No. 91297-1

NO. 43167-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FARNSWORTH,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

---

# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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## A. SUPPLEMENTAL ASSIGNMENTS OF ERROR[1]

1. Charles Farnsworth was denied a fair trial by jury due to the cumulative effect of numerous evidentiary errors.

2. The court denied Farnsworth his right to effectively cross-examine the central witness against him.

3. The court erroneously admitted evidence of Farnsworth's prior convictions and improperly denied Farnsworth's mistrial motion based on this erroneous ruling.

4. The prosecution improperly argued to the jury that Farnsworth had prior convictions for robbery.

5. The court impermissibly permitted the State to introduce evidence of Farnsworth's bad character.

6. The prosecution violated Farnsworth's right to be free from compelled, testimonial statements while in custody.

7. The court impermissibly permitted Farnsworth to appear in court without the physical indicia of innocence.

8. The prosecution failed to meet its burden of proving Farnsworth's 1984 California conviction constitutes a most serious

[1] This Court permitted Farnsworth's counsel to file supplemental briefing after the initially appointed attorney withdrew from the case.

offense in Washington and authorizes a sentence of life without the possibility of parole.

9. The court denied Farnsworth his rights to a fair trial by jury by imposing a life sentence based on a prior conviction that was not proven to a jury or established beyond a reasonable doubt.

10. The sentence of life without the possibility of parole based on prior convictions that were not proven to a jury beyond a reasonable doubt violates Farnsworth's right to equal protection of the law.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR.

1. The right to a fair trial includes the right to adequately cross-examine witnesses for the prosecution and be free from unduly prejudicial allegations of bad behavior that lack probative value. The court prohibited Farnsworth from cross-examining the co-defendant who testified for the prosecution in exchange for a beneficial plea bargain about pertinent impeaching information, permitted the State to offer evidence of unrelated robbery convictions that lacked probative value, admitted evidence of Farnsworth's rude and obstructionist behavior while in custody, and allowed Farnsworth to appear in court in a manner that marked him as a guilty or dangerous person. Did these

numerous errors, considered cumulatively, undermine Farnsworth's right to a fair trial by jury?

2. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Farnsworth's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had at least two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

3. The court imposed a sentence of life without the possibility of parole despite the ambiguous evidence that Farnsworth was convicted of a 1984 California offense where there was no explanation of the factual basis of his plea, the judgment listed a different charge than the complaint, and the elements of the California offense are different that the purportedly parallel Washington crime. Does it violate Farnsworth's right to due process of law to impose a sentence of life without the possibility of parole based on information that did not establish a comparable out-of-state conviction?

4. The Equal Protection Clauses of the Fourteenth Amendment and Article I, section 12 require that similarly situated people be treated the same with regard to the legitimate purpose of the law. Numerous statutes authorize greater penalties for specified offenses based on recidivism but in some instances the prior convictions are treated as "elements" that must be proven to a jury beyond a reasonable doubt, and in other instances, they are treated as "sentencing factors" proven to a judge by a preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and its effect is to deny some persons the protections of a jury trial and proof beyond a reasonable doubt, does it violate equal protection?

C. ARGUMENT.[2]

1. **By restricting Farnsworth's impeachment of the State's central witness, granting the prosecution permission to denigrate Farnsworth's character, and allowing the jury to infer Farnsworth's dangerousness for reasons unrelated to the charged incident, cumulative errors denied Farnsworth a fair trial**

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. The right to a fair trial includes the right to be tried for only the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971). It includes the right to present a defense, which means, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United

[2] The facts of the case are summarized in Appellant's Opening Brief. Additional facts pertinent to the arguments raised herein are included in the

States, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice").

Likewise, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," and the court may not improperly restrict the accused's cross-examination. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); U.S. Const. amend. 6; Wash. Const. art. I, § 22. Numerous erroneous court rulings throughout the course of Farnsworth's trial denied him his right to a fair trial, as detailed below.

a. The court denied Farnsworth his right to confront the central prosecution witness with evidence of his bias and prior convictions for dishonesty

Meaningful cross-examination of the prosecution's witnesses is the "primary and most important component" of the constitutional right to confront witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Testing the credibility of witnesses includes detailing the benefits they may receive from testifying and their prior instances of dishonesty as demonstrated by convictions for crimes of dishonesty. Davis v. Alaska, 415 U.S. at 315-16; see State v. Johnson, 90 Wn.App.

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relevant argument sections below.

54, 69, 950 P.2d 981 (1998). When the right to confront a prosecution witness is at stake, "any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." Johnson, 90 Wn.App. at 69.

James McFarland was the central prosecution witness against Farnsworth. He was the person who entered the bank, requested money, and left in a car Farnsworth drove. 10/20/11RP 1233, 1256-58. He was the only witness who detailed Farnsworth's behind-the-scenes involvement in the crime that McFarland committed. In exchange for a promise that he could plead guilty to a lesser charge, McFarland testified as a witness for the prosecution.10/24/11RP 1259.

i. Impermissible restrictions on impeaching the co-defendant based on his guilty plea.

"A defendant may . . . impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony." State v. Ish, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). A witness's motivation in testifying is "a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. at 316-17. It is "always

relevant" to discredit a witness based on exploring his bias and partiality. Id.

McFarland testified against Farnsworth with the expectation that he would receive a substantial benefit. 10/24/11RP 1259, 1345. The "agreements or promises made by the State in exchange" for McFarland's testimony were relevant and admissible to impeach his credibility. See Ish, 170 Wn.2d at 198.

McFarland was charged with first degree robbery with Farnsworth. CP 1. If convicted of first degree robbery, McFarland would receive the mandatory sentence of life without the possibility of parole as a "three-strike" persistent offender. 10/24/11RP 1259. In exchange for testifying against Farnsworth, McFarland entered a plea bargain under which he expected to receive a sentence of eight to ten years for the crime of theft, a non-violent offense that would not make him a persistent offender and would give better access to privileges while in prison. 10/24/11RP 1260, 1346-48; RCW 9.94A.030(33), (54).

At the time he testified against Farnsworth, McFarland had pled guilty but had not been sentenced. 10/24/11RP 1346. Defense counsel cross-examined McFarland by asking if he pled guilty to both robbery

and theft. McFarland said no, and claimed he pled guilty to "only theft" and not robbery. 10/24/11RP 1347.

Contrary to McFarland's testimony, he had pled guilty to both first degree robbery and theft. 10/25/11RP 1396-97. The court refused the defense request to show McFarland his guilty plea statement which indicated that McFarland pled guilty to both robbery and theft, and thus McFarland's claim that he pled guilty to theft went unchallenged. 10/25/11RP 1400.

The prosecution explained to the court, outside of the jury's presence, that McFarland must "completely fulfill" his obligations and then the State would "remove" the first degree robbery conviction and permit sentencing on the theft offense. 10/25/11RP 1397. It intended to "vacate" McFarland's robbery plea after he cooperated by testifying against Farnsworth. 10/25/11RP 1399. The prosecution asked to bar Farnsworth from questioning McFarland about the actual plea he entered, and the court agreed to this restriction. 10/25/11RP 1396, 1400.

The fact that McFarland had already pled guilty to robbery, and was relying on the prosecution to dismiss that charge after his testimony, substantially heightened McFarland's self-interest in

testifying against Farnsworth in a manner that pleased the prosecution. The jury should have been informed of McFarland needed to "fulfill his obligations" to have his life sentence removed. 10/25/11RP 1397. The jury did not learn the extent of McFarland's vulnerable status and his significant personal investment in testifying against Farnsworth. Davis v. Alaska, 415 U.S. at 318. Barring the defense from questioning McFarland about the nature of his guilty plea and his actual sentencing exposure based on that plea denied Farnsworth his right to meaningfully cross-examine this important witness for the prosecution.

ii. McFarland's 2005 theft conviction was admissible impeachment evidence as a crime of dishonesty.

ER 609(a) provides that witness's prior conviction for a crime of dishonesty is admissible as impeachment evidence. This rule applies to any conviction for a crime of "dishonesty or false statement, regardless of the punishment." State v. Jones, 101 Wn.2d 113, 117, 677 P.2d 131, 135 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988) and State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). A crime of dishonesty has a "direct bearing" on the witness's ability to testify truthfully and thus are automatically

admissible, without further discretion from the court, if the conviction occurred within 10 years. Jones, 101 Wn.2d at 118.

The trial court refused Farnsworth's request to impeach McFarland with a prior theft conviction from 2005. 10/20/11RP 1163, 1167. This theft conviction occurred within 10 years of the incident, and is a crime of dishonesty for purposes of ER 609(a)(2). State v. Schroeder, 67 Wn.App. 110, 115, 834 P.2d 105 (1992); 10/20/11RP 1165. ER 609(a)(2) renders this conviction automatically admissible to impeach the witness. Jones, 101 Wn.2d at 118.

The trial court's ruling rested on its misunderstanding of the plain terms of ER 609. The court believed that crimes of dishonesty must be felonies, punishable by more than one year, to be admissible. 10/20/11RP 1165-67. Yet ER 609(a) provides that a testifying witness's prior conviction "shall be admitted" if:

> the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(emphasis added). The court misread the "or" between ER 609(a)(1) and (2) and ruled that both prongs must be satisfied to render a crime of dishonesty admissible. 10/20/11RP 1167.

A discretionary decision "is based on 'untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Quismondo, 164 Wn.2d at 504 (quoting Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

McFarland's 2005 theft conviction was *per se* admissible as evidence of his potential for dishonesty. Jones, 101 Wn.2d at 118. The court abused its discretion by erroneously construing the law to preclude Farnsworth from impeaching McFarland with his 2005 theft conviction.

iii. McFarland's possession of stolen property convictions were admissible as pertinent crimes of dishonesty.

The court also denied Farnsworth's request to impeach McFarland with his separate felony convictions from 1987, 1988, and 1989 for possession of stolen property. 10/20/11RP 117, 1167, 1170. The court found that these convictions did not occur within ten years as required by ER 609(b).[3] 10/20/11RP 1170. However, Farnsworth explained that the ten-year limit did not apply because McFarland was sentenced to 198 months in prison in 1990, and this lengthy prison sentence should be excluded from the ten-year period. 10/20/11RP 1149, 1169. Additionally, even crimes that occurred more than 10 years earlier are admissible if their probative value outweighs the prejudicial effect. ER 609(b); 10/20/11RP 1169.

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[3] ER 609(b) provides:
**Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Although ER 609(b) does not address whether the 10-year period is tolled when the witness is in prison for other crimes, a witness who has been in prison should receive no benefit from that incarceration to avoid being impeached by prior crimes of dishonesty. See State v. Clarke, 86 Wn.App. 447, 452, 936 P.2d 1215 (1997). It is "sound policy" to toll the 10 year limitation of ER 609(b) when the witness made himself unavailable by virtue of his own wrongdoing and has not lived in the community crime-free. Id. This policy applies with more force when the witness is an accused person who is testifying for the prosecution and his credibility must be closely scrutinized. See Davis v. Alaska, 415 U.S. at 315-16.

Furthermore, the court did not balance of the probative value of the convictions and instead construed ER 609(b) as a per se rule barring the admission of any felony older than 10 years. 10/20/11RP 1170. ER 609(b) explains that a conviction from more than 10 years earlier is inadmissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Under ER 609,

> A trial court is always required to balance on the record when a conviction is more than ten years old, regardless of whether the conviction involves dishonesty or false statement. We conclude that the trial court was required to balance on the record; that it failed to do so; and that its failure was error.

State v. Russell, 104 Wn.App. 422, 434, 16 P.3d 664 (2001) (emphasis in original).

The court found Farnsworth's felony possession of stolen property convictions were more than ten years earlier and did not weigh their probative value. 10/20/11RP 1170. The court's misapplication of the legal standard constitutes an abuse of discretion. Quismondo, 164 Wn.2d at 504.

The court's failure to weigh the probative value of impeaching McFarland, combined with the erroneous refusal to permit impeachment with a 2005 theft conviction, constitutes a critical error in the case at bar. McFarland's testimony was central to the case against Farnsworth, and it was particularly important to provide the jury with full information as to the reasons to question McFarland's veracity. Although the jury heard that McFarland had two prior convictions from 1990, one for first degree burglary and one for attempted robbery in the second degree, this limited testimony sanitized the full picture of

McFarland's crimes of dishonesty that should have been admitted. 10/24/11RP 1258.

During the trial, the prosecution insisted that McFarland's prior convictions should be excluded because the defense had not provided sufficient advance notice of their intent to offer these convictions. 10/20/11RP 1170. Yet McFarland was the prosecution's own witness and the State was well aware of these convictions; the State had given the defense McFarland's criminal history as part of its discovery obligation. 10/20/11RP 1164. Farnsworth's desire to impeach McFarland with his prior convictions for crimes of dishonesty was not a surprise when the State had copies of the prior convictions and had provided this very information to the defense. 10/20/11RP 1164.

Furthermore, even if Farnsworth had not complied with the advance notice requirements of ER 609, "a trial court's imposition of discovery sanctions must be consistent with constitutional mandates." Johnson, 90 Wn.App. at 65; see CrR 1.1 ("These rules shall not be construed to affect or derogate from the constitutional rights of any defendant"); see also State v. Grant, 10 Wn.App. 468, 474–75, 519 P.2d 261 (1974) (in the absence of totally inexcusable neglect, a court may not exclude evidence of alibi as a sanction for failure to comply

with the alibi notice statute). Given the prosecution's actual knowledge of McFarland's criminal history and Farnsworth's constitutional right to test the credibility of this important witness by exposing his convictions for crimes of dishonesty, the court's failure to permit his impeachment with pertinent prior convictions for crimes of dishonesty constitutes a significant deprivation of Farnsworth's right to meaningfully confront this witness.

b. The prosecution cast unproven aspersions against Farnsworth in its opening statement

Before trial, the prosecution insisted that it needed to introduce Farnsworth's prior convictions for robbery under ER 404(b).[4] 9/27/11RP 137-39. Over Farnsworth's objection, the court ruled that these convictions were admissible to show Farnsworth's knowledge that McFarland was going to rob the bank. 9/30/11RP 160-62.

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[4] Under ER 404(b):
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

First, the court's ruling admitting Farnsworth's two prior robbery convictions was erroneous. It is impermissible to introduce evidence that lets the prosecution argue that the defendant was the "type" of person to commit such crimes. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). ER 404(b) is "a categorical bar" to evidence introduced to show the defendant acted in conformity with his character traits. Id. at 429. "There are no exceptions to this rule." Id.

Uncharged criminal conduct may be admitted into evidence only when it is (1) material to an essential ingredient of the charged crime, (2) relevant for an identified purpose other than demonstrating the accused's propensity to commit certain acts, and (2) substantial probative value outweighs its prejudicial effect. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)); ER 404(b). Doubtful cases should be resolved in favor of the defendant. Smith, 106 Wn.2d at 776.

The court concluded that Farnsworth's commission of two 2004 robberies while wearing a wig showed his knowledge of McFarland's robbery because McFarland wore a wig. 9/30/11RP 160, 62. The court ruled Farnsworth's prior robberies were not substantially similar to, or a common plan as, the present charge because in the earlier robberies, he

acted alone, carried a weapon in one instance, stole from fast food restaurants, and he wore a wig. In the instant case, McFarland wore a wig when he used a note to steal from a bank and had no weapon. 9/27/11RP 145-47; 9/30/11RP 158-59. Farnsworth's prior robbery convictions were far more likely to indicate his propensity for committing this crime than to show his knowledge of McFarland's conduct inside the bank.

The State's need for this evidence was minimal at best. McFarland testified that Farnsworth bought the wig for the purpose of committing a robbery. 10/20/11RP 1232-33, 1236. There was no dispute that McFarland wore the wig that he got from Farnsworth, nor was there dispute that Farnsworth drove McFarland to and from the scene of the offense. Armed with McFarland's testimony, as well as the other witnesses who saw the two men driving together before and after the incident, there was little permissible probative value in learning that Farnsworth had twice robbed restaurants while wearing a wig. This information was undeniably prejudicial and demonstrated Farnsworth's tendency to commit dangerous, threatening and forceful thefts without sufficient probative value. See State v. Freeburg, 105 Wn.App. 492,

498, 501, 20 P.3d 984 (2001) ("marginally probative" but undeniably prejudicial wrongful acts should not be admitted under ER 404(b)).

The prosecution informed the jury during its opening statement that Farnsworth had committed other similar bank robberies. It told the jury, "you will hear about two robberies of fast food restaurants, robberies solely by Farnsworth, and he wore a wig and glasses." 1/13/11SuppRP 423. The wig was Farnsworth's "facial disguise" in the other robberies, and shows that "the idea of the wig" was Farnsworth's. 1/13/11SuppRP 423.

During trial, the prosecution also insisted that it was "crucial" to elicit from a detective that using a wig was unusual in a bank robbery, because this was connected to the ER 404(b) evidence it planned to elicit. 10/25/11RP 1456-57. Over defense objection the court permitted the prosecution to offer evidence that it was very rare for anyone to rob a bank while wearing a wig either in 2004, which was the time of Farnsworth's two prior robberies, or at the time of this incident. 10/25/11RP 1458, 1461-62, 1473.

Despite telling the jury in its opening statement that Farnsworth committed two prior robberies where he wore a wig, the State never elicited evidence about those bank robberies at trial. Farnsworth moved

for a mistrial based on the State's opening statement, arguing that the prosecution polluted the jury by telling them of Farnsworth's convictions without introducing this evidence at trial, but the court denied the motion. 10/26/11RP 1675-77.

The danger of introducing evidence of prior convictions is that it dilutes the presumption of innocence and encourages the jury conclude the accused is a bad person. See Freeburg, 105 Wn.App. at 502. The State cannot escape the prejudicial impact of the prior convictions by claiming the information was simply stated in opening arguments and not repeated during trial.

Some instances of misconduct taint the proceedings and that taint cannot removed by an instruction to disregard. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it."); see also Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (recognizing court cannot always assume jury will follow court instruction to disregard prejudicial evidence, as "the practical and human limitations of the jury system cannot be ignored.").

By electing to tell the jury at the outset of the case that Farnsworth had committed two other robberies while wearing a wig, and eliciting information about the uniqueness of wearing a wig at the time of the prior robberies or in the present day, the prosecution threw a skunk in the jury box that a reasonable fact-finder would not simply ignore when it was part of the State's argument. This error, combined with the other errors herein, denied Farnsworth a fair trial.

c. The court permitted the State to introduce evidence of Farnsworth's rude behavior that was far more prejudicial than probative.

ER 404(b) bars the admission of prior acts that are unpopular, disgraceful, or even traits of personality; it is not limited to past criminal acts. State v. Everybodytalksabout, 145 Wn.2d 456, 466-68, 39 P.3d 294 (2002). Evidence of a person's prior conduct "is inadmissible to show that the defendant is a dangerous person or a 'criminal type'." Id. at 466 (quoting State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)). Additionally, evidence of wrongful acts must be more probative than prejudicial. ER 403.

McFarland made plain his dislike of Farnsworth; he disliked him before the incident and these feelings did not change after their arrest. 10/25/11RP 1427-28. He called him a freeloader and liar based on their

interactions before and during the incident. 10/20/11RP 1193; 10/25/11RP 1380. Accordingly, McFarland's decision to strike a plea bargain with the State in exchange for testifying against Farnsworth, when he could avoid a sentence of life without the possibility of parole, was not a great surprise.

The prosecution insisted that a single incident between Farnsworth and McFarland motivated McFarland to testify against Farnsworth, and it elicited this incident over defense objection. 10/20/11RP 1179-80. The court expressed concern with the prejudicial impact of the incident, but permitted the testimony as probative of McFarland's motive and bias in testifying as a State witness. 10/20/11RP 1182-84.

While the charges were pending, McFarland and Farnsworth were both at Western State Hospital. 10/25/11RP 1429. According to McFarland, Farnsworth "flipped the bird" at him and then "jerked down his pants and grabbed his private parts and says 'suck on these you son of a bitch.'" 10/25/11RP 1430. He also called McFarland, "a f[ ]ing stool pigeon." Id. McFarland explained that this incident made him angry at a time he had thought about "taking the beef for" Farnsworth,

and after this incident, he thought "Well, he can do his own time." 10/25/11RP 1431.

The State overstated its claim that this incident was necessary to show McFarland's motive in testifying, when McFarland said that the incident made him decide not to take sole responsibility for the incident, which is different from deciding to testify against Farnsworth. 10/25/11RP 1430, 1431. Given McFarland's dislike of Farnsworth, it is hard to believe that McFarland would actually have affirmatively aided Farnsworth in escaping liability even without this incident.

The State's efforts to portray McFarland's motive in testifying against Farnsworth as something other than the great benefit he was receiving in his own reduced sentence is particularly problematic when it also worked to deny Farnsworth his request to fully cross-examine McFarland about the nature of the guilty plea he entered, his risk of a life sentence based on that plea, and his criminal record for crimes of dishonesty. The prejudicial effect of portraying Farnsworth as a crude and nasty person, while limiting Farnsworth's ability to show McFarland was not credible, denied Farnsworth a fair trial.

d. The court permitted the State to introduce comments Farnsworth made to a detective in the course of the prosecution that were far more prejudicial than probative.

In the course of pretrial proceedings, the prosecution obtained a court order requiring Farnsworth to provide a handwriting sample so the prosecution could compare his handwriting with that on the note used to steal money from the bank. 10/20/11RP 1078. Farnsworth refused to comply with the court order and the prosecution instead provided its handwriting analyst with handwritten documents Farnsworth had filed in court when he was representing himself. 10/19/11RP 1004-05.

The fact that a person refuses to provide information ordered by the court in a criminal case may be admissible against the person. Schmerber v. California, 384 U.S. 757, 763-64, 86 S. Ct. 1826, 1832, 16 L. Ed. 2d 908 (1966). The act of refusal is not a statement protected by the Fifth Amendment right against compelled self-incrimination, so long as the response is limited to compelled real or physical evidence, as opposed to seeking communications or writings. Id.; U.S. Const. amend. 5; Wash. Const. art. I, § 9. The court permitted the prosecution to elicit Farnsworth's refusal to provide a court-ordered handwriting exemplar, despite defense objection. 10/19/11RP 986-89. However, the

State's testimony exceeded the permissible scope of a refusal to comply with a court order and instead amounted to a violation of Farnsworth's right to remain silent.

An accused person's refusal to comply with a court order seeking potentially incriminating physical evidence is considered non-testimonial as an "act of refusal" rather than a "compelled communication." Schmerber, 384 U.S. at 763-64; State v. Nordlund, 113 Wn.App. 171, 53 P.3d 520 (2002). The State may compel physical evidence but it may not compel testimonial evidence. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999). Testimonial evidence includes implicit or explicit communications relating to a factual assertion or disclosing information. Id. at 233.

The fact that Farnsworth refused to comply with a court order to provide a handwriting sample would be admissible against him. See Nordlund, 113 Wn.App. at 188. Although the detective went to the jail for a legitimate purpose, he elicited statements from Farnsworth beyond the mere fact of refusal. In their conversation at the jail, Farnsworth complained he had not been provided the documents he wanted and said he wanted to consult his stand-by counsel. 10/20/11RP 1081, 1097. Farnsworth said he did not want to cooperate and did not want to talk to

the detective. 10/20/11RP 1080-81. The detective elicited Farnsworth's explanations of his feelings about the case and how he had been treated, which exceeds the scope of the "real or physical evidence" the detective was permitted to obtain without violating Farnsworth's right to remain silent. Schmerber, 384 U.S. at 763-64. Farnsworth communications with the detective showed him to be obstructionist and trouble-making. His behavior did not bear on his consciousness of guilt, but rather portrayed him as uncooperative and troublesome. His additional statements to the detective beyond the fact of refusal were improperly elicited at trial.

e. The court permitted Farnsworth to appear in court with markings of his in-custody status.

"Measures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial." State v. Finch, 137 Wn.2d 792, 845, 975 P.2d 967 (1999). Thus, a juror cannot view the accused person in shackles. Id. Similarly, holding a trial in a jailhouse courtroom denies the defendant "the physical indicia of innocence" to which he is entitled. State v. Jaime, 168 Wn.2d 857, 861, 233 P.3d 554 (2010).

A person accused of a crime "is entitled to have his guilt

or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986).

The trial court is charged with ensuring the protection of this right, and "must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." Chandler v. Florida, 449 U.S. 560, 574, 101 S.Ct. 802, 662L.Ed.740 (1981). The trial judge has "an affirmative obligation to control the courtroom and keep it free of improper influence." Carey v. Musladin, 549 U.S. 70, 82, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Souter, J., concurring).

At the start of trial, defense counsel objected to Farnsworth being seated in a wooden chair that was noticeably different from the chairs used by everyone else in the courtroom. 10/12/11RP 7. The rest of the chairs were padded black leather chairs with wheels, while Farnsworth's chair was a hard wooden chair. 10/12/11RP 7-8. The security officer explained that he preferred Farnsworth have this wooden chair even though Farnsworth had not been disruptive. 10/12/11RP 8. The court refused to intervene, although it told defense

counsel he could look for a wooden chair for himself from another courtroom. 10/12/11RP 11-12. Defense counsel objected to being asked to use a chair different from that of the prosecution and declined to change his own chair to resolve this issue. 10/12/11RP 12.

The physical indicia of innocence is essential to a fair trial. Placing Farnsworth in a hard wooden chair that is obviously different from the soft, padded, leather chairs everyone else in the courtroom marked him as a guilty person, or at least a person undeserving of comfort and less trustworthy than the professionals in the courtroom. It detracted from the presumption of innocence and appearance of fairness that is essential to a fair trial.

f. The cumulative error affected the outcome of the case.

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Numerous critical errors occurred during Farnsworth's trial and even if these errors would not alone deny him a fair trial, their cumulative impact affected the outcome of the case. The extent of Farnsworth's accomplice liability for McFarland's acts rested on McFarland's testimony, yet Farnsworth was denied his ability to effectively cross-examine McFarland about issues important to assessing his credibility and self-interest in the case. At the same time, the prosecution introduced allegations portraying Farnsworth as a dislikeable and dangerous person, including his propensity for committing robberies, his crude comments to McFarland, and his obstructionist efforts against the prosecution. The court did not take measures to ensure that Farnsworth appeared in court with the physical indicia of innocence. As explained in Farnsworth's Opening Brief, the evidence that a robbery occurred was slim as McFarland never indicated or threatened the use of force when seeking money from the bank. The efforts to denigrate Farnsworth's character and the unreasonable, erroneous limitations on his cross-examination of McFarland affected the outcome of the case and denied him a fair trial by jury.

2. **The prosecution did not prove the comparability of Farnsworth's prior out-of-state conviction.**

Where prior convictions increase the maximum sentence available, they are "elements" of a crime and must be proved to a jury beyond a reasonable doubt, as discussed in argument sections three and four below. See State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). However, even if this heightened standard of proof does not apply when a court imposes a sentence of life without the possibility of parole, the prosecution did not satisfy its statutory and due process obligation to prove Farnsworth's prior conviction from California was comparable to a Washington most serious offense as necessary to impose a sentence of life without the possibility of parole.

a. The State was required to prove the comparability and validity of Farnsworth's 1984 California conviction.

A persistent offender is a person who:

> [h]as, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions . . . of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted

RCW 9.94A.030 (37)(a)(ii). The State bears the burden of establishing "two applicable convictions exist." State v. Carpenter, 117 Wn.App. 673, 678, 72 P.3d 784 (2003) (citing State v. Manussier, 129 Wn.2d 652, 681-82, 921 P.2d 473 (1996), cert. denied. 520 U.S. 1201 (1997)). A prior out-of-state conviction may not be used as a predicate for a persistent offender sentence unless the prosecution proves the conviction is comparable to a most serious offense in Washington. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); RCW 9.94A.525(3).

To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

> If the evidence is insufficient or incomplete, the State should not be making assertions regarding classification which it cannot substantiate.

Id. at 482. Here, the State's evidence did not substantiate its assertion that Farnsworth's 1984 conviction in California was comparable to a most serious offense in Washington.

b. The legal basis of Farnsworth's 1984 California conviction is ambiguous.

Farnsworth was charged in a two-count complaint and the sentencing document stated he pled guilty to only count "2." Ex. 2 (Judgment). The charging document set forth count two as follows:

COUNT 2

> Said complainant further accuses [Farnsworth][5] of committing the crime of violation of section 25153(a) of the Vehicle Code, a felony, in that on or about January 18, 1984, in Ventura County, California, he did willfully and unlawfully, while under the influence of an alcoholic beverage and a drug and under their combined influence, drive a vehicle and in so driving did commit an act forbidden by law, to wit, passing without sufficient clearance, a violation of Vehicle Code section 21751, in driving of said vehicle which proximately caused death and bodily injury to Teresa Ramirez.

Ex. 2 (complaint).

The court found that Farnsworth was convicted of vehicular manslaughter in California in 1984, under Penal Code § 192(c).[6]

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[5] Farnsworth was charged under a different name but for purposes of the case at bar conceded he was the person convicted in this California case.

[6] Cal. Penal Code § 192(c)(3) (1984) provided that a person commits manslaughter by:

> Driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in violation of Section 23152 or 23153 of the Vehicle Code and in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

2/24/12RP 70. This ruling is erroneous because the judgment states that Farnsworth was convicted of count two and count two did not charge Farnsworth with violating § 192(c). Ex. 2(Judgment).

Count two listed the elements of Vehicle Code § 23153(a)[7] and cited only § 23513(a) as the charged offense. Ex. 2 (Complaint). The charging language listed the elements of § 23153(a), not Penal Code § 192. Unlike section § 23153(a), § 192(c) contains an additional element of driving with gross negligence, and count two does not allege Farnsworth drove with gross negligence as required for § 192(c).

Unlike count two, Farnsworth was accused of violating § "192(3)(c) of the Penal Code" in count one. Ex. 2 (Complaint). The charging language for count one alleged that Farnsworth acted with gross negligence in committing this offense, further illustrating the different statutory basis for counts one and two.

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[7] Cal. Veh. Code § 23153(a) (1984) provided:
It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes death or bodily injury to any person other than the driver

Ambiguity in the legal basis of Farnsworth's guilty plea arises because even though he was sentenced only on count two, the written plea form and the judgment list "§ 192(3)(c)" as the penal code violated. There is no section "192 (3)(c)" of the penal code, either at the present time or in 1984. Section 192(c)(3) pertains to vehicular deaths but the documents inexplicably refer to a non-existent statutory provision which makes an accurate comparability analysis impossible.

Further ambiguity arises in the utter lack of factual basis explaining the conduct for which Farnsworth pled guilty.

c. There was no evidence of the factual basis of Farnsworth's plea.

A sentencing court may not merely rely upon the charging document from the prior conviction as an accurate statement of the defendant's conduct, as such facts "may not have been sufficiently proven." Ford, 137 Wn.2d at 482. The factual comparison may be based only on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt. Lavery, 154 Wn.2d at 258. The sentencing court may look to charging documents, the written plea agreement, a transcript of the plea colloquy, and any explicit findings of fact made by the trial judge and to which the defendant assented.

Shepard v. United States, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). But the sentencing court can only consider facts that were proved to a trier of fact beyond a reasonable doubt or were admitted or stipulated to by the defendant to determine factual comparability. Lavery, 154 Wn.2d at 258.

If the elements of the foreign conviction are different from or broader than the elements of the parallel crime in Washington, the accused lacked incentive to contest issues that would have made him not guilty in Washington. Lavery, 154 Wn.2d at 258. Thus, there must be express evidence that the prosecution had necessarily proven beyond a reasonable doubt the facts that make the offense comparable. Id.

> Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Id; see also Shepard, 544 U.S. at 24.

In assessing the factual comparability of Farnsworth's California offense, this Court is limited to the facts specifically agreed to in Mr. Farnsworth's guilty plea. State v. Freeburg, 120 Wn.App. 192, 198-99,

84 P.2d 292 (2004); State v. Bunting, 115 Wn.App. 135, 141 61 P.3d 375 (2003).

Yet there is no explanation of the factual basis of Farnsworth's plea. Ex. 2 (Disposition Statement). The prosecution did not offer any transcript from the plea or written statement from the accused. In his written guilty plea statement, Farnsworth did not admit any facts. Id. He did not initial the portion of page two which would authorize the court to consider other sources such as police reports as proof of the factual basis of the plea. Id. (page 2). Without any evidence of the underlying facts to which Farnsworth pled guilty, the prosecution did not prove Farnsworth's California conviction was comparable to a Washington most serious offense.

d. The legal elements of the California offense are not comparable.

The court found that Farnsworth was convicted of California's vehicular manslaughter statute § 192 and it was legally comparable with Washington's vehicular homicide statute, RCW 46.61.520 (1984).[8] 2/2/12RP 70.

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[8] RCW 46.61.520 (1984) stated:
When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of

Both California vehicular homicide statutes (§ 23153 and § 192) are different from Washington's statute, RCW 46.61.520. Both require that death or bodily injury are proximately caused by a violation of the traffic law – when the driver commits an act forbidden by law or neglects a duty imposed by law in the driving of the vehicle "which act or neglect proximately causes" death or bodily injury. Veh. Code § 23153(a); Penal Code § 192(c)(3).

The purportedly comparable Washington offense, vehicular homicide, mandates that the drunk driving itself is the proximate cause of the death or injury. "The operation of the vehicle in an intoxicated condition must be the proximate cause of the death." State v. Engstrom, 79 Wn.2d 469, 475, 487 P.2d 205 (1971).

This difference is significant and shows that California's statute is broader than Washington. California did not require that the drunk driving proximately caused the injury, while Washington expressly required proof that the drunk driving proximately caused the injury.

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any vehicle by any person while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner or with disregard for the safety of others, the person so operating such vehicle is guilty of vehicular homicide

Furthermore, the judgment plainly states that Farnsworth was convicted of the offense charged in count two, which was Veh. Code § 23153(a). This statute punishes either death or bodily injury that is proximately caused by an act or a failure to act contrary to the traffic laws. It is not limited to causing death and accordingly, the State did not establish that Farnsworth was convicted of causing another person's death under count two of the complaint, as opposed to bodily injury, contrary to the court's finding. 2/24/12RP 70.

e. The State's failure of proof requires the imposition of a standard range sentence.

Where the defendant has raised a specific objection to the comparability of a prior conviction, "we ... hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced. State v. Lopez, 147 Wn.2d 515, 521, 55 P.3d 609 (2002). Farnsworth objected and offered lengthy argument in response to the prosecution's contention that his California conviction was comparable to a most serious offense in Washington. CP 662-678. The proof offered by the prosecution fell far short of the requirements of due process. Because the State was afforded the opportunity to meet its burden of proof after

Mr. Farnsworth's objection, it may not have another opportunity to do so. Lopez, 147 Wn.2d at 521; Ford, 137 Wn.2d at 485.

3. **The trial court denied Farnsworth his rights to a jury trial and due process of law when it increased his sentence based on unreliable, unproven aggravating facts.**

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

The Due Process Clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. 14. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. 6. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Supreme Court has recognized this principle applies equally to facts labeled "sentencing factors" if the facts increase the maximum penalty faced by the defendant. Blakely, 542 U.S. at 304. More recently, the Supreme Court recognized that the jury's traditional role

in determining the degree of punishment included setting fines, and concluded that under Apprendi, the jury must find beyond a reasonable doubt the facts that determine the maximum fine permissible. Southern Union Co. v. United States, _ U.S. _, 132 S.Ct. 2344, 2356, 183 L.Ed.2d 318 (2012).

In these cases, the Court rejected the notion that arbitrary labeling of facts as "sentencing factors" or "elements" was meaningful. "Merely using the label 'sentence enhancement' to describe the [one act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. A judge may not impose punishment based on additional findings. Blakely, 542 U.S. at 304-05.

b. The rights to a jury trial and proof beyond a reasonable doubt apply in this case.

The Supreme Court has never conclusively held the Sixth Amendment does not apply to proof of prior convictions which elevate the maximum punishment. Before Apprendi, it held that recidivism was not an element of the substantive crime that needed to be pled in the information. Almendarez-Torres v. United States, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

Since Almendarez-Torres, the Court has not analyzed recidivism and carefully distinguished prior convictions from other facts used to enhance the penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476. Apprendi explained that Almendarez-Torres only addressed the charging document. 530 U.S. at 488, 495-96. Apprendi also noted "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." 530 U.S. at 489.

The Washington Supreme Court has noted the United States Supreme Court's failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 142, 75 P.3d 934 (2003) (addressing Ring) cert. denied, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). But it has felt it must "follow" Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case.

Indeed, the Washington Court's "following" of this case has been sharply criticized. State v. Witherspoon, 171 Wn.App. 271, 311-12, 286 P.3d 996 (2012) (Quinn-Brintnall, J, dissenting in part). The

Washington Supreme Court's original decisions addressing the Sixth Amendment's application to the Persistent Offender Accountability Act (POAA) were premised upon the legislative characterizations of a fact as either an "element" or "sentencing fact" as determining the constitutional protections to be afforded. State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1994). This distinction ceased to be constitutionally relevant following Apprendi and Blakely. Apprendi, 530 U.S., at 476; Blakely, 542 U.S. at 304-05.

Treating a persistent offender finding as a mere sentencing factor is in stark contrast to this State's prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940). And historically, Washington cases required a jury determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18. Many other states' recidivist statutes require proof beyond a reasonable doubt. Ind.

Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Farnsworth's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. Farnsworth was entitled to a jury finding beyond a reasonable doubt that he is a persistent offender.

c. Washington requires reliable evidence to impose enhanced punishment.

When the prosecution does not prove the existence of prior convictions beyond a reasonable doubt, it violates due process under article I, section 3. Historically, Washington's sentencing laws required the prosecution to prove prior convictions resulting in habitual offender status beyond a reasonable doubt. See State v. Holsworth, 93 Wn.2d 148, 159, 607 P.2d 845 (1980) (holding that existence of three valid felony convictions "must be proved by the State beyond a reasonable doubt"); State v. Chevernell, 99 Wn.2d 309, 315, 662 P.2d 836 (1983) (construing Holsworth as "based on constitutional mandates which we must obey"); see also State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d

719 (1986) (affirming State's historical burden of proving prior convictions in proving status of habitual criminal offender). Although the majority declined to apply this traditional interpretation of due process to the Persistent Offender Accountability Act in Manussier, Farnsworth respectfully contends the majority discounted the procedures mandated by our constitution. See 129 Wn.2d at 691-93 (Madsen, J., dissenting).

The prosecution's failure to offer reliable evidence connecting Farnsworth to valid prior convictions that may count in his offender score should result in the vacation of the three strikes sentence and remand for a standard range sentence.

**6. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment**

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); U.S. Const. amend. 14. When analyzing equal

protection claims, courts apply strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here – physical liberty – is the prototypical fundamental right; indeed it is the one embodied in the text of the Fourteenth Amendment. "[T]he most elemental of liberty interests [is] in being free from physical detention by one's own government." Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. Manussier, 129 Wn.2d at 672-73. Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause because it is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The legislature has an interest in punishing repeat criminal offenders more severely than first-time offenders. Defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030 (37); RCW 9.94A.570. However, the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels "elements" of a crime or "sentencing factors" which have been attached to them.

Where prior convictions that increase the maximum sentence available are termed "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. See Roswell, 165 Wn.2d at 192 (prior conviction for sex offense must be proved to the jury beyond a reasonable doubt when elevating communicating with a minor for

immoral purposes to a felony); Oster, 147 Wn.2d at 146 (prior convictions for violation of a no-contact order must be proved to jury beyond a reasonable doubt to punish current conviction for violation of a no-contact order as a felony). The State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn.App. 456, 475, 237 P.3d 352 (2010). The courts have simply treated these factors as elements.

But where prior convictions increase the maximum sentence, they have been termed "sentencing factors," and treated as findings fora judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143. Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers as "elements," the Legislature has never labeled the fact at issue here as a "sentencing factor." This judicial construct violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A").

Rationally, the greatest procedural protections should apply to the "three strikes" context due to the severity of the punishment. It makes no sense for greater procedural protections where the necessary facts only marginally increase punishment, but not where the necessary facts result in the most extreme increase possible.

As the Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe [one fact] surely does not provide a principled basis for treating [two facts] differently." Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. This Court should hold that the judge's imposition of a sentence of life without the possibility of parole violated the equal protection clause. The case should be remanded for resentencing within the standard range.

F. CONCLUSION.

For the reasons stated above, Mr. Farnsworth respectfully asks this Court to reverse his conviction for first degree robbery and order a new trial. Alternatively, he asks this Court to reverse his sentence and order the imposition of a standard range sentence.

DATED this 12th day of April 2013.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

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|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | |
| RESPONDENT, | ) | |
| | ) | NO. 43167-0-II |
| v. | ) | |
| | ) | |
| CHARLES FARNSWORTH, | ) | |
| | ) | |
| APPELLANT. | ) | |

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