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Supreme Court No. 88118-9
Court of Appeals No. 40772-8-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Alvin Witherspoon
Appellant/Petitioner

Clallam County Superior Court Cause No. 09-1-00496-9
The Honorable Judge Craddock Verser

PETITIONER'S RESPONSE
TO AMICUS WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS BRIEF

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ARGUMENT

I. MR. WITHERSPOON'S ARGUMENTS DEALING WITH ART. I, § 14 AND THE EIGHTH AMENDMENT RAISE ISSUES OF FIRST IMPRESSION AND ADDRESS RECENT CHANGES IN THE LAW.

Amicus Washington Association of Prosecuting Attorney (WAPA) contends that "[t]his case presents issues that this Court has previously resolved," and thus Mr. Witherspoon's argument "runs afoul of the principle of *stare decisis*." Br. of Amicus WAPA, p. 2. Amicus WAPA is wrong on both counts. Mr. Witherspoon raises arguments that have not previously been addressed by the Supreme Court. In addition, he submits arguments based on recent U.S. Supreme Court precedent. The court has not yet had the opportunity to examine the issues under the recent cases.

A. Mr. Witherspoon's sentence is unconstitutionally cruel.

1. The Supreme Court has never applied the third *Fain*[1] factor to POAA sentencing of second-degree robbery offenders.

Washington sentences may not be cruel. Wash. Const. art. I, § 14.[2] A sentence is cruel if it fails the *Fain* test. *Fain,* 94 Wn.2d at 397. *Fain* requires examination of four factors.[3] *Id.* The third factor is the punishment imposed for the same offense in other jurisdictions. *Id.*

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[1] *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980).

[2] The state constitution provides broader protection than the Eighth Amendment. *State v. Roberts*, 142 Wn.2d 471, 506, 14 P.3d 713 (2000).

[3] Courts often take into account the offender's record. *State v. Magers*, 164 Wn.2d 174, 194, 189 P.3d 126 (2008); *State v. Rivers*, 129 Wn.2d 697, 714-15, 921 P.2d 495 (1996).

The Supreme Court has never applied this factor to a third-strike robbery 2 sentence. The court has instead relied on generalities about sentencing trends. In *Rivers,* the court cited articles outlining the national trend. *State v. Rivers*, 129 Wn.2d at 714, 921 P.2d 495 (1996). It did not cite individual state statutes. *Id.* *Rivers* found it "likely" that the defendant would have received a similar sentence in a majority of jurisdictions.[4] *Id.* The court did not have before it a state-by-state comparison of third-strike robbery sentencing.[5] *Id.*

Mr. Witherspoon has provided such a comparison. Appendices A, B. Only three other states would impose a mandatory sentence of life without parole. Appendix A. One of these three would not consider Mr. Witherspoon a persistent offender. *See* Mont. Code Ann. § 46-18-219.

The *Rivers* court's comparison to other jurisdictions was complicated by an additional problem. The court noted that other states authorize life sentences for third-strike robberies. *Rivers,* 129 Wn.2d at 714. The *Rivers* court believed the difference between life with or without parole to be constitutionally insignificant. *Id.* (citing *In re Grisby,* 121 Wn.2d 419, 427, 853 P.2d 901 (1993)). The Supreme Court has since abandoned this position. *State v. Thomas*, 150 Wn.2d 821, 848, 83

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[4] *Rivers* involved a second-degree robbery charge.

[5] The *Rivers* analysis also appeared in *Thorne. State v. Thorne*, 129 Wn.2d 736, 775, 921 P.2d 514 (1996). The defendant in *Manussier* "provided no information concerning the punishment he would have received in other jurisdictions..." *State v. Manussier*, 129 Wn.2d 652, 678, 921 P.2d 473 (1996). In the absence of proper evidence, the *Manussier* court noted that the POAA was "consistent with reports on the national trend of substantially increasing criminal sentences for repeat offenders." *Id.*

P.3d 970 (2004). The U.S. Supreme Court has also noted the special characteristics of life without parole. *Graham v. Florida*, 560 U.S. 48, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, --- U.S. ---, ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

Life without parole is constitutionally different than life with parole. *Thomas*, 150 Wn.2d at 848. Mr. Witherspoon's sentence is harsher than the life sentences imposed on recidivist robbery 2 offenders in other jurisdictions. Those life sentences do not support the sentence imposed here.

The Supreme Court has never examined the third *Fain* factor. Information from other jurisdictions weighs against persistent offender sentences for robbery 2 offenders. Forty-eight states and the District of Columbia would impose a sentence more lenient than that imposed here. All four *Fain* factors require invalidation of Mr. Witherspoon's sentence. Because the court has never applied the third factor, *stare decisis* is not implicated.

2. *Rivers* and *Manussier* do not control Mr. Witherspoon's case.

Analysis under *Fain* takes into account specifics that are particular to the offense, the offender, and the time of sentencing. A decision upholding a sentence in one case cannot control the analysis in another case, even if both involve the same offense.

The Supreme Court has upheld persistent offender sentences for robbery 2. *Rivers*, 129 Wn.2d at 714; *Manussier*, 129 Wn.2d at 678. Mr. Witherspoon's

case differs from *Manussier* and *Rivers*. Under *Fain, Rivers* and *Manussier* do not control Mr. Witherspoon's case.

Manussier involved a bank robbery in which the defendant claimed to have a gun.[6] The defendant had two prior convictions for first-degree robbery, which "were based upon facts which represented a particularly significant risk of danger to others." *Manussier,* 129 Wn.2d at 677.

Rivers involved a robbery in which the defendant claimed to have a gun, struggled physically with the victim, and threatened to "blow [the victim's] head off." *Rivers,* 129 Wn.2d at 696. The defendant had prior convictions for second-degree robbery, attempted second-degree robbery, and second-degree assault. *Rivers,* 129 Wn.2d at 704.

Here, by contrast, Mr. Witherspoon allegedly made—at most—only a fleeting reference to a pistol as he fled the scene in an effort to avoid confrontation.[7] He did not act violently or make explicit threats. RP (4/12/10) 22-26. He did not injure or even frighten anyone. RP (4/12/10) 17-49. His prior strike offenses did not involve violence against others. Furthermore, his criminal history, although significant, does not include a long list of violent crimes. CP 7.

Manussier and *Rivers* should not be mechanically applied to uphold Mr. Witherspoon's sentence. The three cases share only one similarity—each defend-

[6] The original charge was first-degree robbery. The defendant pled guilty to a reduced charge of second-degree robbery.

ant was convicted of robbery 2. *Fain* requires a reviewing court to consider more than merely the name of the offense of conviction.

Mr. Witherspoon's sentence of life without possibility of parole is unconstitutionally cruel under art. I, § 14. *Fain,* 94 Wn.2d at 397. The sentence must be vacated, and the case remanded to the trial court for a new sentencing hearing. *Id.*

B. Mr. Witherspoon's sentence is categorically prohibited under the U.S. Supreme Court's decision in *Graham.*

1. The Supreme Court has yet to examine persistent offender sentencing for second-degree robbery under *Graham.*

The "categorical approach" to the Eighth Amendment prohibits certain extreme penalties for a whole class of offenders. The "categorical approach" applies to sentences of life without parole. *Graham,* 560 U.S. at ___. This is a recent development.[8] The Supreme Court has not yet examined the POAA under the categorical approach outlined in *Graham. Stare decisis* does not weigh against examining the statute under *Graham.*

2. Washington imposes a harsher third-strike sentence for second-degree robbery then all but three other U.S. jurisdictions.

Graham requires examination of four factors. *Id.,* at ___. All four weigh in favor of invalidating Mr. Witherspoon's sentence under the categorical approach. First, there is a strong national consensus against sentencing robbery 2 offenders to life without parole. Appendices A, B. Washington has very little company in

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[7] Testimony on this point conflicted. Mr. Witherspoon and his fiancée testified that he did not make such a reference. RP (4/13/10) 57, 63, 75-76, 80.

[8] Prior to *Graham,* the "categorical approach" applied only in death penalty cases.

this regard. *Cf. Graham,* at __ (finding a practice shared by 11 jurisdictions to be "exceedingly rare.")

Second, robbery 2 is less serious than murder. The *Graham* court found the distinction between homicides and other crimes important. Under *Graham,* robbery offenders are categorically less deserving of the most serious forms of punishment. *Id.,* at ___.

Third, life without parole is one of only two irrevocable penalties. Only the death penalty is harsher. The severity of the penalty weighs in favor of *Graham's* categorical approach. *Id.,* at ___.

Fourth, sentencing second-degree robbery offenders to life without parole cannot be justified under any penological theory. As in *Graham,* the extreme sentence here is not justified by any reasonable theory of retribution, deterrence, incapacitation, or rehabilitation. *Id.,* at __.

The sentencing practice here is cruel and unusual. *Id.,* at ___. The Eighth Amendment categorically forbids imposition of life without parole for second-degree robbery offenders. This is so regardless of their criminal history.

C. Mr. Witherspoon's sentence is invalid under the U.S. Supreme Court's decision in *Miller.*

1. The Washington Supreme Court has not yet examined the POAA under *Miller.*

The constitution requires that judges have discretion when it comes to certain sentences. *Miller,* --- U.S. at ___. *Miller* created a framework for analyzing the mandatory imposition of a particular sentence. *Miller,* --- U.S. at ___. Alt-

hough *Miller's* holding is limited to juvenile offenders, the decision is founded on constitutional principles that apply to adults and juveniles alike. The Washington Supreme Court has not had the opportunity to examine persistent offender second-degree robbery sentences under *Miller.*

2. The sentencing judge in this case would have exercised his discretion to impose a lower sentence.

The Eighth Amendment guarantees freedom from excessive sentences. *Miller,* --- U.S. at ___. Instead, sentences must be proportioned to the characteristics of the offender and the offense. *Id.* The standards by which sentences are judged evolve as society matures. *Id.*

Like the death penalty, sentences of life without parole are different from all other sentences. *Id.* It is important that extreme sentences—such as death or life without parole—be imposed only when appropriate. *Woodson v. N. Carolina,* 428 U.S. 280, 303-04, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (addressing capital punishment).

The death penalty may not be automatically imposed. *Id.* The *Miller* court held that life without parole may not be automatically imposed on juveniles. *Miller,* --- U.S. at ___. Under *Miller's* reasoning, second-degree robbery offenders should not be subjected to automatic sentences of life without parole.

By mandating life without parole for third-strike robbery offenders, the POAA prohibits the sentencing judge from considering any extenuating circumstances that mitigate in favor of a lower sentence. The statute is unconstitutional,

because it does not allow judges to consider mitigating factors and exercise discretion. In this case, Judge Verser made clear that he would not have imposed life without parole:

> Nevertheless, is this the type of crime that you want to put somebody in prison for the rest of their life for. And, um, exercising discretion, I wouldn't do that.
> ...
> I don't take any pleasure, Mr. Witherspoon, in sentencing you as a persistent offender. That's a choice that was made in the filing decision and the decision that went to trial. The jury found you guilty of robbery in the second degree. A very, very close call in my opinion.
> RP (05/24/2010) 41-42.

Under the reasoning in *Miller,* the POAA violates the Eighth Amendment. The statute requires judges to impose a harsh and irrevocable penalty. It eliminates judicial discretion. For these reasons, it is unconstitutional.

II. MR. WITHERSPOON'S PRIOR STRIKES SHOULD HAVE BEEN PROVED TO A JURY BEYOND A REASONABLE DOUBT. MR. WITHERSPOON RAISES NEW ARGUMENTS AND ASKS THE COURT TO CONSIDER THE EFFECT OF RECENT U.S. SUPREME COURT DECISIONS.

A. The Supreme Court has never considered whether a third-strike offense is in a category separate from infractions, misdemeanors felonies, and capital offenses.

1. A prior conviction is an element of a crime when it makes otherwise lawful conduct criminal, or when it aggravates an offense from one category of crime to another.

Prior convictions are generally exempt from the rule set forth in *Apprendi* and *Blakely. Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). However, a prior conviction that is an element must be

proved to a jury beyond a reasonable doubt. *See, e.g., State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008).

A prior conviction is an element under two circumstances. First, some conduct is not criminal in the absence of a prior conviction. For example, unlawful possession of a firearm requires proof of a prior felony conviction. RCW 9.41.040; *State v. Summers*, 120 Wn.2d 801, 846 P.2d 490 (1993).

Second, a prior conviction is an element when it elevates a crime from one category of offense to another. *Roswell,* 165 Wn.2d at 192. For example, conviction for felony DUI requires proof of multiple prior DUI convictions. RCW 46.61.502(6); *State v. Cochrane*, 160 Wn. App. 18, 20, 253 P.3d 95 (2011). Conviction of a prior sex offense elevates indecent exposure from a misdemeanor to a felony. RCW 9A.88.010(2)(c); *State v. Benitez*, 175 Wn. App. 116, 122, 302 P.3d 877 (2013). Felony violation of a no contact order requires proof of two prior convictions. RCW 26.50.110(5); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). In each case, the prior conviction is an element of the more serious crime.

2. The category of a crime is determined by historical practice, the penalty authorized, and any legislative characterization or label.

The law recognizes different categories of offenses. For example, the U.S. Supreme Court has distinguished between "petty" and "serious" offenses. Petty offenses carry a penalty of less than six months and do not require a jury trial under the Sixth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Three factors aid in categorizing offenses. The strongest factor determining the category of a crime is the penalty imposed. *Id.* The penalty reflects society's judgment as to the seriousness of the charge. *Id.; Lewis v. United States*, 518 U.S. 322, 325-26, 116 S.Ct. 2163, 135 L.Ed.2d 590 (1996).

A second factor is historical practice, which includes an examination of the common law. *See Cheff v. Schnackenberg*, 384 U.S. 373, 379, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The significance of this factor has decreased over time, "because many statutory offenses lack common-law antecedents." *Lewis,* 518 U.S. at 325.

The third factor encompasses "legislative declaration[s]" characterizing an offense. *Muniz v. Hoffman*, 422 U.S. 454, 475-76, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975).

Washington law has traditionally recognized four categories of offenses: infractions, misdemeanors,[9] felonies,[10] and capital crimes. To this list must be added another category of offenses more serious than class A felonies, but ineligible for the death penalty.[11]

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[9] Separated into misdemeanor s and gross misdemeanors.

[10] Separated into class A, B, and C felonies.

[11] This category could be a separate category of crimes, or it could be a part of the category now referred to as "capital offenses."

First, the penalty for this category differentiates it from the other lower categories. Ordinary class A felonies have a maximum penalty of life in prison (with the possibility of parole). RCW 9A.20.021. Life without parole is authorized only when the offender is convicted of aggravated first-degree murder or a third-strike. RCW 9.94A.570; RCW 10.95.030. The difference between life with and without parole is constitutionally significant. *Thomas*, 150 Wn.2d at 848; *see also Graham,* 560 U.S. at ___; *Miller* --- U.S. at ___.

Second, there is no long-standing historical practice of sentencing ordinary felons to life in prison without parole. In the U.S., early life without parole sentences arose when persons sentenced to death were granted pardons conditioned on serving life in prison. *See, e.g., Ex parte Wells*, 59 U.S. 307, 15 L.Ed. 421 (1855); *Schick v. Reed*, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974). A large number of murder defendants were sentenced to life without parole following the U.S. Supreme Court's decision invalidating most capital sentencing laws in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Third, the legislature has made clear that this category encompasses only the very worst offenses. It applies only to aggravated first-

degree murder, and to people who have committed three[12] offenses characterized by the legislature as "most serious." RCW 9.94A.030(37).

Persistent offenders belong in a category more serious than people convicted of ordinary class A or class B felonies. The penalty imposed, the lack of such onerous sentences for ordinary felons, and the legislative declaration that the penalty applies only to the worst offenders all make clear that third strike crimes are not ordinary felonies.

3. Prior strikes are an element of a third-strike offense, because proof of the prior strikes elevates an ordinary felony to a more serious category of crime.

Second-degree robbery carries a maximum penalty of ten years in prison. RCW 9A.20.021. When the prosecution proves two prior strikes, the offense is elevated to a more serious category. RCW 9.94A.570. This more serious category carries a penalty of life without parole. RCW 9.94A.570. The penalty is not available in ordinary felony cases. The legislature has applied it only to first-degree aggravated murder and to "most serious" offenders. RCW 9.94A.030(37).

Instead of facing the penalty for a class B felony, Mr. Witherspoon was given a punishment otherwise reserved for capital offenses. Accordingly, his prior strikes elevated his offense from a class B felony to something more serious. His prior strikes were elements of his third-strike of-

[12] Or, in the case of persistent sex offenders, two.

fense. The prosecution should have been required to prove the prior strikes to a jury beyond a reasonable doubt.

B. The Supreme Court has not had the opportunity to examine the POAA in light of the U.S. Supreme Court's *Alleyne* decision.

The Supreme Court decided *Alleyne* in June of 2013. *Alleyne v. United States*, --- U.S. ---, ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). The Washington Supreme Court has not considered the constitutionality of the POAA since *Alleyne* was decided.

1. A crime is defined by the facts necessary to impose a particular penalty.

At common law, conviction of a particular crime led to imposition of a particular punishment. *Alleyne,* --- U.S. at ___. By definition, the elements of a crime were those facts required to impose the punishment. *Id.* Each offense carried a specified sanction. *Id.* A person charged with a crime knew what punishment to expect upon conviction. *Id.*

The concept of a sentencing factor was foreign to this regime. Any fact that resulted in a higher penalty was necessarily an element of a greater offense. *Id.*

2. The historic link between crime and penalty prohibits imposition of a sentence greater than that authorized by the jury's verdict.

Apprendi and *Blakely* are consistent with the historic practice outlined in *Alleyne.* The *Alleyne* court did not note any exceptions to the rule. *See Alleyne,* --- U.S. at ___. Any fact necessary to a particular punishment

is an element of the crime associated with that punishment. *Alleyne's* logic does not leave room for any exceptions. This includes an exception for the fact of a prior conviction.

Mr. Witherspoon was charged with a third-strike offense. CP 5-17. This offense carried a penalty of life without parole. The elements of the offense are those facts required to impose this particular punishment. The state was required to prove that Mr. Witherspoon committed second-degree robbery, that he'd been convicted of at least two prior strikes "on separate occasions," and that he'd been convicted of one prior strike before committing the other prior strike. RCW 9.94A.030(37).

If the prosecution failed to prove any of these facts, the requested penalty could not be imposed. Accordingly, under *Alleyne,* each of these facts is an element of the offense. Mr. Witherspoon should have been provided a jury trial at sentencing.

C. Mr. Witherspoon does not ask the court to anticipate a U.S. Supreme Court decision overruling *Almendarez-Torres.*[13]

1. The court should adopt *Alleyne's* reasoning as a matter of state constitutional law.

Alleyne is a federal case based on due process and the Sixth Amendment right to a jury trial. *Alleyne* foreshadows the end of the so-called *Almendarez-Torres* exception. However, it is not necessary for this

[13] In *Almendarez-Torres,* the U.S. Supreme Court refused to limit a sentence based on the state's failure to allege prior convictions in the charging document. *Almendarez–Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

court to anticipate the U.S. Supreme Court decision that will overrule *Almendarez-Torres.* Instead, this court should adopt *Alleyne's* reasoning as a matter of state constitutional law.[14] *See, e.g., State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991) (adopting the federal standard requiring liberal construction of charging documents challenged after verdict). This approach sidesteps any problems regarding the continuing validity of *Almendarez-Torres.*

2. *Almendarez-Torres* does not actually control the issues in this case.

Even without adopting the federal standard as a matter of state constitutional law, this court should invalidate Mr. Witherspoon's sentence through application of federal law. Doing so would not require the court to anticipate a new U.S. Supreme Court decision clearing the way.

In past decisions, the court has relied on *Almendarez-Torres* to justify an exception for the fact of a prior conviction. *See, e.g., State v. Smith*, 150 Wn.2d 135, 141, 75 P.3d 934 (2003). These past decisions have rested on an overly broad reading of *Almendarez-Torres.*[15] The *Almendarez-Torres* holding did not address the right to a jury trial or the right to proof beyond a reasonable doubt (although it discussed those matters in *dicta*).

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[14] Because Mr.Witherspoon urges the court to adopt the federal standard, no *Gunwall* analysis is necessary. *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

[15] In some of these cases, as in *Almendarez-Torres* itself, the offender did not challenge the fact of his prior conviction. *See State v. Weber*, 159 Wn.2d 252, 260, 149 P.3d 646 (2006) ("As in *Almendarez–Torres,* Weber does not challenge the 'fact' of his juvenile adjudication...").

The issue in *Almendarez-Torres* was whether the punishment that could be imposed on the defendant was circumscribed by the language of the indictment. *Almendarez-Torres,* 523 U.S. at 227-228. The court held that prior convictions could be used to increase the penalty for an offense even if not mentioned in the indictment.[16] *Almendarez–Torres,* 523 U.S. at 239-248.

The defendant in *Almendarez-Torres* pled guilty to the offense. He admitted he had the requisite prior convictions at his plea hearing. *Id.,* at 227. He did not request a jury trial on his prior convictions. He did not argue that the state was required to prove his priors beyond a reasonable doubt. *Id.,* at 248. Although the *Almendarez-Torres* court discussed the right to a jury determination of elements and the right to proof beyond a reasonable doubt, neither discussion was essential to the holding. *Id.,* at 239-248. The court's remarks on these subjects were therefore *dicta.* They are not binding. *See Tyler v. Cain*, 533 U.S. 656, 663 n. 4, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). In fact, the *Almendarez-Torres* court explicitly reserved ruling on the standard of proof when prior convictions are used to increase the penalty. *Id.,* at 248.

Under *Almendarez-Torres*, the prosecution need not plead prior convictions in the charging document, even if they are used to increase the

[16]The continuing validity of this holding is in doubt. The *Alleyne* court's reasoning makes

penalty. The decision does not relieve the state of its obligation to prove prior convictions to a jury beyond a reasonable doubt. The court's holding related only to the charging document.

Furthermore, the enhancement in *Almendarez-Torres* did not change the category of crime the defendant faced. Instead, it increased the defendant's standard range from something less than 24 months to 77 to 96 months. *Almendarez-Torres* 523 U.S. at 227. Here, by contrast, Mr. Witherspoon's standard range for second-degree robbery was 63-84 months. CP 8. The penalty for third-strike robbery2 is life in prison without possibility of parole. Third-strike robbery 2 cannot be described as a class B felony. Instead, it is more akin to a capital offense: the only other charge that merits this punishment is first-degree aggravated murder. This change in category distinguishes Mr. Witherspoon's case from *Almendarez-Torres.*

For all these reasons, *Almendarez-Torres* does not prohibit this court from applying federal law to invalidate Mr. Witherspoon's sentence.[17] Mr. Witherspoon does not allege a lack of notice, or any defect in the charging document. Instead, he argues that he was entitled to proof of his prior strikes to a jury beyond a reasonable doubt. The prior strikes

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clear that *Almendarez-Torres* rests on a crumbling foundation.

changed his crime from robbery 2 to third-strike robbery 2, which is not a class B felony. *Almendarez-Torres* does not control these issues. The court should vacate Mr. Witherspoon's sentence, and remand the case for a new sentencing hearing.

3. *Almendarez-Torres* is no longer good law.

Almendarez-Torres rested on five erroneous bases that the U.S. Supreme Court has since disavowed.

First, the court asserted that recidivism is a traditional basis allowing a sentencing court to increase the penalty for an offense. *Almendarez-Torres,* 523 U.S. at 243. This is incorrect, as the *Alleyne* court points out. The longer historical tradition is for conviction of a particular crime to carry a fixed penalty. Traditionally, judges lacked authority to increase the penalty, because the facts found by the jury established the crime and hence the sentence. *Alleyne,* --- U.S. at ___.

Second, the court found a significant difference between increases in the mandatory minimum and the statutory maximum penalty to be imposed. *Almendarez-Torres*, 523 U.S. at 244. The U.S. Supreme Court has since recognized that *any* increase in the penalty implicates the Sixth Amendment and the right to due process. *See Apprendi,* 530 U.S. at 490 (increase in the statutory maximum), *Blakely* 542 U.S. at 303 (sentence

[17] In addition, *Almendarez-Torres* involved an increase in the defendant's determinate sentence. It did not involve a change from a determinate sentence to life without parole. The

above the standard range), *Alleyne,* --- U.S. at ___ (increase in the mandatory minimum).

Third, the court presumed that sentencing factors are not elements of the offense. *Almendarez-Torres,* 523 U.S. at 246. The court has since held that such labels are not dispositive, and that "sentencing factors" implicate the jury right and the right to proof beyond a reasonable doubt. *Blakely,* 542 U.S. at 305-314; *Apprendi,* 530 U.S. at 478.

Fourth, the court believed the issue could be impacted by the nature of the offense or the intent of the legislative body. *Almendarez-Torres,* 523 U.S. at 246. These factors are irrelevant under *Apprendi* and its progeny.

Finally, the court noted that the death penalty could be imposed based on aggravating factors found by a judge. *Almendarez-Torres,* 523 U.S. at 247 (citing, *inter alia, Walton v. Arizona,* 497 U.S. 639, 647, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). This is no longer true. *Walton* was overruled by *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The death penalty cannot be imposed absent a jury determination of aggravating factors. *Id.,* at 589.

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defendant's prior convictions did not change the category of offense.

Almendarez-Torres is a building whose entire foundation has been removed. It is not necessary to wait for someone to announce that the building is unsafe: the building has already collapsed.

CONCLUSION

Mr. Witherspoon's persistent offender sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted October 10, 2013.

BACKLUND AND MISTRY

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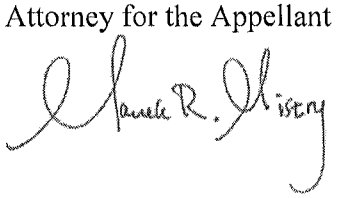

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Attorney for the Appellant

APPENDIX A: ROBBERY 2 SENTENCES IN OTHER JURISDICTIONS

SUMMARY OF MAXIMUM "THIRD STRIKE" SENTENCING BY LENGTH OF TIME
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 (min. 10 years up to LWOP)
Life (discretionary)	Massachusetts Michigan (indeterminate) Utah West Virginia
Life (discretionary with mandatory minimum term)	Alabama (min. 10 years) California (min. 20 years) Idaho** (min. 5 years) Oklahoma (min. 20 years) Texas (min. 25 years)
31-60 years (mandatory minimum if applicable)	Nebraska (60) min. 10 years) Rhode Island (55) (discretionary) Wyoming (50) (min. 10 years) Indiana (38) (discretionary fixed term)
30 years (mandatory minimum if applicable)	Arkansas Florida (court discretion to go higher) Maine (determinate) Missouri (min. 10 years) New Hampshire (min. 10 years)
21-25 years (mandatory minimum if applicable)	Maryland (25) New York (25) (min. 12 years) Wisconsin (21) (discretionary)

20 years (mandatory minimum if applicable)	Georgia** Hawaii (indeterminate) Kentucky (indeterminate) (min. 10 years) New Jersey (fixed min. term 10 years) Virginia**
11-15 years (mandatory minimum if applicable)	Iowa (15) South Carolina (15)** Tennessee (15)** Arizona (12)* (min. 8 years) North Carolina (12) Kansas (11.33) (min. 10.2 years)
10 years (mandatory minimum if applicable)	Alaska (min. 6 years) Colorado Minnesota* (court discretion to go higher) North Dakota*** (discretionary) South Dakota** Vermont**
5-9 years	Illinois (7)** New Mexico (7) Pennsylvania (7)** Connecticut (5)** Delaware (5)** (court discretion to go higher) Ohio (5) Oregon (5) (determinate)

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

APPENDIX B: STATUTES AND PENALTIES FOR ROBBERY 1 AND ROBBERY 2 IN OTHER JURISDICTIONS

Third Strike Penalties
(a) Second-Degree Robbery
(b) First-Degree Robbery

State	Third Strike Statute	Penalty
Alabama	(a) third-degree robbery Code of Ala. §13A-5-9(b)(1) (2006) from Class C felony to Class A (b) First-degree robbery Code of Ala. § 13A-5-9(b)(3) (2006)	(a) life or any term not more than 99 years, not less than 10 years. Code of Ala. § 13A-5-6-(a)(1) (b) life or any term not less than 99 years Code of Ala. § 13A-5-9(b)(3)
Alaska	(a) second-degree robbery Alaska Stat. § 12.55.25(d)(4) (2006), Class B felony (b) first-degree robbery Alaska Stat. § 12.55.25(c)(4) (2006), Class A felony	(a) 6-10 years (same statute) (b) 15-20 years (same statute)
Arizona	(a) robbery A.R.S. § 13-703(c), (j), Class 4 felony (b) armed robbery A.R.S. § 13-703(c), (j), Class 2 felony	(a) 8-12 years A.R.S. § 13-703(c), (j) (b) 14-28 years A.R.S. § 13-703(c), (j)
Arkansas	(a) robbery A.C.A. § 5-4-501(b)(1)(2), Class B felony (b) aggravated robbery A.C.A. § 5-4-501(b)(1)(2), Class Y felony	(a) 5-30 years, A.C.A. § 5-4-501(b)(1)(2) (b) min. 10 years – 60 years or life (same statute)
California	(a) second-degree robbery (serious felony) Cal Pen Code § 667.7(a)(1) (b) first-degree robbery (serious felony) Cal Pen Code § 667.7(a)(1)	(a) life, parole after 20 years, Cal. Penal Code § 667.7(a)(1) (b) life, parole after 20 years, Cal. Penal Code § 667.7(a)(1)

Colorado	(a) robbery – class 4 felony C.R.S. § 18-1.3-401(v)(a) – no enhancement, same penalty (b) aggravated robbery – class 3 felony C.R.S. § 12-1.3-801(1)(a)(I)(b), (II)(c) – crime of violence	(a) 12 years (3x the maximum of presumptive range if third felony within 10 year period C.R.S. § 18.1.3-801(1.5)) (b) life imprisonment, parole eligible after 40 years (same statute)
Connecticut	(a) third-degree robbery – (Class D felony) Conn. Gen. Stat. § 53a-40 – no enhancement, same penalty (b) first-degree robbery (Class B) OR second-degree robbery 9Class C) Conn Gen. Stat. § 53a-40(a)(1)(a)(h)	(a) not more than 5 years (b) not more than 40 years for either first or second degree robbery (same statute)
Delaware	(a) second-degree robbery – (Class E felony) 11 Del. C. § 4215 (a) – a second or other conviction (court discretion on greater punishment) (b) first-degree robbery (Class E felony) 11 Del. C. § 4214(b)	(a) up to 5 years, but court may impose greater punishment up to life (same statute) (b) up to life without parole (same statute)
District of Columbia	(a) robbery – D.C. Code § 22-1804a(2) (2009) D.C., Code § 22-4501(f) – robbery is "crime of violence" (b) robbery – D.C. Code § 22-1804a (a)(2) (2009), D.C., Code § 22-4501(f) – robbery is "crime of violence"	(a) up to life without parole (same statute) (b) up to life without parole (same statute)
Florida	(a) second-degree robbery – felony in the first degree 3x violent felony offender, Fla. Stat. § 775.084(c)(1)(4)(c)1.(b), (b) first-degree robbery – felony in the first degree, 3x violent offender, Fla. Stat. § 775.084(c)(1)(4)(c)1.(a)	(a) 30 years, may go higher (same statute) (b) imprisonment for life (same statute)

Georgia	(a) robbery O.C.G.A. § 17-10-7(c) (2005) (applies to fourth conviction only) (b) armed robbery – OC.G.A. § 17-10-6.1 (2005), serious violent felony, § 17-10-7(2)	(a) n/a, max penalty remains 20 years (b) life without parole (same statute)
Hawaii	(a) second-degree robbery (Class B felony) HRS § 706-662(1), § 706-661(3) (2005) (b) first-degree robbery (Class A felony) HRS § 706-662(1), § 706-661(2) (2005)	(a) indeterminate 20 year term – HRS § 706-661(3) (b) indeterminate life imprisonment – HRS § 706-661(2)
Idaho	(a) robbery – Idaho Code § 19-2514 (2006) (b) robbery – Idaho Code § 19-2514 (2006)	(a) not less than 5 yrs, may extend to life (same penalty) (b) not less than 5 yrs, may extend to life (same penalty)
Illinois	(a) robbery (Class 2 felony)720 ILCS 5/5-4.5-35, not applicable, only Class X felonies apply (b) aggravated or armed robbery – both Class 1 felony 720 ILCS 5/5-4.5-30, not applicable, only Class X felonies apply	(a) same penalty as first and second – max 7 yrs (b) same penalty as first and second – max 15 years
Indiana	(a) robbery (Class C felony) Burns Ind. Code Ann. §35-50-2-8(h) (2005) (b) robbery (Class B felony) Burns Ind. Code Ann. § 35-50-2-8(h)(2005)	(a) additional fixed term not to exceed 30 years – max 38 years (disc.) (same statute) (b) additional fixed term not to exceed 30 years – max. 50 (disc. fixed term) (same statute)
Iowa	(a) second-degree robbery (Class C felony) Iowa Code § 902.8, § 902.9 3 (2005) (b) first-degree robbery (Class B felony) Iowa Code § 902.9 2 (2005)	(a) no more than 15 years (Iowa Code § 902.9(3)) (b) no more than 25 years (same penalty)

Kansas	(a) robbery, Level 5/person felony K.S.A. § 21-6706(b). (b) aggravated robbery – Level 3/person felony K.S.A. § 21-6707(b).	(a) max 136 months, K.S.A 21-6804(a) (b) max. 247 months, K.S.A 21-6804(a)
Kentucky	(a) second-degree robbery (Class C felony) KRS §532.080(3), (6)(b) (b) first-degree robbery (Class B felony) KRS § 532.080(3), (6)(a)	(a) not less than 10 years, no more than 20 (same statute) (indeterminate) (b) not less than 20 years, no more than 50 years or life (same statute) (indeterminate)
Louisiana	(a) simple robbery La. R.S. § 15529.1A(1)(b), crime on violence under La. R.S. § 14.2(13) (b) first-degree robbery La. R.S. § 15.529.1A(1)(b), crime of violence under La. R.S. § 13.2(13)	(a) life without parole (same statute) (b) life without parole (same statute)
Maine	(a) robbery (class B crime) 17-A M.R.S. § 1252 (4-A) (20050 – sentence one class higher (b) robbery (Class A crime) 17-A M.R.S. § 1252 (4-A) (2005) – (sentencing court looks at prior record) – no higher class	(a) not to exceed 30 years (determinate) penalty as Class A crime – 17-A M.R.S. § 1252 (2-A) (b) not to exceed 30 years (sentencing court looks at prior record) 17-A M.R.S. § 1252 (2-A)
Maryland	(a) robbery, felony crime of violence Md. Criminal Law Code § 14.101(a)(9), (d)(1) (b)robbery with a dangerous weapon, felony, crime of violence under Md. Criminal Law Code § 14.101(a)(9), (d)(1)	(a) not less than 25 years (Same statute) (b) not less than 25 years (same statute)
Massachusetts	(a) confining or putting in fear of a person for the purpose of stealing – ALM GL ch. 279, § 25 (2005) – ha-	(a) life ALM GL. Ch. 265, § 21 (parole eligible)

	bitual criminal, max. term as provided by law (b) confining or putting in fear of a person for the purpose of stealing – ALM GL ch. 279, § 25 (2005) – habitual criminal, max. term as provided by law	(b)) life ALM GL. Ch. 265, § 21 (parole eligible)
Michigan	(a) robbery, felony MCLS § 769.11(1)(b) (b) robbery, felony MCLS § 769.11(1)(b)	(a) life (indeterminate – "or lesser term") (b) life (indeterminate – "or lesser term")
Minnesota	(a) simple robbery, defined as violent under 609.1095(d), Subd. (3) (b) aggravated robbery, defined as violent crime under 609.1095(d), Subd. (3)	(a) mandatory 10 years, no parole, court discretion to go higher (same statute) (b) mandatory 20 years, no parole, court discretion to go higher (same statute)
Mississippi	(a) robbery, max. sentence imposed pursuant to Miss. Code Ann. § 99-19-81, 83 as "crime of violence" ((b) robbery, use of deadly wpn max. sentence imposed pursuant to Miss Code Ann. § 99-19-81, § 99-19-83 (habitual criminals, felonies are crimes of violence)	(a) life without parole (b) life without parole
Missouri	(a) second-degree robbery (Class B felony), to Class A felony (§ 558.016 R.S.Mo. 3, 4, 6, 7(2)) (b) first-degree robbery (Class A felony), any sentence authorized as Class A (§ 558.016 R.S.Mo. 3, 4, 7(1))	(a) min. 10 years - max 30 years (§ 558.011 R.S.Mo. 7(2) (b) min. 10 years - max 30 years (§ 558.011 R.S.Mo. 7(2)
Montana	(a) robbery, Mont. Code Anno., § 46-18-219(1)(b)(iv) (b) robbery, Mont. Code Anno., § 46-	(a) life without parole (same statute)

	18-219(1)(b)(iv)	(b) life without parole (same statute)
Nebraska	(a) robbery (Class II felony) R.R.S. Neb. § 29-2221(1) (2005), habitual criminal (b) robbery (Class II felony) R.R.S. Neb. § 29-2221(1) (2005), habitual criminal	(a) mand. min 10 years – max. 60 years (same statute) (b) mand. Min 10 years – max. 60 years (same statute)
Nevada	(a) robbery (Category B felony), Nev. Rev. Stat. Ann § 207.012(a)(b) – upgraded to Category A (b) robbery (Category B felony), Nev. Rev. Stat. Ann § 207.012(a)(b) – upgraded to Category A	(a) from 25 years (mand. min of 10 years), to life, to life without parole Nev. Rev. Stat. Ann § 207.012(b)(1), (2), or (3) (b)) from 25 years (mand. min of 10 years), to life, to life without parole Nev. Rev. Stat. Ann § 207.012(b)(1), (2), or (3)
New Hampshire	(a) robbery (Class B felony), RSA § 651:6 II(a), III(a) (2005) (b) robbery (Class B felony), RSA § 651:6 II(a), III(a) (2005)	(a) mand. min 10 years – max. 30 years (same statute) (b) mand. min 10 years – max 30 years (same statute)
New Jersey	(a) robbery, second-degree crime, N.J. Stat. § 2C:43-7 a.(3), extended terms of imprisonment (b) robbery, second-degree crime, N.J. Stat. § 2C:43-7 a.(3), extended terms of imprisonment	(a) fixed term between 10 and 20 years (same statute) (b) fixed term between 20 years and life (same statute)
New Mexico	(a) robbery, third-degree felony. N.M. Stat Ann. § 31-18-17 B, adds four years to sentence (b) robbery, third-degree felony. N.M. Stat Ann. § 31-18-17 B, adds four years to sentence	(a) 7 years (term set by statute – no good time) N.M. Stat. Ann § 31-18-17B and 31-18-15(a)(9) (b) 22 years (term set by statute – no good time) N.M. Stat. Ann. § 31-18-17 B and 31-18-15(a)(3)

New York	(a) robbery, 3rd degree (Class D felony), NY CLS Penal § 70.08 3(c) (b) robbery, first-degree (Class B felony), NY CLS Penal § 70.08 3(a)	(a) min 12 years, max. 25 years (b) min 20 years, max 25 years
North Carolina	(a) common law robbery (Class G felony) N.C. Gen. Stat. § 14-7.6, sentenced as Class C felon (b)robbery with dangerous wpn (Class D felony), N.C. Gen. Stat. § 14-7.6, sentenced as Class C felon	(a) 117-146 months (9.6 – 12 years) N.C. Gen. Stat. § 15-A-1340.17(c) (b) 117-146 months (9.6 – 12 years) N.C. Gen. Stat. § 15-A-1340.17(c)
North Dakota	(a) robbery (Class C felony), ND. Cent. Code. § 12.1-32-09(1)(c), (2)(c) (b) robbery (Class B felony), ND. Cent. Code § 12.1-32-09(1), (2)b	(a) max 10 years (discretionary) ND. Cent Code § 12.1-32-09(2)(c), must serve 85% of sentence § 12.1-32-09.1 (b) max 20 years (discretionary) ND. Cent Code § 12.1-32-09(2)(c), must serve 85% of sentence § 12.1-32-09.1
Ohio	(a) robbery third-degree felony, Ann. § 2929.14(2)(a) (b) robbery, second-degree felony, Ann. § 2929.14(2)(a)	(a) max 5 years (determinate) (b) max 8 years (determinate)
Oklahoma	(a) second-degree robbery, 21 Okl. St. § 51.1B; 57 Okl. St. § 571 (b) robbery or attempted robbery with dangerous wpn or imitation firearm, 21 Okl. St. § 51.1B; 57 Okl. St. § 571	(a) 20 years to life (if within 10 years of last conviction) (same statute) (b) 20 years to life (if within 10 years of last conviction) (same statute)
Oregon	(a) second-degree robbery (Class C felony) ORS § 164.395(1)(b)	(a) habitual criminal statute repealed, max 5 yrs ORS § 161.605(3)

	(b) first-degree robbery (Class A felony), ORS § 164.415	(b) habitual criminal statute repealed, max 20 years ORS § 161.605(1)
Pennsylvania	(a) robbery, felony in third degree, 18 Pa. C.S. § 3701 (a)(1)(v)(2)(b) (b) robbery, felony in the first degree, 42 Pa. C.S. § 9714(a)(2) – is defined as "crime of violence"	(a) n/a – not defined as crime of violence – not more than 7 years (b) 25 years to life without parole (same statute)
Rhode Island	(a) second-degree robbery. R.I. Gen. Laws § 12-9-21(a) "habitual criminal" (b) first-degree robbery, R.I. Gen. Laws § 12-9-21(a) "habitual criminal"	(a) additional term not exceeding 25 years, max 55 years (R.I. Gen. Law § 11-39-1(b)) (b) additional term not exceeding 25 years, max would be life (R.I. Gen. Law § 11-39-1(a))
South Carolina	(a) common law robbery, S.C. Code Ann. § 16-11-325 (b) armed robbery, S.C. Code Ann. § 17-25-45(a)(1), (c)(1) – "most serious offense"	(a) n/a – subsequent offense committed within 360 days adds 1 year S.C. Code Ann. § 16-1-120(1)(e) – max 15 years (b) life without parole
South Dakota	(a) second-degree robbery (Class 4 felony), SD Codified Laws §§ 22-30-1, 22-30-6, 22-30-7 (b) first-degree robbery (Class 2 felony) SD Codified Laws §§ 22-30-2, 22-30-3, 22-30-7	(a) n/a, 3 or more prior felonies, SD Codified Laws § 22-7-8.1 – max 10 years (b) n/a, 3 or more felonies, SD Codified Laws § 22-7-8.1 – max 25 years
Tennessee	(a) robbery (Class C felony) Tenn. Code Ann. § 39-13-401 (b) aggravated robbery (Class B felony) § 39-13-402	(a) n/a, prior convictions do not meet definition of "persistent offender" under § 40-35-107 – max 15 years (b) n/a, prior convictions do not meet definition of "persis-

		tent offender" under § 40-35-107 – max 30 years
Texas	(a) robbery, second-degree felony, Tex. Penal Code § 12.42(d) (2005) (b) aggravated robbery, first-degree felony, Tex Penal Code § 12.42(d) (2005)	(a) life, not less than 25 years, max 99 years (same statute) (b) life, not less than 25 years, max 99 years (same statute)
Utah	(a) robbery, second-degree felony – Utah Code Ann. § 76-3-203.5(1) (2)(b) (2005) -"habitual violent offender" (b) aggravated robbery, first-degree felony, Utah Code Ann. § 76-3-203.5 (1) (2)(c) (2005) – "habitual violent offender"	(a) upgrade to first-degree felony, max. life (b) same penalty, adds no eligibility for parole – max life without parole
Vermont	(a) larceny from the person 13 V.S.A. § 2503 (2006) (b) larceny from the person, 13 V.S.A. § 2503 (2006), larceny conviction in burglary or robbery 13 V.S.A. § 2507	(a) n/a, does not meet definition of habitual criminal 12 V.S.A. § 11 or violent career criminal 13 V.S.A. § 11a-max 10 years (13 V.S.A. § 608(a)) (b) n/a, does not meet definition of habitual criminal 12 V.S.A. § 11 or violent career criminal 13 V.S.A. § 11a-max 15 years (13 V.S.A. § 608(b))
Virginia	(a) grand larceny – Va Code Ann. § 18.2-95(ii) (2005) (b) robbery – Va Code Ann. § 18.2-58 (2006) and Va. Code Ann. § 19.2-297.1(e) (2006) – sentence of person twice previously convicted of certain violent felonies	(a) n/a, same penalty – max 20 years (mand. min 1 year) (b) life without parole
Washington	(a) second-degree robbery (Class B felony), ARCW § 9.94A.570 – persistent offender (b) first-degree robbery (Class A fel-	(a) life without parole (b) life without parole

	ony), ARCW § 9.94A.570 – persistent offender	
West Virginia	(a) robbery, second-degree felony, W. Va. Code § 61-11-18(c) (2006), punishment for second or third offense felony (b) robbery, first-degree felony, W. Va. Code § 61-11-18(c) (2006), punishment for second or third offense of felony	(a) life (b) life
Wisconsin	(a) robbery (Class E felony) Wis. Stat. § 939.62(1)(c) (2005) – increased penalty habitual criminality (prior felony conviction 5 years or less) (b) robbery (Class C felony) Wis. Stat. § 939.62(1)(c) (2005) – increased penalty for habitual criminality (prior felony conviction 5 years or less)	(a) adds max of 6 years – max. penalty 21 years (disc.) (b) adds max of 6 years – max. penalty 46 years (disc.)
Wyoming	(a) robbery felony – Wyo. Stat. § 6-10-2019(a)(b) – "habitual criminal" convicted of "violent felony" § 6-10-104 (xii) (b) aggravated robbery, felony, Wyo. Stat. § 6-10-2019(a)(b) – "habitual criminal" convicted of "violent felony" § 6-10-104 (xii)	(a) not more than 50 years (mand. min 10 years) (b) not more than 50 years (mand. min 10 years)

CERTIFICATE OF SERVICE

I certify that on today's date I mailed a copy of the Response Brief, postage pre-paid, to:

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

and sent a copy of this document to:

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through email with the permission of the recipient(s).

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 October 10, 2013.

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

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To: Backlund & Mistry
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Attached is the Response to WAPA's Amicus Brief.

Thank you.

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