution.

Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive *Gunwall* criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P2d 808 (1986). *Gunwall* analysis is not strictly necessary in this case, because Mr. Witherspoon is arguing for application of the traditional federal standard for evaluating the constitutionality of a procedure. The U.S. Supreme Court's decision adopting the *Patterson* standard in place of the traditional balancing test rested on federalism considerations that are inapplicable, given that the

omitted).

Court in this case is a state court reviewing state procedures.

Nonetheless, a brief review of *Gunwall* is provided. The first *Gunwall* factor examines the language of the state provision. Article I, Section 3 provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” The strong, simple, and direct language suggests that the framers were concerned with ensuring the rights of the individual. At the same time, the provision recognizes that deprivation of life, liberty, or property will at times be necessary. The provision is thus about balancing the rights of the individual against the needs of the government. Accordingly, a balancing test such as that outlined in *Mathews v. Eldridge* is appropriate for determining the process due in a particular instance.

The second *Gunwall* factor addresses any differences between the state constitution and the corresponding federal provision. Although the state and federal constitutions include identical language, this does not end the inquiry. Instead, independent analysis under the state constitution is appropriate where federal court decisions are not grounded in logic, reason, precedent, and the policies underlying the specific constitutional guarantee at issue. *State v. Davis*, 38 Wash.App. 600, 605 n. 4, 686 P.2d 1143 (1984). Furthermore, state constitutional provisions other than the one being analyzed “may require” that the provision in question “be

interpreted differently” from its federal counterpart. *Gunwall*, at 61.

The third *Gunwall* factor looks at state constitutional history. No legislative history from the constitutional convention suggests that the state and federal due process clauses are coextensive. *See State v. Ortiz*, 119 Wash.2d 294, 303, 831 P.2d 1060 (1992).

The fourth *Gunwall* factor looks at pre-existing state law. Washington Courts have long applied balancing tests in criminal cases. *See, e.g., State v. Osman*, 168 Wash.2d 632, 640, 229 P.3d 729 (2010) (outlining situations in which courts balance competing interests); *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995) (court must weigh competing interests prior to ordering courtroom closure). Thus pre-existing state law suggests that the due process balancing test may be applied to evaluate criminal procedures under Article I, Section 3.

The fifth *Gunwall* factor relates to structural differences between the two constitutions. It will always support an independent constitutional analysis. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (*Young II*).

The sixth *Gunwall* factor requires the court to determine whether or not the subject matter is of local concern. State criminal procedure is a matter of local concern, as the U.S. Supreme Court noted in *Medina*, *supra*.

Accordingly, *Gunwall* analysis suggests that criminal procedures may be evaluated using the balancing test set forth in *Mathews v. Eldridge*.

Under current practice, offenders are sentenced to prison for life (without possibility of parole) upon a judicial finding of two prior strikes, using a preponderance of the evidence standard. *See, e.g., State v. Thieffault*, 160 Wash.2d 409, 418, 158 P.3d 580 (2007). This procedure violates due process, which requires the government to satisfy a more stringent standard of proof, and demands fact-finding by a jury rather than a judge.²¹

First, in *any* case leading to incarceration, the private interest at stake is that “most elemental of liberty interests,” freedom from confinement; this interest has been described as “almost uniquely compelling.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

When the term of imprisonment consists of life without possibility of parole, the private interest at stake weighs heavily in favor of providing

²¹ Washington courts have consistently refused to directly apply *Apprendi* and *Blakely* to prior convictions, even in persistent offender cases. *See Thieffault*, at 418; *see also State v. Langstead*, at 452-453. No published opinion in Washington has examined persistent

(Continued)

additional procedural safeguards:

[L]ife without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences... [T]he sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration...

Graham v. Florida, at ____ (quotation marks and citations omitted).

Second, under the current procedure—judicial factfinding by only a preponderance of the evidence—the risk of an erroneous life term is not insignificant. By focusing on the quantity (rather than the quality) of the evidence, the current standard of proof “may misdirect the factfinder in the marginal case.” *Santosky v. Kramer*, 455 U.S. 745, 764, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (citing *Winship*, at 371, n. 3 (Harlan, J., concurring)). The possibility of even occasional error mitigates in favor of a higher standard of proof. *See, e.g., United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the “significant liberty interests” implicated by an involuntary medication order).

Similarly, a jury of twelve might be better suited than a judge to resolve the disputed facts that arise at sentencing in a persistent offender

offender sentencing under the *Mathews v. Eldridge* balancing test outlined above.

case. Juries are accustomed to finding the kinds of historical facts at issue in persistent offender sentencing hearings, including, for example: (1) the existence of the prior conviction, (2) the identity of the person previously convicted, or (3) the timing of the prior conviction in relation to the current offense and other strike offenses.

Third, the government has a strong interest in ensuring that only those offenders who actually qualify for life sentences under the statute receive them. This interest derives from the inherent prosecutorial commitment to justice²² and from the state's need to allocate scarce prison resources to those offenders who actually qualify for life-long detention. This interest weighs in favor of the improved procedures. On the other side of the equation are (1) the relatively minor costs required to present additional proof (to satisfy the higher evidentiary standard),²³ (2) the cost of convening a jury to decide the facts in contested sentencing cases, and (3) the cost to society of allowing some offenders to serve only their standard range, even though they might have been incarcerated for life without parole if the current procedures remained in effect.

²² See, e.g., *State v. Warren* 165 Wash.2d 17, 27, 195 P.3d 940 (2008) (“As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice”) and RPC 3.8.

²³ Because hearsay is generally admissible at sentencing, the state could theoretically establish prior convictions beyond a reasonable doubt without the need for live testimony.

On balance, the government's interest in maintaining the current procedure is minimal at best. The government would receive some benefit from a change in procedure; this benefit does not outweigh the potential harm.

The enormous significance of the private interest in persistent offender cases, the likely benefits of additional procedural protections, and the government's minimal interest in maintaining the current procedure, all weigh in favor of requiring a jury to find facts beyond a reasonable doubt before a life sentence can be imposed. Wash. Const. Article I, Section 3; *Post, supra*. The current procedure (under which Mr. Witherspoon was sentenced) violates due process. His sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Witherspoon's robbery conviction must be reversed and the case dismissed with prejudice. In the alternative, if the case is not dismissed, the charge must be remanded for a new trial. Likewise, the tampering conviction must be reversed and the case remanded for a new trial.

In the alternative, if the convictions are not reversed, Mr. Witherspoon's life sentence must be vacated and the case remanded for

sentencing within his standard range. A life sentence may not be re-
imposed absent a jury determination, beyond a reasonable doubt, that Mr.
Witherspoon qualifies as a persistent offender.

Respectfully submitted on December 10, 2010.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Alvin Witherspoon, DOC #998026
Washington State Penitentiary
1313 N. 13th Ave
Walla Walla, WA 99362

and to:

Clallam County Prosecutor
223 E. Fourth Ave.
Pt. Angeles, WA 98362

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 10, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 10, 2010.

Jodi R. Backlund

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Appendix

2005-2006 Summary of Third-Strike Sentencing

SUMMARY OF MAXIMUM "THIRD STRIKE" SENTENCING BY LENGTH OF
TIME BY STATE

for Robbery in the Second Degree

Length of Maximum Sentence	State
Life without parole	Louisiana Mississippi Montana Washington
Life without parole (discretionary)	District of Columbia Nevada (mand. min. 10 years up to LWOP)
Life (discretionary)	Massachusetts Michigan (indeterminate) Utah West Virginia
Life (discretionary with mandatory minimum term)	Alabama (mand. min. 10 yrs) California (mand. min. 20 yrs) Idaho**(mand. min. 5 yrs) Oklahoma (mand. min. 20 yrs) Texas (mand. min. 25 yrs)
31-60 years (mandatory min. if applicable)	Nebraska (60) (mand. min. 10 yrs) Rhode Island (55) (discretionary) Wyoming (50) (mand. min. 10 yrs) Indiana (38) (discretionary fixed term)

<p>30 years (mandatory min. if applicable)</p>	<p>Florida (court discretion to go higher) Maine (determinate) Missouri (mand. min. 10 yrs.) New Hampshire (mand. min. 10 yrs.)</p>
<p>21-25 years (mandatory min. if applicable)</p>	<p>Maryland (25) New York (25) (mand. min. 12 yrs) Wisconsin (21) (discretionary)</p>
<p>20 years (mandatory min. if applicable)</p>	<p>Arkansas** Georgia** Hawaii (indeterminate) Kentucky (indeterminate) (mand. min. 10 yrs) New Jersey (fixed mand. min. 10 yrs) Virginia**</p>
<p>11-15 years (mandatory min. if applicable)</p>	<p>California (15) Iowa (15) South Carolina (15)** Tennessee (15)** Arizona (12)* (mand. min. 8 yrs) North Carolina (12) Kansas (11.33) (mand. min. 122 months)</p>
<p>10 years (mandatory min. if applicable)</p>	<p>Alaska (mand. min. 6 yrs) Minnesota* (court discretion to go higher) North Dakota*** (discretionary) South Dakota** Vermont**</p>

5 – 9 years	Illinois (7)** New Mexico (7) Pennsylvania (7)** Colorado (6)** Connecticut (5)** Delaware (5)** (court discretion to go higher) Ohio (5) Oregon (5)** (determinate)
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NOTE:

- * No parole or reduction in sentence.
- ** No enhancement penalty for "third strike"
- *** Must serve 85% of sentence.