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No. 66977-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
DIVISION ONE  
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STATE OF WASHINGTON,

Respondent,

v.

PAUL LEWIS,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Paul Lewis his Sixth Amendment right to a fair and impartial jury.

2. Mr. Lewis was denied his Sixth Amendment right to the effective assistance of counsel.

3. Mr. Lewis's multiple convictions for a single act violate the Fifth Amendment's Double Jeopardy Clause.

4. Mr. Lewis was denied his right to a unanimous jury verdict.

5. The trial court erred and violated Article I, section 7 by admitting the fruits of a warrantless search.

6. Mr. Lewis was denied his Sixth Amendment right to a jury trial and Fourteenth Amendment right to proof of each element beyond a reasonable doubt.

7. Mr. Lewis was denied the equal protection of the law in violation of the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment guarantees a criminal defendant a trial by an impartial jury. Permitting a juror who exhibits actual bias to sit on a jury violates this protection. Juror 31 candidly admitted he could not apply a presumption of innocence. The trial court nonetheless denied Mr.

Lewis's challenge of the juror. Was Mr. Lewis denied his right to an impartial jury?

2. The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. Defense counsel presented expert testimony that undermined Mr. Lewis's defense and which supported the State's case. Did the presentation of this evidence deprive Mr. Lewis of the effective assistance of counsel?

3. The Double Jeopardy Clause of the Fifth Amendment prohibits the imposition of multiple punishments for a single act. The Washington Supreme Court has previously determined attempted first degree robbery and second degree assault are the same offense for double jeopardy purposes. Do Mr. Lewis's convictions for attempted first degree robbery and second degree assault violate double jeopardy principles?

4. The Washington Constitution requires a unanimous jury in criminal cases. This requirement applies to enhancements. Where the jury was not instructed that they must unanimously agree to return a special verdict was Mr. Lewis denied his right to a unanimous jury?

5. Article I, section 7 prohibits an invasion of one's private affairs absent the authority of law. The authority of law comes from either a search warrant or one of the carefully drawn exceptions to the warrant requirement. Courts have repeatedly found the taking of fingerprints is

akin to the taking of a biological sample which requires a warrant. Where the trial court compelled Mr. Lewis to provide a fingerprint but did not comply with the warrant requirement did the court err in admitting the fruits of that search?

6. 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 Mr. Lewis's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

7. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 12 of the Washington Constitution require that similarly situated people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. However, in some instances the prior convictions are treated as 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other

instances they are treated as ‘aggravators’ or ‘sentencing factors,’ permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for this arbitrary distinction and the effect of the classification is to deny some persons the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

C. STATEMENT OF THE CASE

Paul Lewis has substantially limited intellectual ability and extremely poor problem solving and abstract reasoning abilities. 2/7/11 RP 29-31. Mr. Lewis has previously been diagnosed with major depressive disorder, with psychotic features. Id. at 15. However, there is further evidence suggesting the proper diagnosis is one of bipolar disorder. Id. at 17-19.

Paul Roderick testified that he rode his bike to a convenience store in South Seattle in the early morning hours to buy a beer and cigarettes. 2/2/11 RP 121. Mr. Roderick claimed that upon exiting the store Mr. Lewis asked him for a cigarette. Id. at 129-30. According to Mr. Roderick, he not only gave Mr. Lewis a cigarette but offered to share his beer with Mr. Lewis as well. Id. at 130-34. According to Mr. Roderick’s story, as the two shared the beer, Mr. Lewis reached for Mr. Roderick’s back pocket. Id. at 137. When Mr. Roderick moved away Mr. Lewis

pulled out a small knife and demanded Mr. Roderick's wallet. Id. at 134  
Mr. Roderick claimed that when he hesitated Mr. Lewis stabbed him  
several times. Id. at 140-41.

Mr. Lewis testified that he had purchased a beer at the store and  
was drinking it in the store's parking lot when he saw Mr. Roderick exit  
the store. 2/3/11 RP 122. Mr. Lewis asked for a cigarette and the two  
men sat and talked. Id. at 123-26. Mr. Roderick became angry when Mr.  
Lewis refused his request to assist him in purchasing cocaine. Id. at 127-  
29. Mr. Roderick came at Mr. Lewis brandishing a small knife. Id. at  
131. Mr. Lewis turned the knife on Mr. Roderick as the two wrestled. Id.

Witnesses testified to seeing the two men wrestling on the  
sidewalk and street near the store, and saw Mr. Lewis run away. 2/3/11  
RP 42, 48, 68.

Police arrested Mr. Lewis a short distance from the store. 2/2/11  
RP 34-37. Police did not recover Mr. Roderick's wallet nor find the knife  
used in the fight.

The State charged Mr. Lewis with attempted first degree robbery  
and second degree assault, each with a deadly weapon enhancement. CP  
7-8. A jury convicted Mr. Lewis as charged. CP 51-54.

D. ARGUMENT

**1. The trial court denied Mr. Lewis his Sixth Amendment right to be tried by a fair and impartial jury when the court refused to excuse a juror who candidly admitted he maintained a presumption of guilt.**

a. The trial court denied Mr. Lewis's challenge to a biased juror.

“I don't think that I really assume anybody is actually innocent, that they must have done something. That's why they're here.” 2/1/11 RP 85. This is how Juror 31 responded to voir dire questions regarding the presumption of innocence. When defense counsel attempted to clarify whether the juror could nonetheless follow the court's instructions on the point, juror 31 candidly admitted “I would obviously try . . . but I don't think I would ever start anyone like at zero.” *Id.* Nonetheless, the trial court denied Mr. Lewis's challenge to Juror 31 for cause. 2/1/11 RP 69.

b. The Sixth Amendment guarantees Mr. Lewis the right to an impartial jury.

The Sixth Amendment guarantees a defendant the right to a trial by a fair and impartial jury. U.S. Const. amend. VI. RCW 4.44.170(2) provides further definition, providing a challenge for cause is based on:

the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging....

A court may deny a challenge for cause only if the court determines the challenged juror can set aside an expressed opinion or personal experience and try the case impartially based on the evidence at trial and the law as given by the court. RCW 4.44.190; State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). A juror with preconceived ideas may sit on the jury only if he or she can “put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.” State v. Mak, 105 Wn.2d 692, 707, 718 P.2d 407 (1986).

Here, Juror 31 candidly admitted he could not apply a presumption of innocence and the court erred in failing to excuse him.

c. In light of Juror 31’s admitted presumption of guilt, the trial court erred in denying Mr. Lewis’s challenge for cause.

Even as the deputy prosecutor sought to rehabilitate him, Juror 31 qualified his answers and reiterated his presumption of guilt: “I think in the back of my head I would be thinking well then, why - - you know, I think he’s done something to end up here.” 2/1/11 RP 86.

While a trial court is afforded a measure of deference in ruling on a challenge for cause, this Court has emphasized that “appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp” where a potential juror's initial responses

indicate actual bias. State v. Fire, 100 Wn.App. 722, 729, 998 P.2d 362 (2000), reversed on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001); State v. Gonzalez, 111 Wn.App. 276, 281, 45 P.3d 205. Juror 31's expressed belief in a presumption of guilt demonstrates he could not "try the issue impartially and without prejudice to the substantial rights" of a criminal defendant. That is actual bias. RCW 4.44.170(2). Here like the jurors in both Fire and Gonzalez, in his initial response Juror 31 unequivocally admitted his actual bias, and reiterated his views even as the deputy prosecutor attempted to rehabilitate him. As in those cases, this Court applies a far-less deferential standard.

The record is clear that Juror 31 was not rehabilitated as he continued to candidly express his belief in response to further questioning. This Court should reverse Mr. Lewis's convictions and remand for a new trial before an impartial jury.

**2. Defense counsel's presentation of expert testimony which undermined Mr. Lewis's defense denied Mr. Lewis his Sixth Amendment right to the effective assistance of counsel.**

Defense counsel presented a muddled defense that appears to have incorporated a claim of diminished capacity together with a claim of self defense. In support of that theory, defense counsel retained an expert who testified in a manner that completely undercut both claims and went

further to open the door for the State to present additional evidence of past acts by Mr. Lewis. In doing so, defense counsel did not provide the effective assistance of counsel as required by the Sixth Amendment.

a. The defense expert completely undercut Mr. Lewis's defense.

Dr. Kenneth Muscatel adamantly stated he did not believe Mr. Lewis's capacity was diminished. Dr. Muscatel added that Mr. Lewis's mental state was completely irrelevant if the jury believed Mr. Roderick's testimony. 2/7/11 RP 31. He continued, erroneously summarizing a claim of self defense as "saying I didn't do it," and thus concluded diminished capacity could not apply in that context. 2/7/11 RP 35. Dr. Muscatel explained Mr. Lewis's mental state "although not completely irrelevant" could possibly tell the jury something about his emotional dysfunction as a mitigating factor. 2/7/11 RP 49. And this was only so if the jury first believed Mr. Lewis's version of events.

But the damage caused by Dr. Muscatel's testimony did not end there. Rather, Dr. Muscatel suggested to the jury that Mr. Lewis may be malingering and exaggerating his mental deficits. Dr. Muscatel testified Mr. Lewis may have purposefully underperformed on his testing. 2/7/11 RP 45. Dr. Muscatel made a point of emphasizing that he had to rely on Mr. Lewis's word. 2/7/11 RP 16.

b. The Sixth Amendment guarantees the right to the effective assistance of counsel.

The federal and state constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amend. VI; Const. Art. I, § 22; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); State v. Romero, 95 Wn.App. 323, 326, 975 P.2d 564, review denied, 138 Wn.2d 1020 (1999). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). If a defendant cannot afford to hire an attorney, he has the right to appointed counsel. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard

for attorney performance is that of reasonably effective assistance.

Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771.

c. Counsel's deficient performance prejudiced Mr. Lewis.

Strickland emphasized that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable” 466 U.S. at 690. The Court has clarified “the relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In this case it is clear that counsel's decision to present Dr. Muscatel's testimony was not reasonable.

Defense counsel pursued a modified version of self-defense. But the claim of self-defense only applied to the assault charge. CP 74. Thus, even if successful, that defense provided nothing to the jury upon which to acquit Mr. Lewis of the robbery charge. As such, self-defense could not prevent the imposition of a life sentence.

Instead, a diminished capacity defense would constitute a complete defense for both charges. Defense counsel questioned Dr. Muscatel on this point. Dr. Muscatel testified flatly that Mr. Lewis's capacity was not diminished, and in fact his mental state was wholly irrelevant if the jury believed Mr. Roderick's testimony. 2/7/11 RP 31, 35. Dr. Muscatel added that diminished capacity could not apply to a self defense claim,

erroneously summarizing a claim of self defense as “saying I didn’t do it.”  
2/7/11 RP 35. Self-defense is not a denial of acting at all. Rather, self-defense acknowledges the occurrence of the act, the use of force, but negates the unlawfulness of the act. RCW 9A.16.020.

His misstatement of the law aside, Dr. Muscatel termed Mr. Lewis’s behavior an “overreaction.” That testimony effectively defeated Mr. Lewis’s claim of self-defense. See e.g. State v. Callahan, 87 Wn.App. 925, 929, 943 P.2d 676 (1997) (self-defense not applicable where force is unreasonably greater than necessary to defend oneself). But Dr. Muscatel’s testimony did more to undermine Mr. Lewis’s case.

Dr. Muscatel told the jury that Mr. Lewis’s mental illness was only relevant, and then only marginally so, if the jury believed Mr. Lewis’s version of events. 2/7/11 RP 31. Having made Mr. Lewis’s credibility the linchpin of relevance for any mental health evidence Dr. Muscatel then emphasized that he had to rely on Mr. Lewis’s word, 2/7/11 RP 16, and suggested Mr. Lewis may be malingering. 2/7/11 RP 45. Thus, he erected the strawman for the jury and knocked it down for them. In doing so, he not only rendered mental health evidence useless, but in essence told the jury to disregard Mr. Lewis’s substantive testimony as well. The deputy prosecutor drove this point home in his closing

argument, telling the jury that the person paid by the defense said this was a credibility a case and also said Mr. Lewis had malingered. 2/8/11 22-23.

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”

Strickland, 466 U.S. at 690-91. In this case it is clear that defense counsel acts were not the product of reasonable investigation. Dr. Muscatel was not sprung on an unsuspecting attorney by his opponent. Rather, that attorney retained the expert and called him as a witness. There are only two explanations for defense counsel’s action. First, it could be true that defense counsel failed to investigate and thus was unaware of the damning nature of Dr. Muscatel’s opinion. Second, defense counsel may have been aware of the testimony but chose to present it in any event. Had defense counsel been aware of Dr. Muscatel’s testimony, there could be no reasonable strategic basis to put that testimony before the jury. Defense counsel’s actions were unreasonable and prejudicial to Mr. Lewis. This Court must reverse his convictions

**3. Mr. Lewis’s convictions for both attempted first degree robbery and second degree assault violate Double Jeopardy principles.**

The trial court entered convictions of both attempted first degree robbery and second degree assault. CP 116. Convictions of both offenses violated the double jeopardy protections of the Fifth Amendment.

a. The Double Jeopardy Clause prohibits multiple punishments for a single crime.

The Fifth Amendment provides in part that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V. The double jeopardy clause protects against multiple prosecutions for the same conduct and multiple punishments for the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger, 284 U.S. at 304. When applying this standard, courts must examine the offense as charged and do not consider the elements in the abstract. In re Personal Restraint of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

To withstand a double jeopardy challenge, a statute must contain a statement of legislative intent for separate punishments. Whalen v. United

States, 445 U.S. 684, 691-92, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Blockburger test is simply “a rule of statutory construction” which seeks to determine the legislative intent. Albernez v. United States, 450 U.S. 333, 340, 102 S.Ct. 1137, 67 L.Ed.2d 275 (1981). If there is doubt as to the legislative intent for multiple punishments, principals of lenity require the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

Accordingly, where two statutory provisions proscribe the “same offense” they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent.

Whalen, 445 U.S. at 691-92. Multiple convictions for the same offense violate double jeopardy regardless of whether they result in separate punishment. Ball v. United States, 470 U.S. 856, 861-62, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

b. Because they are the same offense, Mr. Lewis could not be convicted of both attempted first degree robbery and second degree assault.

There is no express or implied legislative intent permitting separate punishment for attempted first degree robbery and second degree assault. In re the Personal Restraint of Francis, 170 Wn.2d 517, 523, 242 P.3d 866 (2010). In the absence of an expression of legislative intent, the

Supreme Court in Francis looked to whether the offense merged. Id. at 524.

The offenses in this case were charged in a nearly identical manner to those in Francis. Compare, CP 7-8; Francis, 170 Wn.2d at 524. In each instance the State alleged an attempted first degree robbery based upon the infliction of bodily injury. Id. In each case, the State alleged a second degree assault based upon the infliction of that bodily injury. Id. Based upon the State's reliance on the injury inflicted in the assault as the basis for elevating the attempted first degree robbery, Francis concluded the offense merged and thus convictions for both violate double jeopardy. 170 Wn.2d at 524-25. The same is true here. Mr. Lewis's conviction for the assault should be vacated. See State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005) (where two convictions violate double jeopardy protections, the remedy is to vacate the conviction for the crime that forms part of the proof of the other).

**4. The compelled production of fingerprints to aid the State in its burden of proof is a plain violation of Article I, section 7.**

The State made an oral motion to compel Mr. Lewis to provide his fingerprints so that the State could prove his identity. 3/10/11 RP 2. Mr. Lewis expressed hesitation. Id. at 2-4. The court responded

I'm going to order you to cooperate and place your fingers in the hands of the tech to obtain your fingerprints. If you do not do this voluntarily, I'm going to no [sic] sign an order directing that it be done. It will be done over at the jail and in a manner that is not so friendly.

Id. at 4. Mr. Lewis complied with the court's directive. Id. at 5.

- a. The compelled production of fingerprints is subject of the warrant requirement of Article I, section 7.

Article I, section 7 of the Washington Constitution provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The Washington Supreme Court has concluded the taking of fingerprints is the equivalent of taking biological sample for DNA testing. State v. Surge, 160 Wn.2d 65, 72-73, 156 P.3d 208 (2007). The Court has also concluded that taking a DNA sample invades a person's private affairs and is a search for purposes of Article 1, section 7. State v. Garcia-Salgado, 176 Wn.2d 176, 184, 240 P.3d 153 (2010). Thus, the taking of a DNA sample clearly requires a search warrant. Id. Because a fingerprint is the equivalent of a DNA sample, compelling a person to provide his fingerprints is an invasion of one's private affairs and requires a warrant.

- b. The compelled production of Mr. Lewis's fingerprints does not satisfy the warrant requirement of Article I, section 7.

The warrant requirement is particularly important under the Washington Constitution “as it is the warrant which provides ‘authority of law’ referenced therein.” State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). Generally, the issuance of a warrant requires (1) a sworn statement setting forth facts which establish probable cause to believe evidence of a crime will be recovered; (2) a decision by a neutral magistrate, and (3) a particularized statement in the warrant describing the place and items to be searched. Garcia-Salgado, 170 Wn.2d at 184-85. The warrant requirement may be satisfied by a court order, so long as the order satisfies the requirements of a warrant. Id. at 187. Thus, the order or warrant must be supported by a sworn declaration establishing probable cause to believe evidence of a crime will be discovered, and must satisfy the particularity requirement. Id.

The State did not offer either an affidavit or sworn statement in court in support of its request. Thus, the warrant requirement was not satisfied.

Further, the order directing Mr. Lewis to comply with the State's demand was not written. Instead the judge directed Mr. Lewis's

compliance in open court. 3/10/11 RP 4. Among the purposes served by the warrant and affidavit is that they both establish and limit the facts which a reviewing court can or must examine when faced with a challenge to a warrant. Where an affidavit is insufficient it cannot be rehabilitated by evidence known by the affiant but not disclosed to the issuing magistrate. State v. Murrary, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1998); Whiteley v. Warden, 401 U.S. 560, 564, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971);<sup>1</sup> “In reviewing a probable cause determination the information considered is that which was before the issuing magistrate.” State v. Remboldt, 64 Wn.App. 505, 509, 827 P.2d 282 (1992) (citing *inter alia* State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973)). In addition, on review “[t]he suppression ruling stands and falls on its own merits, based upon the evidence before the suppression judge, not what is later developed at trial.” State v. Meckelson, 138 Wn.App. 431, 438, 135 P.3d 991 (2006) (citing Ladson, 138 Wn.2d at 350), review denied 159 Wn.2d 1013 (2007).

The procedure used here does not limit the facts upon which the validity of the warrant is to be judged. The court’s oral statement

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<sup>1</sup> In Arizona v. Evans, 514 U.S. 1, 13-14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), the Court recognized the correctness of Whiteley’s analysis finding a Fourth Amendment violation, the portion relevant to the present discussion, but disagreed with its application of the exclusionary rule to that violation.

authorizing the search does not contain any statement of facts supporting probable cause. The oral ruling does not incorporate nor even mention a motion supporting the search which contains a statement of facts, and of course none was filed. The oral ruling does not in any way identify or limit those facts which purport to establish probable cause. Where the record does not establish what evidence was before the court, a reviewing court cannot conclude the warrant was supported by probable cause. Garcia-Salgado, 170 Wn.2d at 159. Because there is no factual basis upon which to review the scope of the court's ruling or even its very legitimacy the warrant requirement was not satisfied.

c. The trial court erroneously admitted the fruits of the unlawful search.

Article I, section 7 requires exclusion of evidence obtained in violation of its terms. State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). The State relied upon Mr. Lewis's fingerprints to prove he had two prior most serious offenses and thus was a persistent offender. 4/1/11 RP 11-22. However, because that evidence was obtained in violation of the Article I, section 7, the court erred in permitting its admission.

**5. Mr. Lewis was deprived of his right to a unanimous jury.**

For each of the two counts the State alleged Mr. Lewis' was armed with a deadly weapon. CP 7-8. The jury returned special verdicts

answering “yes” on the special verdict forms pertaining to these enhancements. CP 52, 54. However, the jury was not instructed that their verdicts on the enhancement must be unanimous.

The Washington Constitution requires a unanimous jury verdict in a criminal case. Const. Art. I, §§ 21, 22. The Supreme Court has made clear Article I, section 22 applies to enhancements. State v. Recuenco, 163 Wn.2d 428, 435-36, 180 P.3d 1276 (2008) (Recuenco III). Thus, a jury must unanimously agree the State has proved beyond a reasonable doubt the facts necessary to impose the enhancement. State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).

The failure to ensure the jury is unanimous in its verdict is a manifest constitutional error. Thus, this issue may be addressed in the absence of an objection below. State v. Watkins, 136 Wn.App. 240, 244-45, 148 P.3d 1112 (2006).

The pattern concluding instruction for special verdicts makes this unanimity requirement manifestly clear. That instruction provides:

You will also be given [a special verdict form] [special verdict forms] [for the crime of \_\_\_\_\_] [for the crime[s] charged in count[s] ]. If you find the defendant not guilty [of this crime] [of these crimes] [of \_\_\_\_\_], do not use the special verdict form[s]. If you find the defendant guilty [of this crime] [of these crimes] [of \_\_\_\_\_], you will then use the special verdict form[s] and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the

special verdict form[s] “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously agree that the answer to the question is “no,” or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer “no.”

11A *Washington Practice, Washington Pattern Jury Instructions - Criminal*, 160.00 (2008) (Hereafter WPIC). The “Note on Use” directs “[f]or cases involving a sentencing enhancement, insert this paragraph immediately ahead of the last paragraph in the concluding instruction.”

Despite this direction, in this case, this instruction was not provided. CP 80-81 (Instruction 23). Moreover, Instruction 22, the enhancement instruction, does not include any statement regarding unanimity. CP 79. Thus, the constitutional requirement of unanimity was not conveyed to the jury.

An enhancement is treated as an essential element of the offense. Recuenco III, 163 Wn.2d at 434. Because the enhancement acts as an element of a greater offense, the absence of unanimity on that element requires reversal of the conviction. See, State v. Siers, 158 Wn.App. 686, 702, 244 P.3d 15 (2010) (requiring reversal of conviction where notice of aggravating factor not provided in Information), review granted, 71 Wn.2d 1009 (2011). Thus, this Court must reverse Mr. Lewis’s convictions.

**6. The trial court denied Mr. Lewis his rights to a jury trial and the due process of law.**

- 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. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amend. VI. Thus, it is axiomatic that 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, 542 US. at 300-01; Apprendi, 530 U.S. 476-77.

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 v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Blakely held that an exceptional sentence imposed under Washington's Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Id. at 304-05. Likewise, the Court found Arizona's death penalty scheme unconstitutional because a defendant

could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi v. New Jersey, the Court found New Jersey's "hate crime" legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. 530 U.S. 466, 492-93, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

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; see also, Ring, 536 U.S. at 602 (pointing out the dispositive question is one of substance, not form). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not 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. Almendarez-Torres v. United States held recidivism was not an element of the substantive crime that needed to be

pled in the information, even though the defendant's prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). Apprendi distinguished Almendarez-Torres because that case only addressed the indictment issue. 530 U.S. at 488, 495-96. Apprendi 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 Court therefore treated Almendarez-Torres as a "narrow exception" to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it

demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. Apprendi, 530 U.S. at 499 (Thomas, J. concurring). Rather than focusing on whether something is a sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. Id. at 499-519; accord, Ring v. Arizona, 536 U.S. 610 (Scalia, J. , concurring).

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, 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). The Washington Supreme Court, however, has felt obligated to "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, which attacks the use of prior convictions on other grounds.

Indeed, the Washington Court's "following" of these case has been sharply criticized. State v. McKague, 159 Wn.App. 489, 529-34; 246 P.3d 558 (Quinn-Brintnall, J, dissenting in part), affirmed on other grounds, 172 Wn.2d 802, 262 P.3d 1225 (2011). The Washington Supreme Court's original decisions addressing the Sixth Amendment's application to the Persistent Offender Accountability Act (POAA) were premised upon the conclusion that the legislative characterizations of a fact as either an "element" or "sentencing fact" was determinative of the constitutional protections to be afforded. Moreover, the court found it significant whether the Legislature codified the applicable fact to be proved in a sentencing as opposed to substantive statute. State v. Thorne, 129 Wn.2d 736, 783, 921 P.2d 514 (1994). The distinctions upon which Thorne rested ceased to be constitutionally relevant following Apprendi and Blakely. Apprendi, 530 U.S., at 476. Blakely, 542 U.S. at 304-05. The Washington Supreme Court has not addressed this question following the decisions in Blakely and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007) which plainly rejected the artificial distinction upon which the Washington Court has based its decision. And

with those decisions Thorne and its progeny are no longer analytically sound.

Even if constitutionally significant, the treatment of 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.

Likewise, many other states' recidivist statutes provide for 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 Mr. Lewis'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. Mr. Lewis was entitled to a jury finding beyond a reasonable doubt that he is a persistent offender.

**7. 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. U.S. Const. amend. XIV; Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). 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; Cf. In re the Detention of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (applying strict scrutiny to civil-commitment statute in face of due process challenge, because civil commitment constitutes “a massive curtailment of liberty”).

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).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens through which the Court evaluates the issue. 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 determined that the government has an interest in punishing repeat criminal offenders more severely than first-time

offenders. For example, 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). And 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 which increase the maximum sentence available are termed “elements” of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And 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). In none of these examples has the legislature labeled these facts as elements.

Instead, courts have simply treated them as such.

But where, as here, prior convictions which increase the maximum sentence available are termed as “sentencing factors,” they need only be proved to the judge by a preponderance of the evidence. Smith, 150 Wn.2d at 143 (two prior strike offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike). 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.” Instead in each instance it is an arbitrary judicial construct. This classification 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”); Thorne, 129 Wn.2d at 772 (purpose of POAA is to “reduce the number of serious, repeat offenders by tougher sentencing”).

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts, because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes – even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37)(b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143. This is so despite

the fact that the defendant is the same person, the alleged prior conviction is the same, and the alleged prior conviction is being used for precisely the same purpose in either instance: to punish the person more harshly based on his recidivism.

A similar problem of arbitrary classifications caused the Supreme Court to invalidate a persistent offender statute for violating the Equal Protection Clause in Skinner, 316 U.S. at 541. Like the statute at issue here, the Oklahoma statute at issue in Skinner mandated extreme punishment upon a third conviction for an offense of a particular type. Id. at 536. While under Washington's act the extreme punishment mandated is life without the possibility of parole, under Oklahoma's act the extreme punishment was sterilization. Id. The Court applied strict scrutiny to the law, finding that sterilization implicates a "liberty" interest even though it did not involve imprisonment. The statute did not pass strict scrutiny because three convictions for crimes such as embezzlement did not result in sterilization while three strikes for crimes such as larceny did. Id. at 541-42. Acknowledging that a legislature's classification of crimes is normally due a certain level of deference, the Court declined to defer in this case because:

We are dealing here with legislation which involves one of the basic civil rights of man. ... There is no redemption for

the individual whom the law touches. ... He is forever deprived of a basic liberty.

Id. at 540-41. The same is true here. Being free from physical detention by one's own government is one of the basic civil rights of man. Hamdi, 542 U.S. at 529. The legislation at issue here forever deprived Mr. Lewis of this basic liberty; it subjected him to life in prison without the possibility of parole. It did so based on proof by only a preponderance of the evidence, to a judge and not a jury – even though proof of prior convictions to enhance sentences in other cases must be proved to a jury beyond a reasonable doubt.

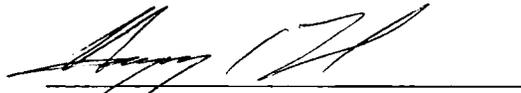
As the Supreme Court explained in Apprendi, “merely using the label ‘sentence enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.” Apprendi, 530 U.S. at 476. But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” Skinner, 316 U.S. at 542. This Court should hold that the trial judge's imposition of a sentence of life without the possibility of parole, based on the court's finding the necessary facts by a preponderance of the evidence,

violated the equal protection clause. The case should be remanded for resentencing within the standard range.

E. CONCLUSION

For the reasons above, this Court must reverse Mr. Lewis's convictions and sentence.

Respectfully submitted this 15<sup>th</sup> day of February, 2012.



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66977-0-I
v.	)	
	)	
PAUL LEWIS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVER _____ _____
<input checked="" type="checkbox"/> PAUL LEWIS 949231 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____ _____

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STATE OF WASHINGTON  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2012.

X \_\_\_\_\_

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