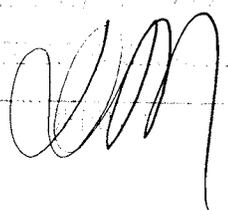


STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
STATE OF WASHINGTON  
BY: 

No. 41409-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Orlen Pagel,**

Appellant.

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Thurston County Superior Court Cause No. 10-1-00348-1

The Honorable Judge Gary Tabor

**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. Pagel's convictions violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
2. Mr. Pagel's convictions violated his state constitutional right under Wash. Const. Article I, Sections 3 and 22 to notice of the charges against him.
3. The Information was deficient because it failed to outline specific facts describing Mr. Pagel's alleged conduct.
4. The evidence was insufficient to prove that Mr. Pagel's current offenses should be scored separately.
5. The trial court erred by failing to find that counts two and three were the same criminal conduct.
6. The trial court erred by adopting Finding of Fact No. 2.1 of the Judgment and Sentence.
7. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.
8. The trial court erred by imposing an exceptional sentence.
9. The trial court erred by concluding that Mr. Pagel's "high offender score result[ed] in one or more offenses going unpunished."
10. Mr. Pagel was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel was ineffective for failing to argue that the burglary and theft comprised the same criminal conduct.
12. Mr. Pagel's exceptional life sentence was imposed in violation of his Sixth and Fourteenth Amendment right to a jury trial.
13. Mr. Pagel's exceptional sentence was imposed in violation of his Sixth and Fourteenth Amendment right to proof beyond a reasonable doubt.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person is constitutionally entitled to be informed of the charges against him. The charging document in this case did not outline any specific facts describing Mr. Pagel's alleged conduct. Was Mr. Pagel denied his constitutional right to adequate notice of the charges under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22?
2. Multiple current offenses comprise the same criminal conduct for purposes of calculating the offender score if they occurred at the same time and place and if they were committed for the same overall criminal purpose. Here, the court failed to analyze Mr. Pagel's November 1<sup>st</sup> burglary and theft charges to determine whether or not they were the same criminal conduct. Did the trial judge abuse his discretion by failing to determine whether or not counts two and three should score separately?
3. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Mr. Pagel's defense counsel unreasonably failed to argue that the November 1<sup>st</sup> burglary and theft charges comprised the same criminal conduct. Was Mr. Pagel denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. 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. Pagel had an offender score of 10, and imposed an exceptional sentence. Does the exceptional sentence violate Mr. Pagel's Sixth and Fourteenth Amendment right to due process and to a jury trial?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Someone had gained unauthorized access to the Olympia Regional Learning Academy and lined up valuable equipment near exits. RP (10/20/10) 36-139; RP (10/21/10) 149-214. A teacher who came in on the weekend saw a person, but did not see his or her face and could not identify him or her. RP (10/20/10) 64-79. Police found a phone and a cigarette butt, and both were linked to Orlen Pagel. RP (10/20/10) 44, 85; RP (10/21/10) 185-188, 205-209.

The state charged Orlen Pagel with Theft in the Second Degree and two counts of Burglary in the Second Degree. CP 2-3. The burglary allegations were that Mr. Pagel, “on or about [October 31, 2009 for count 1, and November 1, 2009 for count 2] with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building.” CP 2. The theft charge alleged that on November 1, 2009, Mr. Pagel “did wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds seven hundred and fifty dollars (\$750.00).” CP 3. The location(s) alleged to have been burglarized and the items alleged to have been taken were not specified. CP 2-3.

After a jury trial, Mr. Pagel was convicted of all three charges. CP 4.

At sentencing, the court did not analyze on the record whether counts 2 and 3, both on the same date, were the same criminal conduct. RP (10/28/10) 3-26. The defense attorney, while not stipulating to the priors, agreed that given the priors presented by the state, the score was 10 points. RP (10/28/10) 4. The court scored them separately and calculated that Mr. Pagel had 10 points. RP (10/28/10) 6; CP 5-6.

The state had charged all three offenses to include the allegation that multiple current offenses and Mr. Pagel's high score resulted in some offenses going unpunished. CP 2-3. The court found that was a basis for an exceptional sentence. CP 4-14; RP (10/28/10) 5-10. The standard range at 9 points was 51 to 68 months on the burglary convictions. RP (10/28/10) 6. The court issued a sentence of 85 months. CP 8.

Mr. Pagel timely appealed. CP 15-26.

## ARGUMENT

**I. MR. PAGEL'S CONVICTIONS WERE 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. Pagel 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).<sup>1</sup> 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).

The rule requires a prosecuting authority to charge crimes with reference to the specific facts of the offense, rather than relying solely on

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<sup>1</sup> 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* underlying [the] charges.” *Leach*, at 699.

the abstract and general language of the statute. *Id.* This reflects the historical practice that has prevailed in Washington since before the adoption of the state constitution.

For example, an 1888 indictment charging first-degree murder used the following language:

Henry Timmerman is accused by the grand jury...of the crime of murder in the first degree, committed as follows: He (said Henry Timmerman) in the said county of Klickitat, on the 3d day of October, 1886, purposely, and of his deliberate and premeditated malice, killed William Sterling, by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said William Sterling with a pistol which he (the said Henry Timmerman) then and there held in his hand, and from which mortal wound the said William Sterling instantly died.

*Timmerman v. Territory*, 3 Wash.Terr. 445, 448, 17 P. 624 (1888). The *Timmerman* Indictment thus contains a recitation of both the legal elements required for conviction and the specific conduct committed by the accused person.

C. The charging document was legally deficient because it did not include specific facts supporting each crime alleged.

Conviction of burglary requires proof that the accused person unlawfully entered or remained in a building with the intent to commit a crime against persons or property therein. RCW 9A.52.030. In this case, the Information outlined these legal elements; however, it did not allege any specific facts other than the date of each offense. CP 2-3.

With the exception of the date, the Information included nothing more than the bare, abstract language of the statute. CP 2-3. It did not inform Mr. Pagel of the specific conduct he was charged with having committed. Accordingly, it lacked the minimal factual specificity required by *Leach*, and was factually deficient. *Leach, supra; see also Brooke, at* 629-630.

Since the essential facts are missing from the Information, Mr. Pagel need not demonstrate prejudice.<sup>2</sup> *State v. McCarty, at* 425. The Information's factual deficiency requires reversal, regardless of Mr. Pagel's actual knowledge, his failure to request a bill of particulars, or any lack of demonstrable prejudice. *Id.* Accordingly, the convictions must be reversed and the case dismissed without prejudice. *Id.*

**II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DETERMINE WHETHER OR NOT COUNTS TWO AND THREE SCORED AS THE SAME CRIMINAL CONDUCT.**

**A. Standard of Review**

A sentencing court's "same criminal conduct" determination will be reversed based on a clear abuse of discretion or misapplication of the

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<sup>2</sup> The obligation is on the prosecuting authority to include the essential facts. *Leach, at* 689. Once it has done so, the defense may clear up any lingering vagueness by requesting a bill of particulars. If the Information is deficient, the accused person's failure to request a bill of particulars makes no difference. *Id.*

law. *State v. Haddock*, 141 Wash.2d 103, 110, 3 P.3d 733 (2000). Failure to exercise discretion requires reversal. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

B. Two offenses comprise the same criminal conduct if committed at the same time and place, against the same victim, with the same overall criminal purpose.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

The burden is on the state to establish that multiple convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wash.App. 361, 365, 921 P.2d 590 (1996), *review denied at* 131 Wash.2d 1006, 932 P.2d 644 (1997), *citing* RCW 9.94A.110; *State v. Jones*, 110 Wash.2d 74,

750 P.2d 620 (1988); *State v. Gurrola*, 69 Wash.App. 152, 848 P.2d 199, review denied, 121 Wash.2d 1032, 856 P.2d 383 (1993).

In determining whether multiple offenses require the same criminal intent, the sentencing court ““should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.... [P]art of this analysis will often include the related issues of whether one crime furthered the other...”” *State v. Garza-Villarreal*, 123 Wash.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wash.2d 207, 215, 743 P.2d 1237 (1987), 749 P.2d 160 (1988)).

RCW 9.94A.589(1)(a) requires analysis of whether the offender’s criminal intent, objectively viewed, changed from one crime to the next. *Haddock*, at 113; see also *State v. Anderson*, 72 Wash.App. 453, 464, 864 P.2d 1001 (1994). Sometimes this necessitates a determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wash.2d 177, 183, 942 P.2d 974 (1997).

Two appellate cases illustrate the analysis. In *State v. Miller*, 92 Wash.App. 693, 964 P.2d 1196 (1998), the Court of Appeals held that the charges of Attempted Theft of a Firearm and Assault in the Third Degree

constituted the same criminal conduct under the facts of that case. In *Miller*, the defendant assaulted an officer while struggling to get his gun. The court held that the “assault on [the officer,] when viewed objectively, was ‘intimately related’ to the attempted theft. Miller could not deprive [the officer] of his holstered weapon without assaulting him.” *Miller*, at 708. Similarly, in *State v. Taylor*, 90 Wash.App. 312, 950 P.2d 526 (1998), the court held that the two crimes at issue—Assault in the Second Degree and Kidnapping—constituted the same criminal conduct under the facts of that case:

The evidence established that [the defendant’s] objective intent in committing the kidnapping was to abduct [the victim] by the use or threatened use of the gun and that his objective intent in participating in the second degree assault was to persuade [the victim], by the use of fear, to not resist the abduction. The assault began at the same time as the abduction, when [the defendant] entered the car. It ended when the kidnapers exited the car and the abduction was over. And there is no evidence that [the defendant] engaged in any assaultive behavior during the kidnapping that did anything beyond facilitating and furthering the abduction.

Further, because the assault and kidnapping were committed simultaneously, it is not possible to find a new intent to commit a second crime after the completion of the first crime... Thus, this record supports only a finding that the offenses were part of the same criminal conduct and [the defendant] is entitled to have the two offenses counted as one crime.

*Taylor*, at 321-322.

- C. The sentencing court should have analyzed counts two and three under the “same criminal conduct” test to determine whether or not they scored together, yielding an offender score of nine and eliminating the basis for an exceptional sentence.

Here, Mr. Pagel was convicted of theft and burglary. The evidence established that he broke into a school and stole computer equipment. The two crimes occurred at the same time and place and involved the same victim. Furthermore, Mr. Pagel’s overall criminal purpose did not change from one crime to the next; instead, he broke into the school to steal the equipment. RP (10/20/10) 36-139; RP (10/21/10) 149-214.

Because of this, the court should have considered whether or not to score the two crimes as the same criminal conduct. RCW 9.94A.589(1)(a); *Garza-Villarreal*. The court would then have had the option of treating the two crimes separately under the burglary anti-merger statute. *See* RCW 9A.52.050.

Instead, however, the court did not analyze the two charges to determine whether or not they constituted the same criminal conduct. Nor did the court make reference to the burglary anti-merger statute. RP (10/28/10) 3-26.

The court’s failure to exercise discretion constituted an abuse of discretion. *Grayson, supra*. Accordingly, Mr. Pagel’s exceptional

sentence must be vacated and the case remanded for a new sentencing hearing. *Id.*

**III. MR. PAGEL 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 (3<sup>rd</sup> 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 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 argue that counts two and three comprised the same criminal conduct.

The charging document provided notice to defense counsel that the prosecution would seek an exceptional sentence based on Mr. Pagel’s criminal history and offender score. CP 2-3. Despite this, defense counsel did not ask the sentencing court to find that counts two and three comprised the same criminal conduct. Nor did counsel ask the court to refrain from sentencing the two charges separately under the anti-merger statute. RP (10/28/10) 3-26.

Counsel’s failure was apparently based on ignorance of the law. Defense counsel did make a half-hearted effort to seek a standard-range sentence, arguing that Mr. Pagel’s offender score was high only because of the doubling provisions of the SRA, rather than because he had ten prior felonies. RP (10/28/10) 7, 16-17. In seeking a standard range sentence, counsel should have asked the court to make the “same criminal conduct” finding regarding counts two and three. Had the trial court scored the two offenses as one, there would have been no basis for an exceptional sentence. Furthermore, there is a reasonable possibility that the trial judge would have chosen to score the two offenses as one, given

that they were committed at the same time and place, against the same victim, and with one overall criminal purpose.

Counsel's unreasonable failure to request a "same criminal conduct" finding prejudiced Mr. Pagel. Accordingly, the exceptional sentence must be vacated and the case remanded for a new sentencing hearing.

**IV. MR. PAGEL'S EXCEPTIONAL SENTENCE VIOLATED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ANY FACT THAT AUTHORIZED AN INCREASED PENALTY FOR EACH CRIME.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. 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).

C. 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. 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).

D. *Almendarez-Torres* does not preclude application of *Blakely* to Mr. Pagel’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); *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*, at 143; *Wheeler*, at 123-24.

*Almendarez-Torres* does not control under the circumstances here. *Almendarez-Torres* addressed only the requirement that elements be pled in the charging document; it did 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. Pagel’s case.

Under the logic of *Blakely*, Mr. Pagel was entitled to a jury determination of his 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*.

**CONCLUSION**

For the foregoing reasons, Mr. Pagel's conviction must be reversed and the case dismissed. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on April 26, 2011.

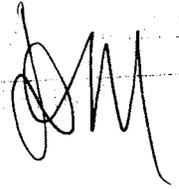
**BACKLUND AND MISTRY**

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

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

CERTIFICATE OF MAILING

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



Orlen Pagel, DOC #847658  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

and to:

Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

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

All postage prepaid, on April 26, 2011.

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 April 26, 2011.

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