filed in COA 11/13/12

88118-9

FILED
NOV 29 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. (to be set)
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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Alvin Witherspoon, the appellant below, asks the Court to review the decision of the Court of Appeals.

II. COURT OF APPEALS DECISION

Alvin Witherspoon seeks review of the Court of Appeals published Opinion entered on October 16, 2012. A copy of the Opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

1. Is evidence insufficient to prove robbery where the alleged victim felt no fear, perceived no threat, and did not know her property had been taken until the accused drove away?

2. Is an accused person deprived of effective assistance when counsel in a three-strikes case fails to seek instructions on an included offense with a significantly lower penalty, where the failure is not based on reasoned strategy?

3. Does imposition of life without parole for second-degree robbery under Washington's three-strikes law constitute cruel and unusual punishment in light of recent U.S. Supreme Court decisions?

4. At sentencing on a three-strikes case, does due process require the state to present more than mere identity of names to establish a prior strike?

5. Does the arbitrary classification of prior convictions as "elements" in some cases and as "sentencing factors" in others violate equal protection, where proof of the prior conviction elevates each offense from one category to another more serious category?

6. In light of recent U.S. Supreme Court decisions, does imposition of life without parole violate an accused person's jury trial right when the finding of two prior strikes is made by the court instead of a jury?

7. Does a life sentence violate an accused person's state constitutional right to due process when the existence of two prior strikes is found by a preponderance of the evidence instead of beyond a reasonable doubt?

8. Does a conviction violate the state constitutional right to jury unanimity when the state presents insufficient evidence on two of three alternative means submitted to the jury?

9. Does a judge violate the appearance of fairness doctrine by presiding over the three-strikes trial of a former criminal client without inquiring into or ruling upon the former client's objection?

10. Must the prosecution produce independent evidence of the corpus delicti of a crime before introducing a defendant's factual statement made during the commission of the crime?

11. Is an Information charging robbery factually deficient when in it fails to include specific facts supporting an allegation that the defendant used or threatened force to obtain or retain possession of property?

IV. STATEMENT OF THE CASE

A. Prior proceedings

Alvin Witherspoon was charged with second-degree robbery, residential burglary, and witness tampering. CP 21-23. He was convicted following a jury trial. At sentencing, the trial judge found that he had two prior strikes, and sentenced him to life in prison without possibility of parole. RP (5/24/10) 35; CP 5-17. Mr. Witherspoon appealed, and his conviction and sentence were affirmed in a published Opinion, with each member of the panel authoring a separate opinion. CP 4; Appendix (Op).

B. Statement of Facts

While out for a drive with his pregnant fiancée (Violet Conklin), Alvin Witherspoon decided to break into the home of Rebecca Pittario. RP (4/12/10) 18; RP (4/13/10) 55-56, 60, 71. When Pittario returned from work, she parked next to Mr. Witherspoon's car. RP (4/12/10) 21-22. Mr. Witherspoon came around from the side of the house, holding one or both hands behind his back. RP (4/12/10) 22-23; RP (4/13/10) 74-76.

According to Pittario, Mr. Witherspoon told her he had a pistol behind his back.[1] RP (4/12/10) 23. She did not see any guns, and she was not afraid. RP (4/12/10) 40, 46.

Mr. Witherspoon got into his car and drove away. As he pulled away, Pittario noticed for the first time that Mr. Witherspoon had her shoe boxes in the back of his car. RP (4/12/10) 24. She got in her car, following him at high speed while on the phone with 911. RP (4/12/10) 25-27. Within a short period of time, police surrounded Mr. Witherspoon's trailer and arrested him and Ms. Conklin. RP (4/12/10) 73-80; RP (4/13/10) 10-23. They obtained a search warrant and found multiple items belonging to Pittario, but did not find any firearms, either in the trailer or in Mr.

[1] 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.

Witherspoon's car. RP (4/12/10) 34-36, 83-91, 99; RP (4/13/10) 25. When she went back to her house, Pittario found that none of her guns were missing. RP (4/12/10) 44.

Mr. Witherspoon was charged with second-degree robbery, residential burglary, and witness tampering (based on telephone conversations he had with Ms. Conklin while in jail). CP 21-23.

On the morning of trial, Judge Craddock Verser told the parties that he had represented a "Witherspoon" approximately fifteen years earlier. RP (4/12/10) 15-216. Mr. Witherspoon objected to having Judge Verser preside over the trial. Judge Verser did not respond to the objection, and presided over the trial. RP (4/12/10) 16.

At trial, Pittario testified that Mr. Witherspoon did not threaten her and that she was not afraid of him. RP (4/12/10) 46, 48. She said she did not fear injury, but only feared she might lose some of her property. RP (4/12/10) 48. Mr. Witherspoon testified that he'd used no force or threats when he'd encountered Pittario, and that his goal was to avoid any kind of confrontation. RP (4/13/10) 75, 81-82.

To establish the tampering charge, the prosecution played a recording of a telephone call from the jail. RP (4/13/10) 32-42. On the recording, Mr. Witherspoon asked Ms. Conklin not to talk to the sheriff anymore, because he would rather serve a sentence than have her end up

in custody. He also said that he'd told police that she was just his passenger. Ex. 40, p. 4. Witherspoon urged her to tell "Burl"—who owned a trailer where Ms. Conklin would stay if the case ended with a prison sentence—about "the hitchhiker," and reminded her that the hitchhiker had asked for a ride, told them about problems with his girlfriend, led them to his girlfriend's house to retrieve his belongings, and fled when a woman arrived at the residence. Ex. 40, p. 4.

The court instructed jurors that a conviction for witness tampering required proof "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..." CP 61. Mr. Witherspoon was convicted as charged. CP 5.

The prosecution alleged that he had two prior strikes, and asked the court to impose a persistent offender life sentence. At sentencing, the state presented four exhibits in its effort establish Mr. Witherspoon's prior convictions. Ex. 1-4. The first exhibit was a 2009 fingerprint card and booking sheet, purporting to relate to "Alvin Leslie Witherspoon," date of birth 7/22/1974. Ex. 1. The card was used by Officer Wright to make fingerprint comparisons to the other documents offered by the state. RP

(5/24/10) 10-27. When Officer Wright confirmed that he had not been present when the card was completed, Mr. Witherspoon objected to the admission of the card, arguing that the state had not established a proper foundation. RP (5/24/10) 14, 22. The objection was overruled, and Exhibit 1 was admitted. RP (5/24/10) 21.

Exhibit 2 consisted of documents relating to a 1992 conviction for third-degree assault. The exhibit pertained to "Alvin Leslie Witherspoon," but did not list a date of birth. Ex. 2. The exhibit included only a "poor quality" photocopy of the offender's fingerprints, and Officer Wright was unable to conclude that this photocopy matched the prints in Exhibit 1. RP (5/24/10) 20, 26-27. The exhibit was admitted over defense objection, and the court included the assault charge in Mr. Witherspoon's criminal history. RP (5/24/10) 12-21.

Officer Wright opined that the fingerprints in Exhibit 3 (a conviction for residential burglary with a firearm enhancement, pertaining to "Alvin Leslie Witherspoon" with no date of birth) matched the fingerprints on Exhibit 1. RP (5/24/10) 20, 23. Exhibit 3 was admitted, and the burglary charge was included in Mr. Witherspoon's criminal history. RP (5/24/10) 12-21.

The prosecutor also offered Exhibit 4, a 1994 conviction for first-degree burglary. The documents pertained to "Alvin Leslie Witherspoon,"

and the state identification matched the identification number listed in the 2009 booking information. The Judgment and Sentence did not include a date of birth, and the charging document listed a DOB of "9/22/74."[2] Ex. 4. Exhibit 4 listed the offender's ethnicity as American Indian or Alaska Native.[3] Ex. 4. Officer Wright was not asked to compare the fingerprints in Exhibit 4 to those in Exhibit 1. RP (5/24/10) 10-27. The exhibit was admitted over defense objection, and included in Mr. Witherspoon's criminal history. RP (5/24/10) 12-21.

Judge Verser reviewed a DOC presentence investigation report, and told the parties that "[t]here 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."[4] RP (5/24/10) 2. He determined that the two prior burglary convictions (Exhibits 3 and 4) counted as strikes, and sentenced Mr. Witherspoon to life in prison without possibility of parole. RP (5/24/10) 33-35; CP 5-17.

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[2] Other documentation, including the 2009 booking sheet, listed a birth date of July 22, 1974. Ex. 1.

[3] The 2009 booking sheet listed Mr. Witherspoon's ethnicity as "White." Ex. 1.

[4] He later contradicted himself, indicating that he'd relied on the PSI in part to decide that Exhibit 4 pertained to Mr. Witherspoon. (5/24/10) 34-35.

Mr. Witherspoon appealed, and the Court of Appeals affirmed his conviction and sentence in a divided opinion. Judge Quinn-Brintnall authored the lead opinion upholding the convictions, but voted to overturn the life sentence. Op., pp. 1-35. Judge Hunt joined the lead opinion to uphold the convictions, and wrote separately to affirm the life sentence. Op., pp. 35-40. Judge Armstrong dissented from the lead opinion, finding insufficient evidence to sustain the robbery conviction, but agreed with Judge Hunt that the life sentence should be upheld if the robbery conviction were valid. Op., pp. 40-43.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that evidence is insufficient to prove robbery, where the "robbery victim" perceived no threat, felt no fear, and didn't know her property had been taken until the accused person drove away. This issue is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(4).

Due process requires the state to prove every element of a criminal 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). 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).

Conviction for robbery requires proof that the accused person unlawfully took property from another

> against [her] will by the use or threatened use of immediate force, violence, or fear of injury...Such force or fear must be used to obtain or retain possession of the property, or to prevent or *overcome resistance to the taking*... Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190 (emphasis added).[5]

In this case, the prosecution did not prove that Mr. Witherspoon used force or fear to obtain or retain possession, to prevent or overcome resistance to the taking, or to complete the taking without Pittario's knowledge. He did not touch Pittario, and his claim that he had a pistol behind his back did not frighten her or contribute to her ignorance of the completed taking. Instead, as she testified, she did not perceive a threat, never felt afraid, and only realized he'd taken her property as he drove away. RP (4/12/10) 25-27, 40, 46-48. Accordingly, the evidence was

[5] The court's instructions in this case omitted the word "such" from the second sentence quoted above. CP 54, 55. To the extent this change added to the government's burden, it is law of the case, given the prosecution's failure to object. See, e.g., State v. Atkins, 156 Wash.App. 799, 807-811, 236 P.3d 897 (2010).

insufficient to prove robbery, and the conviction should have been reversed and the charge dismissed. Smalis, at 144.

The lower court failed to properly address Mr. Witherspoon's sufficiency argument. The lead opinion pointed to no evidence establishing that Mr. Witherspoon's implied threat enabled him to obtain or retain possession, to prevent or overcome resistance, or to prevent Pittario from learning of the taking. Op., pp. 18-20. Nor did the lead opinion deal with Pittario's testimony that she perceived no threat, felt no fear, and only became aware of the completed taking as Mr. Witherspoon drove away. Op., pp. 18-20; RP (4/12/10) 25-27, 40, 46-48. Instead, Judge Quinn-Brintnall suggested that "it is not necessary that actual fear be specifically proven, for the law will presume fear where there appears to be just ground." Op., p. 20 (citing State v. Redmond, 122 Wash. 392, 393-94, 210 P. 772 (1922)).

Redmond does not support the court's decision here, because the Redmond victim's testimony differed significantly from Pittario's. In Redmond, a bank messenger testified that he was robbed by someone who "pressed a gun against his head and commanded him to drop [his] bag, which command he obeyed." Id, at 393. The messenger "testified to no other element of force, nor did he say that he was put in fear." Id. From

this, the jury was allowed to presume fear, despite the absence of direct testimony on the subject. Id, at 393-394.

Thus the Redmond court did not address the situation in which the victim saw no threat, felt no fear, and did not know that property had been taken.[6] Id. Here, by contrast, Pittario testified that she didn't feel threatened or fearful, and that she only became aware of the theft as Mr. Witherspoon drove away. RP (4/12/10) 23-24, 40, 46. The prosecution offered no evidence to dispute this testimony. The Redmond court never suggested that fear could be presumed even if the victim affirmatively testified that s/he felt no fear.

The Supreme Court should accept review and hold that evidence is insufficient to prove robbery, where the "robbery victim" perceived no threat, felt no fear, and didn't know her property had been taken until the accused person drove away. This issue is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(4).

B. The Supreme Court should accept review and determine whether the failure to request a lesser included instruction can ever constitute

[6] Redmond relied on a Georgia case in which the victim testified that he'd signed over all his property after being scared into doing so by a group of men who held him captive. Redmond, at 393 (citing Long v. State, 12 Ga. 293 (1852)). The relevant language in Long held that "actual fear" need not be "strictly and precisely proved, for the law...will presume fear where there appears to be just ground for it." Long, at 321-322. This appears to have been dicta, as the victim in Long specifically testified that he was "scared" (after initially denying it). Id, at 301-302, 332.

> ineffective assistance of counsel. This case presents a significant constitutional issue that is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wash.2d 91, 109, 225 P.3d 956 (2010). 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, defined as "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)).

The presumption of adequate performance 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). Further, 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.")

The Supreme Court has rejected a three-part test adopted by the Court of Appeals for determining when failure to request an instruction on an included offense constitutes ineffective assistance. State v. Grier, 171 Wash. 2d 17, 32, 246 P.3d 1260 (2011) (abrogating State v. Ward, 125 Wash.App. 243, 104 P.3d 670 (2005). In Grier, defense counsel proposed manslaughter instructions in a murder case, but then withdrew the instructions, indicating "that he had discussed this decision with Grier and that she had agreed." Id, at 26-27. The Court reaffirmed the traditional Strickland test for ineffective assistance: deficient performance resulting in prejudice.[7] Id.

The Court emphasized the "subjective nature of the decision" to request instructions on an included offense, and concluded that "the complex interplay between the attorney and the client in this arena leaves little room for judicial intervention." Grier, at 39, 40 (emphasis added).

The question posed in this case is whether the small amount of "room for judicial intervention" following Grier is broad enough to encompass the conduct of defense counsel in this case. Under the now

[7] In reaching this decision, the Court concluded that the decision to pursue or forgo instructions on an included offense rests ultimately with defense counsel. Grier, at 32.

discredited three-part test in Ward, a reviewing court would likely have granted Mr. Witherspoon a new trial, given the huge disparity in sentence between the charged crime and the included crime,[8] the sameness of the defense to each offense, and the risk of conviction under an all-or-nothing approach. Cf. Grier.

Under Strickland, the outcome is less clear. Language in the Grier decision suggests that failure to request instructions on an included offense can never constitute deficient performance, given the highly subjective nature of the decision and the fact that an all-or-nothing approach will always be "at least conceivably a legitimate strategy to secure an acquittal." Grier, at 42.

This Court should accept review and determine whether defense counsel's decision not to request instructions on first-degree theft deprived Mr. Witherspoon of the effective assistance of counsel under the facts of this case. This constitutional issue is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

C. The Supreme Court should accept review and examine Mr. Witherspoon's persistent offender life sentence in light of the U.S. Supreme Court's recent Eighth Amendment decisions in Graham and Miller. This significant issue of constitutional law is of

[8] Life without possibility of parole, on the one hand, vs. 43-57 months and a maximum of 10 years, on the other. See Sentencing Guidelines Commission, Adult Sentencing Manual 2008, p. III-208.

substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

The federal constitution proscribes punishment that is cruel and unusual. U.S. Const. Amend. VIII. The state constitution prohibits cruel punishment. Wash. Const. Article I, Section 14.[9] Any sentence may be reviewed under these provisions, and "no penalty is per se constitutional." Solem v. Helm, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed 2d 637 (1983). In fact, "a single day in prison may be unconstitutional in some circumstances." Id (citing Robinson v. California, 370 U.S. 660, 665, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)).

1. Graham and Miller have altered the framework for Eighth Amendment analysis by taking a categorical approach to cruel and unusual punishment outside the death penalty context.

Recently, the U.S. Supreme Court's Eighth Amendment jurisprudence has shifted as a result of two decisions invalidating mandatory life without parole (LWOP) sentences for juvenile offenders. Graham v. Florida, ___ U.S. ___, ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (addressing non-homicide cases); Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (addressing homicide cases).

[9] The state constitutional protection is broader than the federal right. 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).

Both cases have implications that reach beyond the juvenile realm.[10] Although both cases dealt specifically with juvenile offenders, they hold lessons applicable to other mandatory life sentences, such as those imposed in three-strikes cases.[11]

This case presents an opportunity for the Court to examine Washington's persistent offender sentencing scheme in the context of Graham and Miller. The Supreme Court should accept review and hold that Mr. Witherspoon's persistent offender life sentence violates the Eighth Amendment and Wash. Const. Article I, Section 14. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court RAP 13.4(b)(3) and (4).

2. Mr. Witherspoon's punishment is grossly disproportionate under Washington's pre-Graham/Miller framework.

In Washington, whether or not a particular sentence is disproportionate depends on (1) the nature of the offense, (2) the

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[10] See Momose, A Case for Hope: Examining Graham v. Florida and Its Implications for Eighth Amendment Jurisprudence, 33 U. Haw. L. Rev. 391 (2010); Taylor, Unlocking the Gates of Desolation Row, 59 UCLA L. Rev. 1810, 1817 (2012) (which includes a section "addressing how these cases may change the landscape of Eighth Amendment law.")

[11] See, e.g., John , Jurisprudential Juxtaposition: Application of Graham v. Florida to Adult Sentences, 38 Fla. St. U. L. Rev. 957, 968 (2011) ("Graham's rationale can and should be applied when reviewing noncapital LWOP adult sentences, as the theoretical and factual underpinnings of the factors in Graham would seem to support broader application, hopefully unifying the mess that seemingly is the Court's Eighth Amendment jurisprudence.)

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, and (5) the offender's criminal history. Fain, at 397; see also State v. Magers, 164 Wash.2d 174, 194, 189 P.3d 126 (2008) (including criminal history in the analysis). The Washington Supreme Court has recognized that "there may be cases in which application of the [Persistent Offender Accountability Act (POAA)]... 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.[12]

First, Mr. Witherspoon's current offense was relatively minor compared to other second-degree robberies. His conduct included neither overt violence nor explicit threats. He was unarmed (although he may have claimed to have a pistol), and his conduct did not even frighten Pittario, much less harm her or kill her. RP (4/12/10) 22-26, 34-36, 40, 44,

[12] The Supreme Court has previously rejected challenges brought by 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 circumstances differ significantly from those of the defendants in Manussier and Rivers. Specifically, his offense was less serious and his criminal history less repugnant. Furthermore, Mr. Witherspoon has provided information about other jurisdictions that was lacking in Manussier and Rivers. Finally, additional developments in the law—even prior to Graham and Miller—have altered the analysis. See, e.g., State v. Thomas, 150 Wash.2d 821, 83 P.3d 970 (2004) (finding constitutional significance in the difference between life with and life without possibility of parole).

46, 83-91, ; RP (4/13/10) 25, 57, 63, 75-76, 80. As the U.S. Supreme Court recognized in Graham, "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, at ___. Crimes that don't result in death "differ from homicide crimes in a moral sense." Id, at ___.

Second, Washington's three-strikes law was intended (in part) to place "the most dangerous criminals in prison." RCW 9.94A.555. Mr. Witherspoon's criminal history is serious, but there is no indication that he has ever killed anyone, tried to kill anyone, or inflicted serious harm. CP 5-17. Even when his record is taken into account, Mr. Witherspoon is not one of "the most dangerous criminals." RCW 9.94A.555.

Third, Mr. Witherspoon would have received a lighter punishment in most other jurisdictions. Around the time of his crime only three other states imposed life without when a third strike is second-degree robbery.[13] See Opening Brief, p. 51-52.

Fourth, Mr. Witherspoon received a much higher sentence than he would have in the absence of the provisions imposing a mandatory life

[13] Many jurisdictions include second-degree robbery as a strike offense. See Shapiro, Life in Prison for Stealing $48?: Rethinking Second-Degree Robbery As A Strike Offense in Washington State, 34 Seattle U. L. Rev. 935, 961 (2011). However, only a few states mandate LWOP when the third strike is second-degree robbery.

sentence. His standard range and statutory maximum were only 63-84 months and 10 years, respectively. RCW 9A.20.021; CP 8. In addition, his sentence was significantly higher than the average Washington sentence for second-degree robbery, which is less than 20 months. See Table 2, Sentencing Guidelines Commission, Statistical Summary of Adult Felony Sentencing (2010).

Fifth, although extensive, Mr. Witherspoon's criminal history was not so horrific that lifelong incarceration was the only way of protecting society. His longest sentence prior to the current term of life without parole was only 120 months. See Ex. 3.

Mr. Witherspoon's case presents the circumstances forecast by the Court in Thorne. His life sentence violates the state and federal prohibition against excessive punishment. This case presents significant issues of constitutional law that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4). Accordingly, the Supreme Court should accept review, reverse the life without possibility of parole sentence, and remand the case for a new sentencing hearing.

D. The Supreme Court should accept review and hold that due process requires the prosecution to present more than identity of names to establish a prior strike when seeking a persistent offender life sentence. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

Under the due process clause, the burden of proving prior convictions at sentencing rests with the prosecution. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; State v. Hunley, ___Wash.2d ___, ___, ___ P.3d ___ (2012). Traditionally, in habitual offender proceedings, identity of names alone is insufficient to establish identity of person when considering evidence of a prior conviction. State v. Brezillac, 19 Wash. App. 11, 13, 573 P.2d 1343 (1978) (citing State v. Harkness, 1 Wash.2d 530, 96 P.2d 460 (1939)). Instead, some independent evidence must be introduced. Id.

Following enactment of the SRA, 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 requires additional proof, but only if the offender states under oath that s/he was not the person named in the prior document. Id. In fashioning this rule, the Ammons court was focused on "achiev[ing] the proper balance." Ammons, at 190.

The Ammons rule predated Washington's three-strikes law (which was enacted in 1993). At the time Ammons was decided, habitual offender cases were tried to a jury and required proof beyond a reasonable doubt. 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 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).

Given this context, the Ammons court could not have considered the identity of names standard to be sufficient to prove persistent offender status. In third strike cases, prior convictions do not merely "help determine a presumptive standard sentence range;"[14] instead, they are used to eliminate judicial discretion, resulting in mandatory punishment more

[14] Williams, at 367.

severe than any other punishment short of death. RCW 9.94A.570; See Graham, at ___.

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.[15] Furthermore, no adverse inference should be drawn from an offender's silence. The requirement that an offender declare under oath that s/he is not the person named in a prior conviction shifts the burden of proof and violates the right to remain silent pending sentencing. Mitchell v. United States, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); Estelle v. Smith, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). Instead, the 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).

Here, the prosecution failed to prove 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

[15] But see State v. Rivers, 130 Wash. App. 689, 700, 128 P.3d 608 (2005) (applying Ammons rule to persistent offender proceeding).

person named in Exhibit No. 2, and made no effort to tie him to Exhibit 4. RP (5/24/10) 10-33. Because Mr. Witherspoon objected to the sufficiency of the evidence, the prosecution must be held to the existing record on remand. In re Cadwallader, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

The Supreme Court should accept review and hold that due process requires the prosecution to produce more than identity of names in a persistent offender case. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; Harkness, supra. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

E. The Supreme Court should accept review and hold that equal protection requires the prosecution to prove an offender's prior convictions to a jury beyond a reasonable doubt when the prior convictions elevate the crime charged from a felony to a superfelony. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

Equal protection requires that similarly situated individuals receive similar treatment under the law. See U.S. Const. Amend. XIV; Wash. Const. Article I, Section 12; Harris v. Charles, 171 Wash.2d 455, 462, 256 P.3d 328 (2011); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). A statutory classification that implicates physical liberty is subject to rational basis scrutiny. Thorne, at 771. Under the rational basis test, a legislative

classification is unconstitutional if it "rests on grounds wholly irrelevant to the achievement of legitimate state objectives." Id (quoting State v. Harner, 153 Wash.2d 228, 235–36, 103 P.3d 738 (2004)).

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.

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 superfelony 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 superfelony (punished by imposition of a mandatory life sentence without the possibility of parole). Put another way, there is no rational basis for classifying an offender's recidivism as an 'element' when it elevates an offense from a gross misdemeanor to a felony and an 'aggravator' when it changes the offense from a felony to a superfelony. Id.

Despite being similarly situated, Mr. Witherspoon did not receive the same treatment guaranteed those offenders impacted by the Roswell case. That is, his crime was elevated from a felony to a superfelony, yet he was not afforded a jury trial and the requirement of proof beyond a reasonable doubt. 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. State v. Smith, 117 Wash.2d 263, 279, 814 P.2d 652 (1991).

The Court of Appeals upheld the classification, ruling that "it is within the legislature's discretion to define what facts constitute elements of the crime..." Op., p. 26. This is incorrect. "Merely using the label 'sentence enhancement'... does not provide a principled basis for treating [sentencing factors and elements] differently." Apprendi, at 476. In Roswell, any legislative attempt to label the prior offense an "aggravator" rather than an "element" would not have changed the outcome. It is the constitution—not the legislature—that has the final word. Roswell, supra.

The Court of Appeals also reasoned that "there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense." Op., p. 26 (citing State v. Langstead, 155 Wash.App. 448, 454–57, 228 P.3d 799, review denied, 170 Wash.2d 1009, 249 P.3d 624 (2010); State v. Williams, 156 Wash.App. 482, 496–99, 234 P.3d 1174, review denied, 170 Wash.2d 1011, 245 P.3d 773 (2010)).

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 superfelony with a mandatory punishment of life in prison with no possibility of parole.[16] Furthermore, under the Langstead approach, the legislature could circumvent the constitutionally-based rule in Roswell simply be 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. Thus Langstead violates the rule that the legislature "cannot modify or impair a judicial interpretation of the constitution." Hunley, at ___.

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 to a felony; for Mr. Witherspoon, the crime was elevated from a class B felony to a superfelony. Id. He should have been afforded a jury trial and the requirement of proof beyond a reasonable doubt.

The Supreme Court should accept review and hold that Mr. Witherspoon was denied the equal protection of the law. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

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[16]See Graham, at ___ (outlining the characteristics of LWOP sentences).

F. The Court should accept review and hold that Mr. Witherspoon's life sentence violated his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Sections 21 and 22. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

An accused person has the right to a jury trial for any fact which increases the penalty for a crime must be found by a jury. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 21 and 22; 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).

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). There is an exception for "the fact of a prior conviction;" however, this "represents at best an exceptional departure from the historic practice" of having jurors determine facts that increase

the penalty. Apprendi, at 487, 490 (citing Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)).

The Court has made clear that analysis under Apprendi and its progeny centers primarily on the historical role juries have played: courts analyzing Apprendi issues should "examine the historical record, because 'the scope of the constitutional jury right must be informed by the historical role of the jury at common law.'" Southern Union Co. v. United States, ___ U.S. ___, ___, 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012) (quoting Oregon v. Ice, 555 U.S. 160, 170, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009)). The "salient question [in Apprendi cases] is what role the jury played" historically. Southern Union Co., at ___. A court's

> application of Apprendi's rule must honor the "longstanding common-law practice" in which the rule is rooted. The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain. We accordingly considered whether the finding of a particular fact was understood as within "the domain of the jury... by those who framed the Bill of Rights."

Ice, at 167-68.

Thus, for example, facts that determine the maximum fine to be imposed following conviction must be submitted to a jury, because "ample

historical evidence [shows] that juries routinely found facts that set the maximum amounts of fines." Southern Union Co., at ___.

In Washington—as elsewhere—juries have historically determined whether or not someone is a persistent (or habitual) offender. See State v. Furth, 5 Wn.2d 1, 18, 104 P.2d 925 (1940). The practice remained in force until abolished by a divided Supreme Court following passage of the POAA. Manussier, at 690-91 (Madsen, J., dissenting).

Manussier should be reconsidered in light of the Supreme Court's recent decision in Southern Union Co. By discarding years of precedent concerning persistent or habitual offenders, the Manussier court failed to follow the clear direction signaled by the Supreme Court in Apprendi and reaffirmed in Southern Union Co.

The bare fact of a prior conviction is not the same as habitual or persistent offender status (which, at a minimum, requires proof of multiple prior convictions that are of the most serious kind). Indeed, the U.S. Supreme Court has never applied the Almendarez-Torres court's "exceptional departure from the historic practice"[17] to three strikes laws.

In addition, Almendarez-Torres, which provided a basis for the Court's continuing adherence to the Manussier rule in the post-Apprendi

[17] Apprendi, at 487.

era,[18] does not actually control under the circumstances here. First, in rejecting an Apprendi-based argument for persistent offenders, the Washington Supreme Court actually misstated the holding of Almendarez-Torres, claiming that in Almendarez-Torres "the Supreme Court held that prior convictions are sentence enhancements rather than elements of a crime, and therefore need not be proved beyond a reasonable doubt to a jury." Smith II, at 141 (emphasis added).

In fact, Almendarez-Torres addressed only the requirement that elements be pled in the charging document, and concluded that a prior conviction treated by congress as a mere sentencing factor need not be pled. The case did not address the burden of proof or jury trial right. Almendarez-Torres, at 243-45. Almendarez-Torres is therefore a Fifth Amendment charging case. Furthermore, the Almendarez-Torres court explicitly reserved ruling on whether or not an offender has a right to proof beyond a reasonable doubt, even in the case of a prior conviction. Id, at 248 ("we express no view on whether some heightened standard of proof might apply [at sentencing].")

Second, the statute at issue in Almendarez-Torres increased the permissible sentence from two to twenty years in prison. Thus it did "not

[18] See State v. Smith, 150 Wash. 2d 135, 141, 75 P.3d 934 (2003).

itself create significantly greater unfairness" for the offender because judges traditionally exercise discretion within broad statutory ranges. Id, at 245. It did not change the punishment from a fixed term with the possibility of early release to a life term without any possibility of parole.

Because it did not address recidivism in the case of persistent or habitual offenders, Almendarez-Torres does not control Mr. Witherspoon's case. Instead, under the logic of Apprendi, Blakely, and the Court's more recent decision in Southern Union Co., Mr. Witherspoon was entitled to a jury determination of his qualifying prior convictions, with proof beyond a reasonable doubt.

The Supreme Court should accept review and hold that offenders are constitutionally entitled to a jury trial before imposition of an automatic sentence of life in prison without possibility of parole. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

G. The Court should accept review and hold that Mr. Witherspoon's persistent offender life sentence violated his state constitutional right to due process. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

Wash. Const. Article I, Section 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." 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).

In civil cases, the U.S. Supreme Court uses a three-factor test to determine whether existing procedures are constitutionally adequate to protect the interest at stake. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).[19] This test has also been applied to civil cases in Washington. See, e.g., Post v. City of Tacoma, 167 Wash.2d 300, 313, 217 P.3d 1179 (2009).

Under the federal constitution, Mathews does not provide the appropriate framework for analyzing state criminal procedures. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992)). This is 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.'" Id, at 444 (quoting Spencer v. Texas, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967)). Instead, the Supreme Court has adopted a far more deferential standard when evaluating state criminal

[19] The three factors are (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. Mathews, at 335.

procedures.[20] Medina, at 445-446 (citing Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

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

[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 omitted).

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 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).

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 .

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. Thiefault, 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 is "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 additional procedural safeguards.[22] 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

[21] Although Washington courts have consistently refused to directly apply Apprendi and Blakely to prior convictions in persistent offender cases, no published opinion in Washington has examined persistent offender sentencing under the Mathews balancing test outlined above. None of the lower court's opinions in this case even refer to Mathews. See Op., generally.

(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.[23]

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 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

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[22] See Graham, at ___ (outlining the characteristics shared by LWOP and death sentences).

[23] 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).

commitment to justice[24] 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),[25] (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.

On balance, the government's interest in maintaining the current procedure is minimal at best. The state 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,

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[24] 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.

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

Section 3; Mathews, at 335. The current procedure under which Mr. Witherspoon was sentenced violates due process.

The Supreme Court should accept review, vacate Mr. Witherspoon's sentence, and remand the case for a new sentencing hearing, with instructions to impanel a jury and to require proof beyond a reasonable doubt if the prosecution seeks to impose a persistent offender life sentence. Id. This significant issue of constitutional law is of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

H. THE COURT SHOULD ALSO ACCEPT REVIEW OF MR. WITHERSPOON'S OTHER ISSUES WHICH PRESENT SIGNIFICANT CONSTITUTIONAL ISSUES THAT ARE OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DECIDED BY THE SUPREME COURT. RAP 13.4(B)(3) and (4).

The trial court made several constitutional additional errors, which were affirmed by the Court of Appeals. The Supreme Court should accept review and hold that a defendant's state constitutional right to jury unanimity is violated when the state presents insufficient evidence on two of three alternative means submitted to the jury. The Court should also accept review and hold that an attorney provides ineffective assistance of counsel (in violation of the Sixth and Fourteenth Amendments) when s/he fails to raise a valid corpus delicti objection to the admission of factual

statements made during commission of the charged crime. The Court should also accept review and hold that a trial judge violates the appearance of fairness (under the Fourteenth Amendment) when he discloses that he represented the defendant in the past and then presides at trial without inquiring into or ruling on the defendant's objection. The Court should also accept review and hold that an Information provides constitutionally insufficient notice (under the Fifth, Sixth, and Fourteenth Amendments, and under Wash. Const. Article I, Sections 3 and 22) when it fails to allege specific facts to support each element of the charged crime. Each of these significant issues of constitutional law are of substantial public interest, and should be decided by the Supreme Court .RAP 13.4(b)(3) and (4).

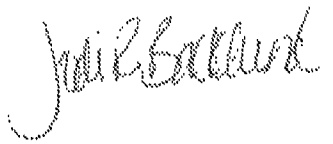
VI. CONCLUSION

This case presents significant constitutional issues that are of substantial public interest. Accordingly, the Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4). Mr. Witherspoon's robbery conviction must be vacated and the charge dismissed with prejudice. In the alternative, if the charge is not dismissed, the case should be remanded to the superior court for a new trial.

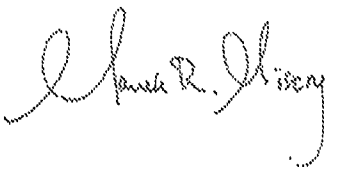
If the conviction is not reversed, Mr. Witherspoon's persistent offender life sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted November 13, 2012.

BACKLUND AND MISTRY



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



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

CERTIFICATE OF SERVICE

I certify that on today's date I mailed a copy of the Petition for Review, 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 the Clallam County Prosecuting Attorney (at lschrawyer@co.clallam.wa.us) through the Court's online filing system, 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 November 13, 2012.

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

APPENDIX: COURT OF APPEALS DECISION

FILED
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DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALVIN L. WITHERSPOON, Appellant.	No. 40772-8-II PUBLISHED OPINION

QUINN-BRINTNALL, J. — A jury found Alvin Witherspoon guilty of first degree burglary and second degree robbery while armed with a deadly weapon after Witherspoon broke into the home of Becky Pittario on November 12, 2009, stole some of her property, and had a brief encounter with Pittario before fleeing the scene. RCW 9A.56.210(1); RCW 9A.56.190; RCW 9A.52.025(1). The jury also found Witherspoon guilty of witness tampering based on a jailhouse phone conversation he made to his fiancée, Violet Conklin, after his arrest. RCW 9A.72.120(1).

On appeal, Witherspoon argues that we should reverse his convictions because (1) his constitutional right to a unanimous jury verdict was violated when the State failed to ask for a unanimity instruction related to alternative means of committing the witness tampering charge, (2) the trial court violated the appearance of fairness doctrine, (3) defense counsel ineffectively represented Witherspoon by failing to request a jury instruction on a lesser included offense and by representing him despite a conflict of interest, (4) the State failed to include specific facts in

the charging documents alleging that he used or threatened force in the commission of a robbery, (5) the State failed to establish the corpus delicti of robbery, and (6) the State failed to prove Witherspoon's robbery conviction by sufficient evidence.

We affirm Witherspoon's convictions.

Witherspoon also challenges his persistent offender life sentence arguing that (7A) the trial court violated the appearance of fairness doctrine at sentencing; (7B) his life sentence violates the Eighth Amendment and article I, section 14 of the Washington State Constitution; (7C) finding the existence of his prior convictions by a preponderance of the evidence violated his right to equal protection under the law; (7D) the trial court violated his Sixth Amendment rights in finding by a preponderance of the evidence that the State met its burden of establishing the existence of two prior "most serious offense" convictions for purposes of Washington's persistent offender accountability act (POAA), RCW 9.94A.570; and (7E) the trial court violated his state due process right by finding his prior convictions were proven by a preponderance of the evidence.

In my view, the trial court violated Witherspoon's Sixth Amendment rights by classifying him as a persistent offender, a fact-finding function historically left to the jury, and the trial court violated Witherspoon's state due process right by finding his prior convictions were proven by a preponderance of the evidence.[1] Accordingly, I would vacate Witherspoon's sentence for purposes of the POAA and remand for submission of his POAA status to a jury to determine

[1] Although a majority of the panel agrees that Witherspoon's convictions should be affirmed, my colleagues do not share my views on the POAA. Accordingly, Sections 7D and 7E of this lead opinion do not represent the majority opinion as to Witherspoon's sentence.

whether the State has proven his prior two most serious offense convictions beyond a reasonable doubt.

FACTS

BACKGROUND

On November 12, 2009, Witherspoon and Conklin went for a drive and ended up at Pittario's home. The parties do not dispute that Witherspoon broke into Pittario's home and stole some of her belongings. While Witherspoon was still on the property, Pittario drove up to her house, parked next to Witherspoon's car, and saw Conklin in the passenger seat of Witherspoon's vehicle. Pittario exited her car and saw Witherspoon come from around the side of her house, walking fast. He then asked her about an address, got in the car, and drove away.

During the encounter between Witherspoon and Pittario, Witherspoon held one or both hands behind his back. At trial, Pittario testified that she asked Witherspoon what he had behind his back, and he said, "A pistol." Report of Proceedings (RP) (Apr. 12, 2010) at 23. Conklin testified that Pittario asked what was behind Witherspoon's back and Witherspoon said, "[N]othing." RP (Apr. 13, 2010) at 57. Witherspoon said Pittario did not ask about his hands.

As Witherspoon drove away, Pittario noticed property she thought was hers in the back of Witherspoon's car. Pittario followed Witherspoon in her own car while on the phone with 911 as Witherspoon fled the scene in excess of 85 MPH. Later that day, police arrested Witherspoon and Conklin at his trailer and obtained a search warrant. The police found multiple items belonging to Pittario, including jewelry and compact disks.

After his arrest, Witherspoon called Conklin from the jail to persuade her to stop talking with law enforcement and to lie about what had occurred at Pittario's residence. The jail recorded this conversation.

PROCEDURE

The State charged Witherspoon with second degree robbery, residential burglary, and witness tampering. During trial, the State played a recorded jail phone call between Witherspoon and Conklin. During the phone call, Witherspoon told Conklin, "I don't want you to talk to them no more . . . [t]o the Sheriff . . . I don't know, as long as I saved your ass, that's all that matters okay? I mean, I can do this, you can't." Ex. 40 at 3-4. In the same phone call, Witherspoon also told Conklin to talk to a man named Burl:[2]

> [Witherspoon]: You can tell Burl that what it was is that we were on our way back, okay, from my grandma's, which we never even got out there. We never even found it. I mean, we had the right idea where, where it was at but we never was [sic] able to locate her. And um, we were coming back and uh we picked up that, what, what was it, Jesse or James or something?
> [Conklin]: Yeah.
> [Witherspoon]: And uh, you know um, I'm thinking he was about 45. He had a, he was about my height and had a, like a rusty, rusty color hair. Honey?
> [Conklin]: Yeah.
> [Witherspoon]: And uh, so anyway, and uh, he mentioned uh that you know, he needed, you know, a ride. And I, I, I [sic] was much obliged to give it to him. And he gave me 15, he gave us $15. . . .
> . . . .
> [Witherspoon]: And uh, uh, and then uh so I dropped him off up there, waited for him because he said he needed to get his bag and a couple pillows. And uh, he dropped the bag out. Oh, and a couple of those fucking shoe, shoe boxes or whatever they were. He brings them out. You know, I don't think nothing of it. . . . And uh, I drive fucking away. I hear a car pull up. So I, you know, you know you saw it too and I turned around. And I didn't, what did I say to the lady?
> [Conklin]: She told the cops that you told her that you had a pistol.
> . . . .
> [Witherspoon]: . . . I figured well okay, well obviously you know, what this guy's doing, either a burglary or he's taking all his girlfriend's stuff. So, soon as we got home, you know, I decided to put stuff in the trailer, and then shortly after I'm putting stuff in the trailer the Sheriffs show up. So then I freak up [sic]. . . . I put the stuff under my bed.

Ex. 40 at 4-6.

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[2] Witherspoon did not call Burl as a defense witness.

After the State rested, defense counsel moved to dismiss the robbery charge for insufficient evidence, arguing that the State had not proven that Witherspoon used or threatened the use of force or fear during the encounter with Pittario. The trial court denied the motion. The trial court also denied Witherspoon's motion to dismiss the charge of witness tampering after Witherspoon argued there was no proof that he knew that Conklin would be a witness. The jury convicted Witherspoon on all counts. At sentencing, the trial court concluded that Witherspoon had been convicted of two prior most serious offenses and sentenced him to life in prison under the POAA. Witherspoon appeals his convictions and sentence.

DISCUSSION

WITHERSPOON'S JUDGMENT

1. UNANIMOUS JURY VERDICT ON WITNESS TAMPERING

Witherspoon argues that insufficient evidence supports his witness tampering conviction, infringing on his right to a unanimous jury. He claims that the State did not sufficiently prove that he directed Conklin to withhold information from law enforcement. Witherspoon also argues that the State failed to present evidence as to whether he attempted to induce Conklin to absent herself from an official proceeding; the State concedes this point. The State contends that the lack of a unanimity instruction was harmless because the prosecutor presented evidence of only two means of witness tampering. Because any rational trier of fact would find that Witherspoon encouraged Conklin both to withhold information from law enforcement *and* perjure herself at trial, we affirm.

There are three alternative means of committing witness tampering: attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent himself or herself from an official proceeding, or (3) withhold information from a law enforcement agency. RCW 9A.72.120(1)(a)-

(c). Here, the information and the jury instructions alleged all three alternatives. But the State presented evidence of only two alternatives.

In Washington, criminal defendants have a right to a unanimous jury verdict. WASH. CONST. art. I, § 21. In order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citing *State v. Kitchen*, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)). Thus, to affirm a conviction where there are alternative means of committing a crime and the jury is instructed on each means, this court must find that "(1) substantial evidence must support each alternative means on which evidence or argument was presented, or (2) evidence and argument must have been presented on only one means."[3] *State v. Lobe*, 140 Wn. App. 897, 905, 167 P.3d 627 (2007); *see State v. Johnson*, 132 Wn. App. 400, 410, 132 P.3d 737 (2006); *State v. Rivas*, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013 (2000), *overruled on other grounds by Smith*, 159 Wn.2d 778.

In *Lobe*, the State charged two counts of witness tampering and both the charging documents and jury instructions included all three alternative means. *Lobe*, 140 Wn. App. at 901-02. The State failed to provide sufficient evidence that Lobe attempted to persuade Pappas,

[3] *State v. Rivas*, 97 Wn. App. 349, 984 P.2d 432 (1999), *review denied*, 140 Wn.2d 1013 (2000), *overruled on other grounds by Smith*, 159 Wn.2d 778, from Division One and *State v. Johnson*, 132 Wn. App. 400, 132 P.3d 737 (2006), *review denied*, 159 Wn.2d 1006 (2007), from this court affirmed convictions where there was substantial evidence of only *one* of several alternative means. Notably, our Supreme Court overruled *Rivas* on the grounds that the common law definitions of assault, when submitted as a jury instruction, do not create alternative means of committing the crime charged. *Smith*, 159 Wn.2d at 787. But the court did not address the underlying alternative means rule. And although the rule in *State v. Lobe*, 140 Wn. App. 897, 167 P.3d 627 (2007), focuses its analysis on only a single means, the essential rationale applies to cases involving substantial evidence of more than one alternative means.

a witness, to testify falsely (count III). *Lobe*, 140 Wn. App. at 906. The State also failed to present sufficient evidence that Lobe committed witness tampering by attempting to convince another witness, Attouf, to testify falsely or to absent herself (count IV). *Lobe*, 140 Wn. App. at 905-06. The State presented sufficient evidence that Lobe attempted to persuade Attouf to withhold information but, in closing, the State argued for the first time that Lobe ordered Attouf to absent herself from the proceedings, an unsupported alternative means. *Lobe*, 140 Wn. App. at 906. We held that the probability of jury confusion was too great to affirm the conviction for count III because the jury was also improperly instructed on count IV, for which the State advanced an alternative means not supported by sufficient evidence. *Lobe*, 140 Wn. App. at 907.

Here, the State charged Witherspoon with one count of witness tampering. Both parties concede that the State did not argue or attempt to prove that Witherspoon tried to induce Conklin to absent herself from official proceedings, one of the three alternative means. Instead, the State presented substantial evidence that Witherspoon attempted to persuade Conklin to withhold information from law enforcement, evidenced by his statement, "I don't want you to talk to them no more . . . [t]o the Sheriff." Ex. 40 at 3-4. The State also argued that Witherspoon induced Conklin to testify falsely when he told her to tell a man named Burl a story about a hitchhiker committing a robbery.

Thus, viewed in the light most favorable to the State, the evidence leaves no doubt as to whether Witherspoon attempted to induce Conklin *both* to withhold information from law enforcement and to testify falsely. Accordingly, the State presented substantial evidence supporting both means of witness tampering argued at trial.

Because "[t]here is no danger that the jury based its guilty verdict on the unsupported alternative means" of inducing Conklin to absent herself from trial, and "there is substantial,

uncontroverted evidence of the charged alternative means (here, two of three), . . . there is no danger the jury was not unanimous in finding [the defendant] guilty based on the two presented and uncontroverted alternative means." *Lobe*, 140 Wn. App. at 909 (Hunt, J., dissenting). Accordingly, a unanimity instruction was unnecessary here and Witherspoon's argument fails.

2. APPEARANCE OF FAIRNESS DOCTRINE

Next, Witherspoon argues that the trial court violated the appearance of fairness doctrine by making comments evidencing a potential bias. Witherspoon focuses on the trial judge's statements that before becoming a judge, he may have defended Witherspoon in a past, unrelated proceeding. Because of this, Witherspoon claims the judge should not have presided over his trial.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (citing *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). "'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.'" *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). An individual must demonstrate evidence of a judge's actual or potential bias for an appearance of fairness claim to succeed. *Gamble*, 168 Wn.2d at 187-88; *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141 (1996). The Code of Judicial Conduct (CJC) and due process require judges to disqualify themselves in a proceeding in which their impartiality "might reasonably be questioned." *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007) (quoting former CJC Canon 3(D)(1) (2007)). The test for determining whether

the judge's impartiality might reasonably be questioned is an objective one. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), *review denied*, 159 Wn.2d 1022 (2007).

Prior to the start of trial, the trial court informed the parties that it recognized the name "Witherspoon":

> THE COURT: . . . I don't know this for sure but the name Witherspoon rang a bell with me, it may be 15 years ago I represented Mr. Witherspoon as a [d]efense attorney, I don't know or not, I was working with the Defender's Office.
>
> . . . .
>
> THE COURT: Does that bother anybody?
>
> . . . .
>
> [Witherspoon]: What year?
>
> THE COURT: I have no idea, just the name sounded familiar. I don't even remember what it was about, if or what it was about, but the name sounded familiar so I always disclose that that's a possibility.
>
> [Witherspoon]: Let me consult my attorney, Your Honor.
>
> . . . .
>
> THE COURT: The name sounded familiar.
>
> [Witherspoon]: Your Honor, would that have been a juvenile matter?
>
> THE COURT: Could have been.
>
> [Witherspoon]: Your Honor, I have objections.
>
> THE COURT: Okay. Let's bring in our jury panel.[4]

RP (Apr. 12, 2010) at 15-16.

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[4] The State claims that the record contains a typographical error and that Witherspoon actually said, "Your Honor, I have [no] objections." Br. of Resp't at 30 (alteration in original). The State plausibly argues that this explains the context as to why the judge answered in the affirmative and commenced the trial. But RAP 9.5(c) requires that a party file an objection to, and propose amendments to, a verbatim report of proceedings within 10 days after receipt of the report of proceedings. The State has failed to timely object. Furthermore, the State asks this court to correct Witherspoon's statement because it contains a typographical error, citing *State v. Russell*, 171 Wn.2d 118, 249 P.3d 604 (2011). However, in *Russell*, the record of proceedings said the prior and subsequent evidence of sexual misconduct showed Russell's "lawful disposition." 171 Wn.2d at 121 n.1. Our Supreme Court noted this was merely a typographical error or the prosecutor misspoke, but given the context, the State clearly meant the evidence showed Russell's "*lustful* disposition." *Russell*, 171 Wn.2d at 121 n.1. Here, in contrast, whether Witherspoon stated he did or did not have objections may affect the merits of his appearance of fairness argument. Accordingly, we address Witherspoon's claim on the merits.

Here, the facts are analogous to those in *Dominguez*. In *Dominguez*, the trial judge had, in his professional capacity, once represented the defendant in a criminal proceeding and also prosecuted him in an unrelated case. 81 Wn. App. at 327. Furthermore, the defendant also claimed to have filed a lawsuit or disciplinary complaint against the judge following the case in which the judge had represented him. *Dominguez*, 81 Wn. App. at 327. The judge denied the defendant's motion to recuse because the judge remembered little about the defendant and knew nothing about the present case. *Dominguez*, 81 Wn. App. at 327. Division Three of this court held that the defendant's "bare oral assertion[s]" did not amount to a violation of the appearance of fairness doctrine. *Dominguez*, 81 Wn. App. at 329.

Assuming Witherspoon did object at trial, he fails to provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice. The record is not clear that the trial judge had actually represented Witherspoon in the past. Further, Witherspoon does not provide any evidence that if the trial judge previously represented him, such representation affected the present case. Viewing the evidence objectively, the trial judge's impartiality may not be reasonably questioned under these circumstances.

Accordingly, we hold that Witherspoon's appearance of fairness claim fails.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Witherspoon contends that his counsel ineffectively represented him by failing to request an instruction for theft as a lesser included offense. Further, he claims that the trial court infringed on his right to effective assistance of counsel by not adequately inquiring into a potential conflict of interest. Because counsel's performance did not fall below an objective standard of reasonableness and the evidence does not support his contention that the trial court infringed on his right to effective assistance, these claims fail.

To demonstrate that counsel ineffectively represented him, Witherspoon must show that (1) his counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there is a reasonable probability that but for the deficient performance, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). This court allows trial counsel considerable deference and employs a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "To rebut this presumption, the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *Grier*, 171 Wn.2d at 42 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

A. FAILURE TO REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION

Witherspoon argues it was objectively unreasonable for defense counsel to pursue an "all or nothing" strategy and that he was entitled to the lesser included offense instruction of theft because the evidence fails to show force or the threat of force. Br. of Appellant at 39. We disagree.

Both a defendant and the State have a statutory right to present to the jury a lesser included offense if all the elements of the lesser offense are necessary elements of the charged offense (the legal prong) and the evidence supports an inference that only the lesser crime was committed (the factual prong). *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006); *see* RCW 10.61.006. The inclusion or exclusion of a lesser included offense is a tactical decision, for which this court grants significant latitude to defense attorneys. *Grier*, 171 Wn.2d at 39. To

prevail on an ineffective assistance of counsel claim, the defendant bears the burden of establishing the absence of *any* conceivable legitimate strategy. *Grier*, 171 Wn.2d at 42.

The primary difference between theft and robbery, as charged in this case, is the use or threatened use of force.[5] Viewed in the light most favorable to Witherspoon, the conflicting testimony at trial permits a jury to rationally conclude that Witherspoon obtained Pittario's property without the use of force. Consequently, Witherspoon and his defense counsel could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal on the robbery charge. *Grier*, 171 Wn.2d at 43.

At trial, Witherspoon's counsel argued that the State had not proven beyond a reasonable doubt that Witherspoon used force. Defense counsel stated, "Witherspoon was intending to commit theft. He wanted to take Ms. Pittario's property, that's pretty obvious. . . . But, it's not robbery unless you take that property from the presence of a person by the use or threatened use of immediate force, violence or fear of injury." RP (Apr. 13, 2010) at 123-24. Because Witherspoon admitted to taking the property, if defense counsel had requested a lesser included instruction for theft, there was a strong probability that the jury would have convicted on the lesser included offense. Alternatively, defense counsel declined to request the instruction to force the jury to convict on the robbery charge requiring a finding of force. And if the jury believed the defense theory of the case, it could have acquitted Witherspoon on the robbery charge. That this strategy ultimately proved unsuccessful is immaterial. *See Grier*, 171 Wn.2d at 43. Accordingly, we hold that Witherspoon's ineffective assistance claim fails.

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[5] A person commits robbery when he or she "unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person." RCW 9A.56.190.

B. CONFLICT OF INTEREST

Witherspoon contends that the trial court infringed on his right to effective assistance when it failed to adequately inquire into a potential conflict of interest involving defense counsel's continued representation. Again, we disagree.

If a trial court knows, or reasonably should know, of a defense attorney's potential conflict of interest, the court must conduct an inquiry to determine the nature of the conflict. *State v. Dhaliwal*, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). Reversal is not required when a trial court knows of a potential conflict but fails to inquire; the defendant must show the conflict adversely affected counsel's performance. *Dhaliwal*, 150 Wn.2d at 571. This court reviews a trial court's refusal to appoint new counsel for abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006).

Witherspoon's contention that the trial court failed to conduct an adequate inquiry is unfounded. He requested new counsel for two reasons: (1) he believed his attorney might be a defense witness on the tampering charge; and (2) he expressed concern that as a "third strike case," he felt the court should appoint an independent investigator. Clerk's Papers (CP) at 27. The trial court stated that although defense counsel might be a limited witness because Conklin called him, counsel did not discuss the case with her and, thus, his credibility was not at stake. Further, the trial court expressed concern that new counsel would be a hardship on Witherspoon. As to Witherspoon's second concern, he does not provide any evidence that an investigator would have found other evidence, or that other witnesses were available to assist in his defense that were not called. Consequently, because Witherspoon does not show any conflict adversely affected counsel's performance, we hold that this ineffective assistance claim also fails.

4. CONSTITUTIONALLY SUFFICIENT INFORMATION

For the first time on appeal, Witherspoon argues that the second amended information was factually deficient because it did not include specific facts that Witherspoon used or threatened to use force to obtain or retain stolen property. We disagree.

Article I, section 22 of our state constitution provides, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." This notice is formally given in the information. *See* CrR 2.1(a)(1) (the information "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged").

A charging document must include all essential elements of a crime, statutory and nonstatutory, to adequately inform the defendant of the nature of the charges against him and allow him to prepare his defense. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The information must also allege the particular facts supporting every element of the offense. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The primary purpose of the rule is to provide the defendant with sufficient notice. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991)).

When, as here, the defendant challenges the charging document for the first time on appeal, this court liberally construes the document in favor of validity. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005). This court will find the charging document sufficient if the necessary elements appear in any form or by fair construction may be found on the face of the document. *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010). This court reviews the information as a whole, according to common sense and including implied facts, to determine if the accused is reasonably apprised of the elements of the crime charged. *Kjorsvik*, 117 Wn.2d

at 105-08. If it does include all necessary elements, the defendant may prevail only if he can show the inartful or vague language in the charging document actually prejudiced him. *Kjorsvik*, 117 Wn.2d at 106.

Witherspoon argues that the charging document failed to include the specific conduct that formed the basis for the allegation that he used or threatened force.[6] The State charged Witherspoon with one count of second degree robbery; the information stated in relevant part,

> 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 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 at 21.

This information includes all the essential elements for the crime of second degree robbery. *See* RCW 9A.56.190. Witherspoon contends that because the information fails to allege all the essential facts supporting every element of second degree robbery, specifically the use or threatened use of force, it is thereby defective.

In *Winings*, the information charged second degree assault while armed with a deadly weapon and it failed to state the victim, the weapon used, or the manner in which Winings used the weapon. 126 Wn. App. at 85. Winings argued that the information was factually deficient.

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[6] The State argues that Witherspoon waived his right to challenge the information by not requesting a bill of particulars. This is an incorrect interpretation of the law. A defendant may waive his *vagueness* challenge to a constitutionally sufficient information if he fails to request a bill of particulars. *Nonog*, 169 Wn.2d at 225 n.2; *Winings*, 126 Wn. App. at 84. But because Witherspoon's challenge is to the *constitutional sufficiency* of the information, it may be raised at any time. *See Nonog*, 169 Wn.2d at 225.

Winings, 126 Wn. App. at 85. We held that the information, though vague, was constitutionally sufficient because it alleged assault of another with a deadly weapon in violation of former RCW 9A.36.021 (2001) and included the date and location. *Winings*, 126 Wn. App. at 86.

Here, construed liberally, the information provides facts supporting each element of second degree robbery. It alleges Witherspoon did unlawfully take personal property of the victim, Pittario, by the use or threatened use of immediate force, violence, or fear of injury to said person or the property of said person. It further states that Witherspoon violated RCW 9A.56.210(1) and .190. As in *Winings*, for purposes of constitutional sufficiency, the second amended information sufficiently apprised Witherspoon of the second degree robbery charge.

5. CORPUS DELICTI

Witherspoon argues for the first time on appeal that the State failed to prove the corpus delicti of the robbery independent of his statements made during the commission of the crime.[7] The record does not support this argument.

"Corpus delicti" means the "body of the crime" and requires the State to prove both a criminal act and a resulting loss. *See State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In Washington, a defendant's incriminating statements are not sufficient, standing alone, to establish that a crime took place. *Brockob*, 159 Wn.2d at 328. The State must present independent evidence corroborating the defendant's incriminating statement. *Brockob*, 159 Wn.2d at 328-29. The court may then consider the independent evidence in connection with the defendant's confession, and establish the corpus delicti by a combination of the confession and

[7] Neither party cites authority requiring a defendant to raise a corpus delicti issue at trial. Notably, the Washington Supreme Court has addressed corpus delicti arguments raised for the first time on appeal. *See, e.g.*, *State v. Riley*, 121 Wn.2d 22, 31-32, 846 P.2d 1365 (1993).

the independent proof. *Aten*, 130 Wn.2d at 656. The independent evidence need not be sufficient to establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of proof. *Aten*, 130 Wn.2d at 656. There must be evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved. *Aten*, 130 Wn.2d at 656.

Witherspoon's statement to Pittario that he had a pistol was made as part of the crime itself.[8] Witherspoon fails to cite legal authority for the proposition that statements made during the course of the criminal act are confessions and, thus, require independent corroboration. Further, we recently held that the corroboration requirement does not apply to incriminating statements made prior to or during the course of an offense. *State v. Zillyette*, 163 Wn. App. 124, 131 n.5, 256 P.3d 1288 (2011), *rev'd on other grounds*, 173 Wn.2d 784, 270 P.3d 589 (2012). And both Divisions One and Three of this court have explicitly refused to apply the corpus delicti rule to exclude statements made prior to or during the commission of a crime. *See State v. Dyson*, 91 Wn. App. 761, 763-64, 959 P.2d 1138 (1998); *State v. Pietrzak*, 110 Wn. App. 670, 682, 41 P.3d 1240, *review denied*, 147 Wn.2d 1013 (2002).

In *Pietrzak*, Division Three reviewed Pietrzak's precrime statements as a matter of first impression on appeal. 110 Wn. App. at 680. The State presented evidence that Pietrzak told people that he disliked the victim, Kelly Conway, and wanted to kill her. *Pietrzak*, 110 Wn. App. at 681. After Peitrzak made these statements, Conway disappeared. *Pietrzak*, 110 Wn. App. at 681. During the trial, after the State rested, Pietrzak's defense counsel unsuccessfully

[8] Witherspoon's statement goes to the use or threatened use of force or fear to obtain or retain possession of the property of another, elements the State must prove to convict him for robbery. *See* RCW 9A.56.190.

moved the court to dismiss the case for insufficient evidence of corpus delicti. *Pietrzak*, 110 Wn. App. at 678. The court held that Pietrzak's precrime statements were an admission of guilt which corroborated his postcrime statements and established the corpus delicti of the charged crime. *Pietrzak*, 110 Wn. App. at 682.

In *Dyson*, Division One looked to the definition of a confession as an "expression of guilt as to a past act" and concluded that Dyson's statements comprising negotiation and agreement for an act of prostitution were statements made as part of the crime. 91 Wn. App. at 763. The court held the corpus delicti rule did not apply because Dyson's statements did not constitute a confession. *Dyson*, 91 Wn. App. at 763-64.

Here, Witherspoon's statement that he had a pistol was part of the crime of robbery. Also, Witherspoon never "expressed guilt" at a later date about this act—no confession occurred. The corpus delicti rule does not apply in this case.[9]

6. SUFFICIENT EVIDENCE FOR ROBBERY CONVICTION

Witherspoon argues that insufficient evidence supports his conviction for second degree robbery because the State failed to prove that he used "force or fear" while stealing from Pittario. Br. of Appellant at 27.[10] Further, Witherspoon argues that because the evidence was insufficient to prove the elements of the crime beyond a reasonable doubt, his robbery conviction violates his Fourteenth Amendment right to due process. Again, we disagree.

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[9] Witherspoon also raises this issue in the context of ineffective assistance of counsel. Because the corpus delicti rule is inapplicable to this case, that claim necessarily fails as well.

[10] Witherspoon also raises this issue, and only this issue, in his statement of additional grounds. RAP 10.10. We address the merits of this argument here.

In considering a challenge to the sufficiency of the evidence, this court construes the evidence in the light most favorable to the jury's verdict and asks whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant who challenges the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from the evidence. *Salinas*, 119 Wn.2d at 201. This court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

A person commits robbery "when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the *use or threatened use* of immediate force, violence or fear of injury to that person or his or her property or the person or property of anyone." RCW 9A.56.190 (emphasis added). Here, the jury instructions included this statutory language. Witherspoon's assertions that the instruction required the State prove actual force or fear is unfounded.

There is sufficient evidence of force to support a robbery conviction if the taking of property is attended by a threatening menace, word, or gesture that would, in common experience, create an apprehension of danger and induce a person to part with her property. *State v. Shcherenkov*, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008), *review denied*, 165 Wn.2d 1037 (2009). Any force or threat, however slight, that induces the owner to part with her property, is sufficient. *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992) (citing *State v. Ammlung*, 31 Wn. App. 696, 704, 644 P.2d 717 (1982)). But it is not necessary that

actual fear be specifically proven, for the law will presume fear where there appears to be just ground. *State v. Redmond*, 122 Wash. 392, 393-94, 210 P. 772 (1922).

At trial, Pittario testified that she arrived home to find an unknown car in her driveway facing in the direction of the exit. When Pittario got out of her vehicle, Witherspoon came around the side of the house, walking fast, with his left hand behind his back. When Pittario asked what Witherspoon had behind his back, Witherspoon said he had a pistol. Any rational trier of fact could interpret Witherspoon's suspicious act of keeping his hands behind his back as evidence that he was deliberately implying he had a weapon. Further, the jury could have reasonably found that Witherspoon's statement that he had a pistol to be an indirect communication that he would use force if needed to retain possession of Pittario's property.

Although not overwhelming when viewed in the light most favorable to the jury's verdict, the evidence here is sufficient to prove the elements of the crime beyond a reasonable doubt. Thus, Witherspoon's contention that his robbery conviction violates his due process right fails.

Because all of Witherspoon's arguments fail, we affirm his convictions.

7. WITHERSPOON'S POAA SENTENCE

Witherspoon challenges his sentence, arguing that (A) the trial court violated the appearance of fairness doctrine at sentencing; (B) his life sentence violates the Eighth Amendment and article I, section 14 of the Washington State Constitution; (C) finding the existence of his prior convictions by a preponderance of the evidence violated his right to equal protection under the law; (D) the trial court violated his Sixth Amendment rights in finding, in place of a jury, that the State met its burden of establishing the existence of two prior "most serious offense" convictions for purposes of Washington's POAA; and (E) the trial court

violated Witherspoon's state due process right by finding his prior convictions were proven by a preponderance of the evidence.

A. APPEARANCE OF FAIRNESS DOCTRINE

Witherspoon contends that the trial court violated the appearance of fairness doctrine because the court announced during sentencing that it would impose a life sentence because it "trusted the prosecutor." Br. of Appellant at 48. This is an inaccurate characterization of the record. Rather, the trial court stated that it was not sure which party carried the burden of proof to establish Witherspoon's prior convictions. Specifically, the trial court stated, "I don't know what the burden is. I'll take [the prosecutor] at her word. . . . I'll take [the prosecutor] at her recitation of the law." RP (May 24, 2010) at 34-35. Witherspoon did not object at sentencing to the prosecutor's statement of law nor does he cite legal authority to support his claim that this amounts to a violation of the appearance of fairness doctrine. *See* RAP 2.5(a) (an "appellate court may refuse to review any claim of error which was not raised in the trial court"). The trial court's mere reliance on the prosecutor's statement of law, without more, does not violate the appearance of fairness doctrine.

Accordingly, we hold that Witherspoon's appearance of fairness claim related to sentencing fails.

B. CRUEL AND UNUSUAL PUNISHMENT

Witherspoon alleges that his sentence violates the Eighth Amendment ban on "cruel and unusual punishment," and the Washington Constitution's article I, section 14 prohibition against "cruel punishment."

A sentence violates article I, section 14 when it is grossly disproportionate to the crime for which it is imposed. *State v. Flores*, 114 Wn. App. 218, 223, 56 P.3d 622 (2002), *review*

denied, 148 Wn.2d 1025 (2003). The Washington Constitution provides greater protection than the federal constitution; thus, if the state provision is not violated, the statute violates neither constitution. *Flores*, 114 Wn. App. at 223. A punishment is grossly disproportionate if it is clearly arbitrary and shocking to the sense of justice. *State v. Smith*, 93 Wn.2d 329, 344-45, 610 P.2d 869, *cert. denied*, 449 U.S. 873 (1980). To determine whether a sentence is grossly disproportionate, this court considers the following factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment imposed for other offenses in the same jurisdiction. *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980); *Flores*, 114 Wn. App. at 223. No one factor is dispositive. *State v. Gimarelli*, 105 Wn. App. 370, 380-81, 20 P.3d 430, *review denied*, 144 Wn.2d 1014 (2001).

Witherspoon's contention that his punishment violates his rights under the Eighth Amendment to the United States Constitution and article I, section 14 of the state constitution is without merit. He argues that his current offense was "relatively minor," that the legislature did not intend for the POAA to apply to him as a "small-time offender[ ]," and that he would have received a lighter punishment in other jurisdictions. Br. of Appellant at 50.

In *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996), our Supreme Court determined that a life sentence under the POAA based on a conviction for second degree robbery did not constitute cruel punishment. Rivers had previous convictions for two second degree robberies, attempted second degree robbery, and second degree assault. The court applied the *Fain* factors and held that because second degree robbery involves a threat of violence toward another, it is a "most serious offense." *Rivers*, 129 Wn.2d at 712-15. Further, the court concluded that the legislative purpose of the POAA was to deter criminals from committing three most serious

offenses and to segregate repeat offenders from society if they do. *Rivers*, 129 Wn.2d at 713. The court in *Rivers* determined the sentence was not grossly disproportionate because other states impose sentences as severe and because the POAA punishes other serious crimes with life imprisonment without parole in this jurisdiction. 129 Wn.2d at 714.

Here, we conclude that Witherspoon's sentence is not grossly disproportionate. The first *Fain* factor, the nature of the offense, supports his sentence. Witherspoon committed second degree robbery, a crime against a person, and a most serious crime under former RCW 9.94A.030(32)(o) (2008). The legislative purpose behind the POAA is deterrence and given Witherspoon's criminal history of serious offenses, he has demonstrated a propensity for recidivism for which the statute requires segregation. *See State v. Thorne*, 129 Wn.2d 736, 775, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As Witherspoon concedes, he would receive a similar, harsh sentence in at least six states.[11] The penalties among jurisdictions do vary, but many include life sentences for three-time offenders. *Rivers*, 129 Wn.2d at 714; *Thorne*, 129 Wn.2d at 775 ("Washington's so-called 'three strikes' law is similar to state and federal legislation throughout much of the United States.").

Finally, our Supreme Court has repeatedly held that a life sentence imposed after a defendant was convicted for robbery was not cruel and unusual punishment. *Rivers*, 129 Wn.2d at 714 (citing *State v. Lee*, 87 Wn.2d 932, 558 P.2d 236 (1976)); *see also State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473 (1996) (upholding a life sentence where prior convictions were for

[11] Washington, Louisiana, Mississippi, and Montana require a life sentence without parole for second degree robbery when committed as a third strike. Nevada and the District of Columbia authorize this as a maximum sentence, but the sentencing judge retains discretion.

second degree robbery and first degree robbery, and current conviction was for second degree robbery), *cert. denied*, 520 U.S. 1201 (1997).

Witherspoon's sentence is not disproportionate in light of the offense he committed and his criminal history; accordingly, we hold that his life sentence does not constitute cruel punishment.

C. EQUAL PROTECTION

Witherspoon argues that the POAA's classification of his prior convictions as sentencing factors rather than as additional elements of the crime violates his constitutional right to equal protection. Specifically, Witherspoon claims that under our Supreme Court's reasoning in *State v. Roswell*, 165 Wn.2d 186, 192-94, 196 P.3d 705 (2008), there is no rational basis to require that some prior convictions be proved to a jury beyond a reasonable doubt as an element of the crime, and to allow others be found by a judge by a preponderance of the evidence, as sentencing factors. We disagree.

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. U.S. CONST. amend XIV; WASH. CONST. art. I, § 12; *Thorne*, 129 Wn.2d at 771. Our Supreme Court has upheld the POAA as constitutional against challenges based on equal protection principles. *Thorne*, 129 Wn.2d at 772 (holding a recidivist may be justifiably punished more severely than a first-time offender); *Manussier*, 129 Wn.2d at 674) (improved public safety is a legitimate state objective when punishing recidivists). When a statutory classification implicates physical liberty, it is subject to rational basis scrutiny unless that classification also affects a semisuspect class. *Thorne*, 129 Wn.2d at 771. Recidivist criminals are not a suspect class. *Manussier*, 129 Wn.2d at 673. Thus, this court applies rational basis scrutiny to Witherspoon's challenge.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to 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) there is a rational relationship between the classification and the purpose of the legislation. *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991). The burden is on the party challenging the classification to show that it is purely arbitrary. *Thorne*, 129 Wn.2d at 771. Witherspoon argues that there is no rational basis to distinguish between recidivists whose prior convictions are treated as aggravators for the purposes of sentencing and other recidivists for whom a prior conviction is treated as an element of the current offense.

In *Roswell*, the defendant was charged with communication with a minor for immoral purposes, a crime elevated from a gross misdemeanor to a felony if the defendant has a prior conviction for the same crime or a felony sex offense. 165 Wn.2d at 190; RCW 9.68A.090. Our Supreme Court held that because Roswell could not be convicted of felony communication with a minor for immoral purposes without proof of the prior conviction, the prior conviction was an essential element of the crime charged and had to be proven to a jury beyond a reasonable doubt. *Roswell*, 165 Wn.2d at 194.

Here, Witherspoon argues that distinguishing between a prior conviction as a sentencing aggravator and a prior conviction as an element of a crime is arbitrary and lacks a rational basis because his prior convictions elevate the punishment for his current offense to a mandatory life sentence without parole.

But there is a rational basis for distinguishing between "persistent offenders" and "nonpersistent offenders" under the POAA. *State v. McKague*, 159 Wn. App. 489, 518-19, 246 P.3d 558 (citing *Manussier*, 129 Wn.2d at 674; *Thorne*, 129 Wn.2d at 771-72), *aff'd*, 172 Wn.2d

802, 262 P.3d 1225 (2011). The legislature did not include all recidivists under the POAA, but specifically targeted the most serious, dangerous offenders. *Thorne*, 129 Wn.2d at 764. Notably, the purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison and reduce the number of serious, repeat offenders by tougher sentencing. RCW 9.94A.555. And it is within the legislature's discretion to define what facts constitute elements of the crime and the penalty for that crime, even where prior convictions as an element of the crime have the singular effect of increasing punishment for recidivists. *Thorne*, 129 Wn.2d at 767.

Furthermore, both Divisions One and Three of this court have held that under the POAA there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. *See State v. Langstead*, 155 Wn. App. 448, 454-57, 228 P.3d 799, *review denied*, 170 Wn.2d 1009 (2010); *State v. Williams*, 156 Wn. App. 482, 496-99, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011 (2010). Thus, Witherspoon's equal protection challenge fails.

D. DETERMINING PRIOR CONVICTIONS FOR PURPOSES OF POAA

Witherspoon argues that the trial court violated his Sixth Amendment jury trial rights by determining the existence of his prior convictions itself without submitting this factual issue to a jury.[12] Although our Supreme Court has repeatedly rejected the argument that the Sixth

[12] To reiterate, the following sections—Sections 7D and 7E—do not represent the majority view of the court.

Amendment applies to sentencing determinations under the POAA,[13] this view fails to comport with the constitutional principles elucidated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely*.[14]

Two recent United States Supreme Court opinions, *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), and *Southern Union Co. v. United States*, ___ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), cast further doubt on the constitutionality of having a trial court, rather than a jury, decide whether prior convictions are proven by a preponderance of the evidence as, *historically*, juries made this determination under recidivist statutes like the POAA. *See, e.g.*, *State v. Furth*, 5 Wn.2d 1, 10, 104 P.2d 925 (1940) ("On a charge of being an habitual criminal, is the question of defendant's prior conviction an issue of fact to be determined by the jury? The weight of authority answers that question . . . in the affirmative.").

In *Ice*, the majority addressed whether the Sixth Amendment mandates that a jury decide if a defendant convicted of multiple offenses should be sentenced to consecutive or concurrent

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[13] *See, e.g.*, *State v. Magers*, 164 Wn.2d 174, 193, 189 P.3d 126 (2008) (approving this court's holding in *State v. Ball*, 127 Wn. App. 956, 959-60, 113 P.3d 520 (2005), *review denied*, 156 Wn.2d 1018 (2006), concluding that *Blakely* has no application in sentencing under the POAA); *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007) (the State is not required to submit prior convictions to a jury and prove them beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and its progeny); *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (holding that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), expressly held that a prior conviction need not be proved to a jury and the United States Supreme Court has not held otherwise since), *cert. denied*, 541 U.S. 909 (2004).

[14] *See McKague*, 159 Wn. App. at 527 (Quinn-Brintnall, J., concurring in part and dissenting in part) ("Here, I reiterate and expand the analysis in my dissent in *State v. Rudolph*, 141 Wn. App. 59, 72, 168 P.3d 430 (2007), *review denied*, 163 Wn.2d 1045 (2008), that under *Blakely*, a trial court sitting without a jury may not constitutionally sentence a defendant to life without the possibility of parole on a class B felony that otherwise carries a maximum term of 10 years.").

sentences. 555 U.S. at 163. The Supreme Court rejected the argument that a jury must decide this issue because, historically, this role fell to the trial court:

> Our application of *Apprendi*'s rule must honor the "longstanding common-law practice" in which the rule is rooted. *Cunningham* [*v. California*], 549 U.S. [270, 281, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007)]. The rule's animating principle is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense. *See Apprendi*, 530 U.S. at 477. Guided by that principle, our opinions make clear that the Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain.
>
> . . . .
>
> The historical record demonstrates that the jury played no role in the decision to impose sentences consecutively or concurrently. Rather, the choice rested exclusively with the judge.

Ice, 555 at 167-68.

In *Southern Union*, the Court was asked to determine whether *Apprendi*'s reasoning should extend to criminal fines imposed pursuant to a natural gas distributor's violation of the Resource Conservation and Recovery Act of 1976.[15] 132 S. Ct. at 2349. After an extended discussion of the traditional role juries have played in setting fines, the Court held that "requiring juries to find beyond a reasonable doubt facts that determine [a] fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle.'" *Southern Union*, 132 S. Ct. at 2351. As in *Ice*, the Court stressed the importance of analyzing the jury's historic role in relation to the issue at hand and, in relation to setting criminal fines, concluded that "ample historical evidence [showed] that juries routinely found facts that set the maximum amounts of fines." 132 S. Ct. at 2356.

Here, unlike with the imposition of consecutive or concurrent sentences in *Ice* but comparable to setting fines as addressed in *Southern Union*, the State was historically required to

[15] 42 U.S.C. § 6928(d)(2)(A).

"prove to a jury beyond a reasonable doubt that the defendant to be sentenced under a recidivist statute was the person who was previously convicted of statutorily qualifying offenses"—not the trial court. *McKague*, 159 Wn. App. at 528 (Quinn-Brintnall, J., concurring in part and dissenting in part); *see also Graham v. West Virginia*, 224 U.S. 616, 32 S. Ct. 583, 56 L. Ed. 917 (1912); *United States v. Jackson*, 368 F.3d 59, 67-68 n.9 (2d Cir. 2004); *Furth*, 5 Wn.2d at 10; Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 408 (2002).

Accordingly, in my view, Witherspoon should be resentenced and, at that time, a jury of his peers should determine whether the State has proven beyond a reasonable doubt the existence of his prior convictions for purposes of the POAA. As Justice Scalia bluntly stated in *Blakely*,

> The Framers would not have thought it too much to demand that, before depriving a man of . . . more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," [4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)], rather than a lone employee of the State.

542 U.S. at 313-14.

E. STATE DUE PROCESS CLAIM

Witherspoon also asserts that imposition of a life sentence without parole violates due process under article I, section 3 of the Washington Constitution because the State did not prove the existence of his prior convictions beyond a reasonable doubt and, in result, insufficient evidence supports the trial court's finding that he is a persistent offender. He is correct.

Washington has had a recidivist offender statute, in one form or another, since 1903. Prior to passage of the POAA, RCW 9.92.090 served as the primary vehicle for sentencing repeat offenders to increased sentences as "habitual criminals." That statute states,

> Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which

> under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in a state correctional facility for life.

RCW 9.92.090.

Because RCW 9.92.090 did not explicitly provide the burden the State had to meet to prove the existence of prior convictions, our Supreme Court settled the issue. In *State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980), the court held, "The existence of three valid felony convictions is an element of the habitual criminal status which must be proved by the State *beyond a reasonable doubt*." (Emphasis added.) Just three years later, the court further elaborated on this requirement and its grounding in the Washington Constitution:

> While the faithful application of *Holsworth* may reduce the number of convictions upon which the State may rely in habitual offender proceedings, its requirements are based upon constitutional mandates which we must obey. We cannot now retreat from our holding in *Holsworth* and allow a renewed emasculation of defendants' constitutional rights simply because it may increase convictions of alleged habitual offenders. The federal and state constitutions, as embodied in our criminal justice system, have concerns much broader than the laudable but narrow one of incarcerating repeat offenders.

State v. Chervenell, 99 Wn.2d 309, 315, 662 P.2d 836 (1983).

In 1986, prior to passage of the POAA, the court was asked to address a somewhat similar standard of proof issue related to sentencing under the then recently passed Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW. In *State v. Ammons*, 105 Wn.2d 175, 186-87, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986), three defendants attempted to argue that under the SRA, the State should be held to the *Holsworth* beyond a reasonable doubt standard for purposes of proving prior convictions to accurately calculate a defendant's offender score: "The fifth challenge, made by all three appellants, is that due process requires that the

state must prove a prior conviction, considered in sentencing a defendant, is constitutionally valid and was imposed upon this defendant." The *Ammons* court rejected this reasoning, but in doing so noted that

> [i]n only two situations has this court held that the State, before using a prior conviction, had to affirmatively show its constitutional validity: (1) a proceeding to establish a status of habitual criminal or habitual traffic offender, [*Chervenell*, 99 Wn.2d at 312]; [*Holsworth*, 93 Wn.2d at 157]; *State v. Ponce*, 93 Wn.2d 533, 611 P.2d 407 (1980); and (2) a proceeding to establish the crime of felon in possession of a firearm.

105 Wn.2d at 187.

Thus, despite having the opportunity to proclaim that the State need only prove a defendant's prior convictions by a preponderance of the evidence *both* for determining recidivism *and* calculating an offender score, the *Ammons* court distinguished *Chervenell* and *Holsworth*, leaving their fundamental logic intact: for purposes of determining whether a defendant is an habitual offender, the State must prove a defendant's previous convictions beyond a reasonable doubt.

Finally, in *Manussier*, the court directly addressed whether under the POAA, the State had the burden of proving the existence of a defendant's prior convictions by a preponderance of the evidence or beyond a reasonable doubt standard. Contrary to extensive persuasive authority and 90 years of precedent holding that a defendant's prior offenses used to increase his or her sentence under a recidivist statute must be proven beyond a reasonable doubt, the *Manussier* majority concluded that because other portions of the SRA call for a preponderance standard, so should the POAA. 129 Wn.2d at 681-84. In a thorough and well-articulated dissent, Justice Madsen pointed out the problematic nature of the majority's reasoning:

> The majority in this case attempts to distinguish the procedures required in *Furth* for habitual offender sentencing by stating that RCW 9.94A, which

> includes the persistent offender law, provides for a different procedure: prior convictions need only be proved by a preponderance of the evidence. Majority at 682. However, this overlooks the fact that *Furth*'s constitutional determination rests on state constitutional law, not on statutory language. . . .
>
> . . . .
>
> There is little new under the sun and a review of history shows that the [POAA], despite its catchy title—Three Strikes and You're Out—is no exception. The right to an information alleging the defendant is a persistent offender, the right to have the prosecutor exercise discretion in that determination, the right to a jury trial and proof beyond a reasonable doubt of the allegation have been guaranteed by this state's case law and constitution since statehood and should not be tossed aside simply because an old law receives a new name.

Manussier, 129 Wn.2d at 691-97 (Madsen, J., dissenting).

Because our constitution requires the State to prove prior convictions beyond a reasonable doubt for purposes of increasing a defendant's sentence under any of our habitual criminal statutes, Justice Madsen's view is the correct one.[16]

In proving prior convictions beyond a reasonable doubt, identity of names is generally insufficient. *See, e.g.*, *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) ("Because 'in many instances men bear identical names,' the State cannot [establish identity for purposes of criminal liability] by showing identity of names alone. Rather, it must show, 'by evidence

[16] The *Manussier* decision predates both *Apprendi* and *Blakely*. The POAA decisions following *Apprendi* and *Blakely* have generally conflated whether *Apprendi* and *Blakely* require a jury to determine the existence of prior convictions and whether the fact finder must find the existence of two prior convictions beyond a reasonable doubt (or fail to discuss the standard of proof entirely). *See, e.g.*, *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. . . . All a sentencing court needs to do is find that the prior conviction exists. . . . No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence."); *Smith*, 150 Wn.2d at 143 ("[F]or aggravating and mitigating factors, it seems appropriate to require . . . the additional process of a jury trial. It does not follow, however, that such process is also required to determine the fact of prior convictions."). *But see Smith*, 150 Wn.2d at 156-58 (Chambers, J., dissenting) (explaining that *Furth* required that a recidivism finding be beyond a reasonable doubt, whomever serves as the fact finder, and that Justice Madsen's *Manussier* dissent correctly articulates why this should still be the law).

independent of the record,' that the person named therein is the defendant in the present action.'" (footnotes omitted) (quoting *Gravatt v. United States*, 260 F.2d 498, 499 (10th Cir. 1958); *United States v. Jackson*, 368 F.3d 59, 63 (2nd Cir. 2004); and *Furth*, 5 Wn.2d at 10, respectively)). As we explained in *Huber*, the State can meet the burden of proving identity

> in a variety of specific ways. Depending on the circumstances, these may include otherwise-admissible booking photographs, booking fingerprints, eyewitness identification, or, arguably, distinctive personal information. But the State does not meet its burden merely because the defense opts not to present evidence; if the State presents insufficient evidence, the defendant's election not to rebut it does not suddenly cause it to become sufficient.

129 Wn. App. at 503 (footnotes omitted).

Here, the record reflects that for at least one of Witherspoon's two prior convictions, the trial court appears to have employed a preponderance of the evidence standard in determining the existence of the prior conviction:

> And so the State has established with Exhibit 3 that Mr. Alvin Witherspoon was convicted of one of the most serious offenses in Snohomish County Superior Court in 99-1-1322-5. Which was filed on -- the judgment and sentence was filed on February 17th, 2000.
>
> The other issue is whether the Court can make the same determination with reference to Count 1 of the judgment and sentence which was entered in Snohomish County cause number 94-1-711-9, and that was issued on July 18th of 1994. And that crime in Count 1 is burglary in the first degree, another of the most serious offenses as defined by the statute, which would make that a strike offense. There is -- in that one they have his birthday as September 22nd, 1974 not July 22nd of '74, and there are no fingerprints on that one to connect -- to positively identify Alvin Witherspoon that's here today as being the Alvin Witherspoon that was convicted of that. So, that's far more suspect.
>
> I don't know what the burden is. I'll take [the prosecutor] at her word,[17] I should have read this I guess, I wasn't anticipating this sort of problem. I'll take

[17] The prosecutor argued to the trial court that "[i]t's not the same as trial. There's sufficient evidence before the Court taking into consideration the presentence investigation report as well as the priors that have been admitted to establish that this is his third most serious offense." RP (May 24, 2010) at 33. The trial court felt compelled as Witherspoon's sentencing began, to state for the record that "[t]here 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 (May 24, 2010) at 2.

> [the prosecutor] at her recitation of the law saying that there's got to be some reason for me to doubt that that is the Alvin Leslie Witherspoon that's before me today. And I don't have that. I believe that it is the same person in light of the presentence investigation as well as the certified copy that's entered.

RP (May 24, 2010) at 34-35.

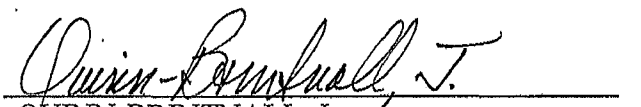
"Exhibit 3," referenced above, was a guilty plea from February 2000, involving two counts of residential burglary. At sentencing, Sequim Police Officer Chris Wright testified that the booking fingerprints included with the certified judgment and sentence from February 17, 2000, conclusively matched Witherspoon's booking fingerprints taken after his arrest in November 2009. This satisfied the State's requirement of proving identity beyond a reasonable doubt.

However, the State did not ask Wright to compare booking fingerprints from "Exhibit 4," a July 1994 certified judgment and sentence related to another first degree burglary guilty plea, with Witherspoon's 2009 booking prints.[18] Moreover, the information related to that plea lists the defendant's date of birth as "9/22/74," not Witherspoon's stated July 22, 1974 date of birth in the 2009 booking information. Ex. 1. In addition, the 2009 booking information lists Witherspoon's ethnicity as White, whereas the 1994 booking information lists the defendant's ethnicity as American Indian or Alaskan Native. The booking information from 1994 and 2009 had the same state identification number, WA15782364, and the same name, "Alvin L. Witherspoon." In light of these discrepancies, the trial court believed that the State's success in proving identity related to this strike was "far more suspect." RP (May 24, 2010) at 34.

[18] The State did ask Officer Wright to compare booking prints from "Exhibit 2," a certified copy of a 1992 guilty plea involving third degree assault. It is unclear why the State had Wright analyze the 1992 conviction as third degree assault is not a "most serious offense" for purposes of the POAA. Former RCW 9.94A.030(32). Regardless, Wright was unable to make a definitive match because of the poor quality of the certified copy.

Nevertheless, because the trial court accepted the prosecutor's assertion that the State needed to prove only identity by a preponderance of the evidence—not beyond a reasonable doubt—the trial court ruled that identity had been established. This was error.

In my opinion, the State is required to do more than convince a trial court by a preponderance of the evidence that a defendant has three strikes for the purposes of the POAA. The State must convince the trial court beyond a reasonable doubt. Here, the State did not satisfy this burden for one of the two previous convictions. Moreover, Witherspoon's current "most serious offense" conviction involves second degree robbery, a class B felony that normally carries a *maximum* penalty of 10 years. RCW 9A.20.021(1)(b). Washington's Constitution requires proof beyond a reasonable doubt to support imprisoning Witherspoon beyond this 10-year statutory maximum. Accordingly, I would vacate Witherspoon's sentence for purposes of the POAA.



QUINN-BRINTNALL, J.

HUNT, J. (concurring in part, dissenting in part) — I concur in sections 1 through 6 of Judge Quinn-Brintnall's lead opinion affirming Witherspoon's convictions and in her holding in sections 7A, 7B, and 7C of the lead opinion that Witherspoon's Persistent Offender Accountability Act (POAA)[19] sentence (1) does not violate the appearance of fairness doctrine, (2) does not constitute cruel and unusual punishment, and (3) does not violate his constitutional right to equal protection. *See* Lead opinion (§ 7A, 7B, and 7C, respectively) at 21-26. But I respectfully dissent from the lead opinion's view that Witherspoon's sentence should be vacated: In particular, I depart from Judge Quinn-Brintnall's rationale and her agreement with Witherspoon in sections 7D and 7E of the lead opinion that imposition of his life sentence under the POAA violated due process under Washington Constitution Article 1, Section 3 because a jury did not determine the existence of his prior most serious offense convictions beyond a reasonable doubt. *See* sections 7D and 7E, respectively, of the lead opinion at 26-35. Existing law is expressly contrary to this assertion and it controls here.

I. EXISTING LAW ALLOWS TRIAL COURT TO FIND PRIORS BY PREPONDERANCE OF EVIDENCE

In support of her assertion that the State must prove to a jury the existence of two prior most serious offense convictions beyond a reasonable doubt for POAA sentencing purposes, Judge Quinn-Brintnall relies on (1) her disagreement with the current law "reject[ing] the argument that the Sixth Amendment applies to sentencing determinations under the POAA" because, in her view, it "fails to comport with the constitutional principles elucidated in *Apprendi*

[19] RCW 9.94A.570.

v. New Jersey . . . and *Blakely v. Washington*"[20]; (2) the POAA's predecessor, the "habitual criminal act" of the 1970s, RCW 9.92.090[21] and the Supreme Court's interpretation of this former statute in *State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980); and (3) current Chief Justice Madsen's dissent in *State v Manussier*, 129 Wn.2d 652, 691, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997). But former RCW 9.92.090 is no longer the law in the State of Washington. Instead, in 1993, Washington voters approved Initiative 593, later known as the "POAA," now codified as RCW 9.94A.570, which replaced the former habitual criminal act.

Furthermore, as Judge Quinn-Brintnall candidly acknowledges, current Washington Supreme Court case law interpreting the current POAA is *contrary* to her point of view[22]: "[O]ur Supreme Court has repeatedly rejected the argument that the Sixth Amendment applies to sentencing determinations under the POAA." Lead opinion at 26-27. Expressly rejecting the argument that "a defendant's prior offenses used to increase his or her sentence under a recidivist statute must be proven beyond a reasonable doubt, the *Manussier* majority concluded that

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[20] Lead opinion at 26-27 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

[21] RCW 9.92.900 provides that RCW 9.92.090 does not apply to any felony offense committed on or after July 1, 1984.

[22] To support her departure from current precedent, Judge Quinn-Brintnall cites two United States Supreme Court cases. In *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), the Court held that, because the determination was historically left to the trial court, the Sixth Amendment was not violated where the trial court determined whether a defendant convicted of multiple defenses should be sentenced to consecutive or concurrent sentences. *Ice*, 555 U.S. 167-168. Similarly, in *Southern Union Co. v. United States*, ___ U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), the Court held that juries must determine a fine's maximum amount, as juries historically made this determination. *Southern Union*, 132 S. Ct. at 2356. Neither case, however, addresses the issue before us here or controverts our state Supreme Court's express holdings contrary to Judge Quinn-Brintnall's point of view.

because other portions of the SRA call for a preponderance standard, so should the POAA." Lead opinion at 31 (citing *Manussier*, 129 Wn.2d at 681-84). The *Manussier* court also held that the POAA does not violate state[23] and federal due process standards in not requiring a jury trial to decide the existence of such prior convictions for sentencing purposes. 129 Wn.2d at 682-83.

Even after *Manussier*, our Supreme Court has consistently continued to hold that a judge can determine a prior conviction for POAA sentencing purposes and that a jury determination is not required.[24] All three divisions of the Washington Court of Appeals have also continued to follow this holding.[25] This precedent controls here and we must follow it, regardless of any personal disagreement with its premise or correctness. "When the Court of Appeals fails to follow directly controlling authority by this court, it errs." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006) (citing *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)).

II. PREDICTIONS ABOUT FUTURE SUPREME COURT HOLDINGS DO NOT CONTROL

I further disagree with Judge Quinn-Brintnall's extrapolating from existing law to predict what the United States Supreme Court might hold in the future and then to advocate application

[23] The Court explicitly based its holding on the due process rights protected by article 1, section 3 of our state constitution. *Manussier*, 129 Wn.2d at 679-80.

[24] *See, e.g.*, *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, 541 U.S. 909 (2004), in which the Court specifically acknowledged the same holding in *Almendarez-Torres v. United States*, 523 U.S. 224, 247, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), and noted that United States Supreme Court has not "specifically held otherwise since then." *Smith*, 150 Wn.2d at 143. *See also In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 256-57, 111 P.3d 837 (2005); *State v. Mutch*, 171 Wn.2d 646, 659, 254 P.3d 803 (2011).

[25] *See, e.g.*, *State v. Rivers*, 130 Wn. App. 689, 692, 128 P.3d 608 (2005) (Division One), *review denied*, 158 Wn.2d 1008 (2006), *cert. denied*, 549 U.S. 1308 (2007); *State v. McKague*, 159 Wn. App. 489, 515-17, 246 P.3d 558 (Division Two), *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011); *State v. O'Connell*, 137 Wn. App. 81, 90-91, 152 P.3d 349 (Division Three), *review denied*, 162 Wn.2d 1007 (2007).

of this prediction here. Even assuming that her prediction may ultimately turn out to be correct, (1) as we have just noted, this prediction is contrary to controlling existing law; and (2) the Supreme Court has firmly admonished intermediate appellate courts such as ours not to engage in such predictions and, instead, to await its future pronouncements on these issues. For example, the United States Supreme Court has expressly noted:

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

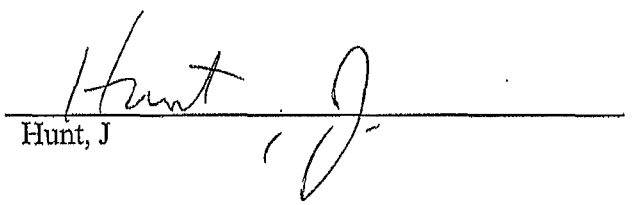
Agostini v. Felton, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)).[26]

Judge Quinn-Brintnall asserts that to sentence Witherspoon to life imprisonment under the POAA for his second degree robbery conviction, "Washington's Constitution requires proof beyond a reasonable doubt to support imprisoning [him] beyond this 10-year statutory maximum." Lead opinion at 35. This assertion, however, flatly contradicts (1) our Washington Supreme Court's express holding in *State v. Magers*[27] that *Blakely* does not apply to POAA sentences; and (2) our court's majority holding in *McKague*, affirmed by our Supreme Court, that a the trial court does not violate a defendant's constitutional rights when it finds the

[26] More recently, addressing a different legal doctrine, our Washington Supreme Court reiterated its prior direction to the lower courts not to apply that doctrine in other contexts '"unless and until this court has, based upon considerations of common sense, justice, policy and precedent, decided otherwise.'" *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 165, 273 P.3d 965 (2012) (quoting *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 417, 241 P.3d 1256 (2010) (Chambers, J., concurring)).

[27] 164 Wn.2d 174, 193, 189 P.3d 126 (2008).

existence of his prior convictions "by a preponderance of the evidence for purposes of the POAA." *State v. McKague*, 159 Wn. App. 489, 516-517, 246 P.3d 558, *aff'd*, 172 Wn.2d 802, 262 P.3d 1225 (2011). Accordingly, I would hold that neither the federal nor state constitution requires a jury to find the existence of prior convictions beyond a reasonable doubt for purposes of sentencing under the POAA.[28] I would affirm Witherspoon's POAA sentence no matter how prescient our astute colleague's reasoning and her fervent desire that the law be otherwise.



Hunt, J

[28] Here, the same panel of judges that sat on *McKague* is similarly split on the same POAA issue. As Judge Armstrong explained in *McKague*:

> In affirming the conviction, the lead opinion is split on the sentencing issues under the POAA. Thus, as a matter of law, I concur with Judge Hunt that the federal constitution does not require that a jury find the existence of prior convictions beyond a reasonable doubt under the POAA.

McKague, 159 Wn. App. at 524 (Armstrong, J., concurring in part, dissenting in part). Judge Quinn-Brintnall's POAA opinion in the instant case mirrors her dissent in *McKague*.

Here, because Judge Armstrong joins me in this analysis and in my departure from Judge Quinn-Brintnall's desire to have a jury determine prior convictions for POAA purposes, his opinion appears to join with mine to form a majority holding on this point.

ARMSTRONG, J. — I concur with Judge Hunt's discussion of the persistent offender accountability act (POAA)[29] issues and that the trial court did not error in finding Alvin Witherspoon's criminal history; assuming a valid conviction here, the trial court did not err in sentencing Witherspoon as a persistent offender. But because the State failed to prove Witherspoon used force or fear to overcome the victim's will and to take her property from her presence, I disagree with the majority that the State proved the robbery charge.

To convict of robbery, the State must prove the following elements, (1) an unlawful taking (2) of personal property (3) from the person or presence of another (4) against her will and (5) by the use or threatened use of immediate force. RCW 9A.56.190; *State v. Truong*, 168 Wn. App. 529, 277 P.3d 74 (2012). "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial." RCW 9A.56.190. A threat of force exists where the threatened person reasonably interprets the language or actions of another to be threatening. *State v. Shcherenkov*, 146 Wn. App. 619, 629, 191 P.3d 99 (2008). But force used in attempting to escape after a theft is not robbery. *State v. Johnson*, 155 Wn.2d 609, 611, 121 P.3d 91 (2005) (rejecting the argument that force used in an effort to escape after a theft constitutes the force necessary for robbery).

State v. Handburgh, 119 Wn.2d 284, 291, 830 P.2d 641 (1992), illustrates the difference between a forceful taking and a forceful retaining of stolen property. In *Handburgh*, the defendant rode off with a bicycle while the owner was inside a recreational center. When the owner came outside, she saw Handburgh on her bicycle, and demanded its return. Handburgh refused, rode the bicycle into an alley, and dropped it into a ditch. When the owner tried to

[29] Chapter 9.94A RCW.

retrieve it, Handburgh threw rocks at her. But the owner persisted and when she approached the bicycle to retrieve it, the defendant and the victim fought. After losing the fist fight, the owner ran from the alley, leaving the bicycle behind. *Handburgh*, 119 Wn.2d at 286. The court concluded that Handburgh did not commit robbery when he took the bicycle because the taking was not by force or threatened force and was not from the owner's presence. But the court concluded that Handburgh committed robbery when he forcibly prevented the owner from retrieving the bicycle. *Handburgh*, 119 Wn.2d at 293.

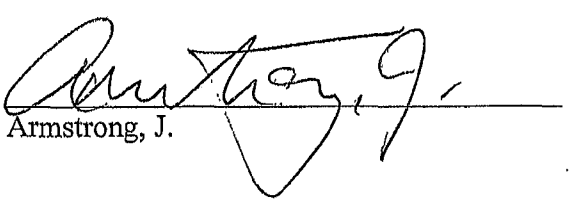
Here, there is no evidence that Witherspoon used force or threatened force to take Rebecca Pittario's property. The stolen property was already in Witherspoon's car when Pittario drove into her driveway. During the encounter between Witherspoon and Pittario, Witherspoon held one or both hands behind his back. Pittario testified that she asked Witherspoon what he had behind his back and he replied, "A pistol." Report of Proceedings (Apr. 12, 2010) at 23. Although Witherspoon disputed this, we draw all reasonable inferences in the State's favor and interpret them most strongly against Witherspoon, as we must in evaluating the sufficiency of the evidence. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). But missing is any evidence that Witherspoon's gun threat overcame Pittario's will to recover or retain her property. She did not know that Witherspoon had taken her property and put it in his car when he stated that he had a gun behind his back; she did not discover the theft until Witherspoon was speeding out her driveway. It is logically impossible to find that Pittario had the will to retain or recover property, which she did not know had been stolen. And the State offered no evidence that Witherspoon made any threat that Pittario should not follow them. Pittario testified that she was not afraid and, in fact, she gave chase. Like in *Handburgh*, Witherspoon stole Pittario's property without her knowledge; but unlike *Handburgh*, Witherspoon did not use force or threatened force to

overcome Pittario's will to recover her property, even assuming it was in her presence while in his car.

The State also failed to prove that Witherspoon took any property from Pittario's presence. To be within the victim's presence, the stolen property must be "'so within [the victim's] reach, inspection, observation or control, that he could, if not overcome with violence or prevented by fear, retain his possession of it.'" *Handburgh*, 119 Wn.2d at 289 (quoting *State v. Manchester*, 57 Wn. App. 765, 768, 790 P.2d 217 (1990)).

Pittario testified that she did not know Witherspoon had possession of her property until she saw it in the back seat of his car as he drove away. Thus, Witherspoon's gun threat did not prevent Pittario from attempting to retain possession of the property; instead, her ignorance of the situation did. And when she learned that her property had been stolen as Witherspoon was speeding away, it was no longer within her "reach" such that she could have retained it. *Handburgh*, 119 Wn.2d at 289. The State failed to prove a taking from Pittario's presence.

Because the State failed to prove a taking by threat of force from Pittario's presence, I would reverse and remand for dismissal of the robbery charge.



Armstrong, J.

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