Supreme Court No. ____
(COA No. 84550-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS ANDERSON,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Nicholas Anderson, petitioner here and appellant below, asks this Court to accept review of the published Court of Appeals decision terminating review dated July 22, 2024, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). A copy is attached.

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals originally remanded Mr. Anderson's case for a jury trial solely on a sentencing enhancement because the trial court had increased Mr. Anderson's sentence based on a factual finding that had not been proved to the jury. [1] This decision relied on this Court's opinion in *State v. Wu*.[2] But in this appeal, the Court of Appeals

[1] The original ruling remanded the case for fact-finding on two sentencing issues. *State v. Anderson*, 9 Wn. App. 2d 430, 447 P.3d 176 (2019), *review granted and remanded*, 195 Wn.2d 1001 (2020). The modified ruling issued following *Wu* remanded the case for fact-finding on one sentencing enhancement. *State v. Anderson*, 13 Wn. App. 2d 1078 (2020) (unpublished), *review denied*, 196 Wn.2d 1027 (2020).

[2] *State v. Wu*, 194 Wn.2d 880, 453 P.3d 978 (2019).

reversed its prior decisions, ruling that contrary to *Wu,* the factual issue increasing Mr. Anderson's sentence does not require a jury finding or proof beyond a reasonable doubt. The Court of Appeals' conflicting decisions and its confusion over when a factual issue requires a jury finding and proof beyond a reasonable doubt merits this Court's review under RAP 13.4(b)(1), (2) and (3).

2. In *Erlinger v. United States*,[3] the Supreme Court ruled that any factual question that increases a person's sentence must be proved to a jury beyond a reasonable doubt, no matter how simple or obvious that factual question is. The only exception to this constitutional requirement is the fact that a prior conviction exists.

The published Court of Appeals decision is the first appellate opinion addressing *Erlinger* in this state. However, contrary to *Erlinger*, the Court of Appeals incorrectly ruled that

[3] __ U.S. _, 144 S. Ct. 1840 (June 21, 2024).

a court may increase a person's sentence based on a factual allegation related to a prior conviction even when this fact is not an inherent part of the conviction and was not previously proven to a jury beyond a reasonable doubt. This Court should grant review because *Erlinger* expressly holds that any factual issue beyond the existence of a prior conviction must be proved to a jury. The published Court of Appeals decision conflicts with *Erlinger* and will mislead other courts deciding similar issues. RAP 13.4(b)(3), (4).

3. The Court of Appeals previously remanded Mr. Anderson's case for a trial solely on a statutory sentencing enhancement. The enhancement at issue required the prosecution to prove beyond a reasonable doubt that Mr. Anderson was previously charged with driving under the influence, this same charge was later reduced, and it resulted in a conviction for reckless driving.

In its recent decision, the Court of Appeals ruled the prosecution failed to prove beyond a reasonable doubt that Mr.

Anderson was the person who had the necessary prior DUI charge, but decided this issue only requires proof by a preponderance of the evidence and the State met this lesser burden. This Court should grant review to address the trial court's authority to hold a sentencing trial solely on an enhancement and whether a preponderance of evidence suffices to increase a person's punishment. RAP 13.4(b)(2), (3), (4).

4. In the trial court and in a Statement of Additional Grounds, Mr. Anderson objected to the increase in his sentence because it rested on an allegation of DUI that was dismissed, could not have been proven, and was not part of his conviction for reckless driving as necessary for the sentencing enhancement. The Court of Appeals declined to address the issue, incorrectly claiming it rested on facts outside the record. Where Mr. Anderson informed the trial court that the original charge did not justify the sentencing increase, and the trial court lacks authority to impose a legally invalid sentence, this Court

of Appeals decision is contrary to this Court's precedent. RAP 13.4(1), (4).

C. STATEMENT OF THE CASE

a. Initial direct appeal.

In 2017, Nicholas Anderson was convicted after a jury trial of four counts of vehicular homicide, one count of vehicular assault, and one count of reckless driving. CP 20-21. Judge Cheryl Carey presided at the trial and sentencing. CP 36.

The Court of Appeals affirmed his convictions but ruled the trial court improperly increased Mr. Anderson's punishment based on two factual issues that required jury findings. *State v. Anderson*, 9 Wn. App. 2d 430, 447 P.3d 176 (2019), *rev. granted and remanded*, 195 Wn.2d 1001, 458 P.3d 786 (2020); CP 37-38. The factual issues triggering sentencing enhancements involved (1) whether Mr. Anderson had a prior reckless driving conviction for an incident that was originally charged as driving under the influence, and (2) whether this prior reckless driving conviction involved drugs or alcohol. 9

Wn. App. 2d at 447-48, 462-63;[4] CP 37-38 (explaining prior decision).

While the prosecution's petition for review was pending, this Court decided *State v. Wu*, 194 Wn.2d 880, 890, 453 P.3d 978 (2019). In *Wu*, this Court agreed the jury must determine the essential elements of felony DUI, including whether one of the predicate convictions was a reckless driving conviction that was originally charged as DUI. 194 Wn.2d at 882, 893.

Following *Wu*, this Court remanded Mr. Anderson's case for further consideration based on *Wu*. 195 Wn.2d at 1001.

On remand, the Court of Appeals ruled "a jury must decide" whether Mr. Anderson had a prior reckless driving conviction resulting from a charge originally filed as a DUI offense, but did not need to decide whether the reckless driving

[4] The judges unanimously agreed the former issue requires a jury finding and two judges agreed the latter issue also requires a jury finding. 9 Wn. App. at 447-48 (unanimous); 9 Wn. App. 2d at 462-63 (Chun, J., dissenting in part).

conviction involved alcohol or drugs. CP 39.[5] It ordered, "[o]n remand, the State must prove beyond a reasonable doubt only that Anderson was convicted of reckless driving on a charge originally filed as a DUI offense." *Id*. This is "a question of fact that a jury must decide." *Id*. This Court denied the prosecution's petition for review of the Court of Appeals' reversal of this sentencing enhancement. 196 Wn.2d at 1027 (S.Ct. No. 98884-8).

b. Proceedings after remand.

When Mr. Anderson returned to court, the trial judge had retired.[6] The court appointed new counsel for Mr. Anderson due to a conflict of interest. RP 7-10.

Defense counsel told the court that "before we empanel a jury," it had a motion to dismiss that should be resolved. RP 19.

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[5] *See State v. Anderson*, 13 Wn. App. 2d 1078, *rev. denied*, 198 Wn.2d 1027 (2020).

[6] https://governor.wa.gov/news/2019/inslee-appoints-david-steiner-king-county-superior-court (appointing David Steiner to replace Judge Carey following her April 1, 2019 retirement).

Mr. Anderson moved to dismiss the sentencing enhancements because they were never charged in the information or any other written document. CP 43-44, 77-87; RP 60-63. The prosecution insisted the sentencing enhancement is not an element that needs written notice and also claimed it told former defense counsel it would ask the sentencing court to impose the enhancement. CP 55; RP 64-65. Judge Elizabeth Berns denied the motion to dismiss, ruling the prosecution's conversations with defense counsel provided sufficient notice. CP 90, 92-93.

Appearing before a different judge brand new to the case, Andrea Darvas, Mr. Anderson agreed to a bench trial at which the prosecution must prove beyond a reasonable doubt that he had be subject to the necessary prior charge that would increase his sentence. RP 127-32.

The prosecution's cases consisted solely of four exhibits. RP 123-27. After the court admitted these exhibits, the prosecution rested and called no witnesses. RP 128.

The prosecution contended the exhibits showed Mr. Anderson was previously charged with DUI and convicted of reckless driving under the same case number. RP 130-31.

Mr. Anderson pointed out there was no identification of Mr. Anderson. RP 129. He argued "there's nothing" in the exhibits showing the person who signed the documents "is the same Mr. Nicholas Anderson, Nicholas Windsor Anderson, who is sitting at counsel table today." RP 129.

The trial court ruled the prosecution met its burden of proof but did not specify its grounds for finding Mr. Anderson was the person charged and convicted in the documents presented. RP 131-32; CP 127-28. It concluded this prior charge and conviction triggered two-year sentencing enhancements for each of the vehicular homicide convictions, served consecutively. RP 131-32; CP 24, 98. It reimposed the same sentence Judge Carey previously imposed. RP 157; CP 159.

The Court of Appeals agreed the prosecution had not offered evidence that Mr. Anderson was the person who faced this prior charge to prove this fact beyond a reasonable doubt. Slip op. at 14. But reversing its prior decision, it ruled that a preponderance of the evidence sufficed and the trial court could presume Mr. Anderson was likely the person with this prior charge based on a similarity of names. Slip op. at 13-15.

The facts are further explained in Appellant's Opening and Reply Briefs, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. The published Court of Appeals decision disregards the constitutional prohibition on increasing a person's sentence based on facts not inherent in a prior crime or found by the jury, contrary to precedent from this Court, the Court of Appeals, and the United States Supreme Court.

a. The Court of Appeals decision conflicts with its prior decisions by authorizing a sentencing enhancement resting on a fact never found by a jury or proven beyond a reasonable doubt.

Any fact, other than a prior conviction, that increases a person's punishment must be charged, submitted to the jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI; XIV. If an aggravating fact produces a higher sentence it becomes "an element of a distinct and aggravated crime." *Alleyne v. United States*, 570 U.S. 99, 116-17, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Elements and charges may not be added to a case in a retrial. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854

(1987); *State v. Dallas*, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995).

Mr. Anderson had a jury trial in 2017. No charging document included any mention of a sentencing enhancement based on RCW 9.94A.533. CP 90 (Finding of Fact 7). The prosecution never presented the jury with allegations alleging Mr. Anderson had been previously charged with DUI in prior case, and convicted of reckless driving for that same allegation, to prove the sentencing enhancement in this case, as it should have. *See, e.g.*, *State v. Wu*, 194 Wn.2d 880, 882, 893, 453 P.3d 978 (2019) (explaining court properly submitted this same factual issue to the jury in a bifurcated trial).

In two related decisions in 2019 and 2020, the Court of Appeals ruled this sentencing enhancement was not supported by the necessary factual determination made by a jury as this Court requires. CP 39; 9 Wn. App. 2d at 446-47. But rather than strike this unproven increase in Mr. Anderson's punishment, it affirmed his convictions and directed the trial

court to hold a jury trial solely on this sentencing enhancement. CP 39.

It in its 2024 decision, the Court of Appeals reversed its prior rulings. Slip op. at 13. It held the trial court does not have authority to empanel a jury on an enhancement alone. Slip op. at 8, 13. And it furthered ruled that the factual issue at stake does not require a jury finding at all, despite its prior decisions holding the opposite is true. Slip op. at 13, 15.

This Court should grant review to settle this issue because the confused and conflicting Court of Appeals decisions demonstrate the need for this Court to resolve the issue.

b. The published Court of Appeals decision misconstrues and is contrary to Erlinger and the well-established constitutional principles on which it rests.

In *Erlinger*, the Supreme Court reiterated there is "no doubt" that "[v]irtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a

reasonable doubt (or freely admitted in a guilty plea).” 144 S. Ct. at 1851 (quoting *inter alia* Apprendi, 530 U.S. at 490). The Due Process Clause of the Fifth Amendment and the jury trial requirements of the Sixth Amendment “forbid” a court from making its own findings about facts related to a prior conviction. *Id*. at 1855.

The only “narrow exception” under which a judge may find a fact authorizing increased punishment is the fact of a prior conviction’s existence. *Id*. at 1853-54. *Erlinger* further recognized there is “more reason to question” the narrow prior conviction exception, because appears incompatible with the constitution, but explained that issue was not presented in the case. *Id*. at 1857.

In *Erlinger*, the trial court increased the defendant’s sentence based on the judicial finding that the defendant’s multiple prior burglary convictions were committed on different occasions. *Id*. at 1847. The defendant had been convicted years earlier of burglarizing four different businesses -- “a pizza shop,

a sporting goods store, and two restaurants" over the span of eight days. *Id*. at 1847; *Id*. at 1885 (Jackson, J., dissenting) (explaining underlying facts)); *Id*. at 1867 (Kavanaugh, J. dissenting) ("each burglary occurred several days apart from the other two"). The sentencing court ruled these burglaries "occurred on distinct occasions" and imposed an increased sentence. *Id*.

The Supreme Court ruled that even though undisputed court documents showed the different convictions, along with the separate named victims and their dates of their commission, the Fifth and Sixth Amendments "forbid" a court from using such documents to resolve any legal questions that would authorize additional punishment, beyond the conviction's existence and its essential legal elements. *Id*. at 1855. It rejected the argument that the exception for prior convictions "permits a judge to find perhaps any fact related to a defendant's past offenses." 144 S. Ct. at 1853.

Even when the factual issues are obvious, or easy for a judge to decide from available certified documents, "none of that means the judge and not the jury makes that call. There is no efficiency exception to the Fifth and Sixth Amendments." *Id*. at 1856.

Erlinger squarely controls the constitutional requirements for increasing Mr. Anderson's sentence based on facts related to, but not inherent in, a prior conviction. The prosecution had to establish that this particular reckless driving conviction was originally charged as a DUI. This factual question was not proven as part of Mr. Anderson's prior conviction.

This Court recognized this distinction in *Wu*, and ruled the question of how a prior conviction was charged, used to increase a person's punishment, is a factual determination that must be proved to the jury. *Wu*, 194 Wn.2d at 882, 893.

The Court of Appeals decision misconstrued and misrepresented *Erlinger*, inexplicably relying on a dissenting

opinion to narrow the majority's holding and taking words out of context.

Citing a dissenting opinion, the Court of Appeals claimed *Erlinger* permits any fact involving "recidivism" to be found by a judge. Slip op. at 12 (quoting "dissenting opinion of J. Kavanaugh" for idea that judge may find facts "based on 'recidivism'"). But the majority in *Erlinger* plainly stated that any fact related to a prior conviction must be proven to a jury, other than the conviction's existence and its essential elements. 144 S. Ct. at 1857.

"[T]he government must prove beyond a reasonable doubt to a unanimous jury the facts necessary to sustain the punishment it seeks." *Id*. at 1858. There is no exception for facts that seem overwhelmingly proved to a judge or can be inferred from court documents. *Id*. at 1856. The Court of Appeals decision carves out an exception for "recividism" facts that is contrary to *Erlinger*.

The Court of Appeals cited Judge Kavanaugh's dissent to assert that state courts are free to apply different approaches to facts related to recidivism. Slip op. at 12. But the dissent's view of the breadth of the prior conviction exception is not what the Supreme Court held. The majority holding in *Erlinger* does not suggest state courts may construe the federal constitution differently that the United States Supreme Court.

Even Judge Kavanaugh acknowledged that the *Erlinger* majority decision creates a "new constitutional rule [that] will apply not only to federal cases, but also to state cases." *Erlinger*, 144 S. Ct. at 1866 n.2 (2024) (Kavanaugh, J., dissenting) (emphasis added). The Court of Appeals untenably disregarded *Erlinger*'s application to the constitutional requirements that apply in Mr. Anderson's case.

Not only is the Court of Appeals decision wrong under *Erlinger*, it is a published decision that will cause confusion in the lower courts. Review should be granted.

c. The Court of Appeals impermissibly diluted the State's constitutional burden of proving fact essential to increased punishment.

The Court of Appeals appropriately acknowledged that it improperly remanded Mr. Anderson's case for a jury trial on a single issue related to enhanced punishment, because there is no statutory procedure for a court to hold such a trial on a limited issue. Slip op. at 8; *see, e.g.*, *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007) ("Trial courts lack inherent authority to empanel sentencing juries."). However, the Court of Appeals did not strike the enhancement, as it should have, since it was not properly proven at the time of Mr. Anderson's jury trial.

Instead, it lowered the burden of proof to a preponderance of the evidence and ruled the prosecution satisfied this lesser burden at the bench trial the court conducted on remand. Slip op at 14-15.

The prosecution was required to prove Mr. Anderson was the person originally charged with DUI. *See State v. Ceja Santos*, 163 Wn. App. 780, 785, 260 P.3d 982 (2011) (reversing

felony DUI premised on prior convictions where "no evidence links" prior judgments to the defendant who appeared at trial).

When relying on documents to prove a necessary fact, the prosecution must prove "that the person named therein is the same person on trial." *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005). The lack of this necessary evidence undermines the sentencing enhancement.

The entirety of the prosecution's case rested on four exhibits, without any witness testimony. Exs. 1-4. The prosecution offered no evidence that the person appearing in court was the person charged in that prior case, as it must. RP 131-33; CP 127-28. Mr. Anderson expressly objected to this lack of proof. RP 129.

Recognizing that the prosecution had not met its burden of proving Mr. Anderson was the person named in it exhibits, the Court of Appeal diluted the burden of proof. Slip op. at 14-15. Under a lesser preponderance of the evidence standard, the Court of Appeals ruled the similarity of names in one document

was enough to prove Mr. Anderson was the person who was previously charged with DUI and later convicted of a reduced charge of reckless driving.

The Court of Appeals decision to endorse a statutorily unauthorized sentencing procedure and to alter the State's burden of proving the facts essential to increased punishment is contrary to the controlling statutes and settled law. This Court should grant review.

2. The Court of Appeals baselessly refused to address Mr. Anderson's claim that he was not subjected to this sentencing enhancement because he was never properly charged with DUI.

The Court of Appeals refused to address Mr. Anderson's properly raised Statement of Additional Grounds, which explained that he could not be properly subjected to this sentencing enhancement because his prior reckless driving conviction was not based on a validly charged DUI. The Court of Appeals mistakenly claimed Mr. Anderson was relying on facts outside the record. Slip op. at 16-17.

Contrary to the Court of Appeals, Mr. Anderson made this same argument in the trial court. He explained that while he was once charged with reckless driving and DUI, they were separate counts, not based on the same allegation. RP 148. The DUI was not reduced as part of a plea bargain, but was dismissed due to a lack of admissible evidence supporting the charge. *Id*. Because his reckless driving conviction did not stem from a DUI charge, this sentencing enhancement should not apply. RP 148-49.

Although Mr. Anderson offered this explanation as part of the sentencing hearing and not part of the bench trial, the Court of Appeals ruled that no formal trial was necessary for the trial court to impose this sentencing enhancement. Slip op. at 14-15. *Id*. Consequently, Mr. Anderson's objection at the sentencing hearing sufficed to present the trial court to contrary information undermining the sentencing enhancement.

A court's understanding of a person's criminal history is a fundamental defect undermining the sentence imposed. *In re*

Pers. Restraint of Fletcher, _ Wn.2d _, 552 P.3d 302, 309 (2024). A court "acts without statutory authority" when it imposes a substantially increased sentence based on incorrect information about a person's criminal history. *Id*. Here, Mr. Anderson explained to the court that his reckless driving conviction was separate from the initially charged DUI and this sentencing enhancement should not apply. RP 148. The prosecution offered no contrary evidence. The enhancement was not validly proven and should be stricken.

This Court should grant review of the constitutional and statutory issues at stake in this case. Not only did the Court of Appeals misconstrue the Sixth and Fourteenth Amendments, but its decision is fraught with other significant errors. It improperly remanded the case for a jury trial solely on the sentencing enhancement, then acknowledged this remand was improper after the fact. Then it diluted the prosecution's burden of proof and while also failing to hold the prosecution to its burden of proving Mr. Anderson was the person who was

charged with DUI and convicted of reckless driving based on the same incident.

E. CONCLUSION

Based on the foregoing, Petitioner Nicholas Andson respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 3705 words and complies with RAP 18.17(b).

DATED this 21st day of August 2024.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS WINDSOR ANDERSON, Appellant.	No. 84550-1-I DIVISION ONE PUBLISHED OPINION

COBURN, J. — Nicholas Windsor Anderson was convicted of vehicular homicide and the trial court imposed a two-year sentence enhancement based on a judge's determination that Anderson's previous reckless driving conviction was amended from a charge of driving under the influence (DUI). On his first appeal, this court found that the enhancement required a jury finding and remanded to the trial court to empanel a jury for fact-finding on that issue. State v. Anderson, 9 Wn. App. 2d 430, 447 P.3d 176 (2019) (Anderson I). Following the State's appeal of that decision, the Supreme Court remanded back to this court, which again ordered the trial court to empanel a jury for fact-finding on the sentence enhancement alone. State v. Anderson, No. 76672-4-I, slip op. at *3-4 (Wash. Ct. App. June 8, 2020) (unpublished) (Anderson II), https://www.courts.wa.gov/opinions/pdf/766724.pdf.

After Anderson waived jury on remand, the trial court held a bench trial and issued the same sentence as the one imposed at Anderson's original trial. This second

appeal followed. Both Anderson and the State argue on appeal, though on different bases, that the Anderson II court should never have remanded for jury fact-finding to support a sentence enhancement. Both parties are correct in that the trial court had no statutory authority to empanel a fact-finding jury for resentencing under RCW 9.94A.533(7) and that a judge can determine whether a prior conviction for Reckless Driving was procedurally amended from a charge of Driving Under the Influence (DUI) because that is not an inquiry as to the facts underlying the charge. But, this is not an appeal of Anderson II and in the end, a judge, not a jury, properly decided the question on remand. Anderson also challenges the sufficiency of the State's evidence that established Anderson had the prior conviction; and imposition of a Victim Penalty Assessment (VPA) and restitution interest. We remand to strike the VPA and reconsider restitution interest, but otherwise affirm.

FACTS

This is the second appeal following Anderson's conviction for four counts of vehicular homicide and one count each of vehicular assault and reckless driving following a jury trial in 2017. The background facts are set forth in the first appeal, Anderson I, 9 Wn. App. 2d 430, and will be repeated here only as necessary. Anderson drove intoxicated, causing an accident resulting in the deaths of four passengers and serious lasting injuries to a fifth. Id. at 436-37.

> The sentencing court imposed concurrent sentences of 280 months for each of the four vehicular homicide convictions. It also imposed two 24-month enhancements to run consecutively to each of the vehicular homicide convictions and to each other (192 months total) because Anderson had two prior convictions for driving under the influence (DUI) and reckless driving. And it imposed 120 months for the vehicular assault conviction and 364 days for the reckless driving conviction to run consecutively to the vehicular homicide convictions and the

> enhancements. The court sentenced Anderson to a total of 592 months in prison and 364 days in jail. It waived all nonmandatory legal financial obligations (LFOs) and imposed a $100 DNA fee.

Id. at 437-38. The court also ordered Anderson to pay $97,996.48 in restitution and imposed interest under RCW 10.82.090. At sentencing, the court enhanced the term of imprisonment for vehicular homicide under RCW 9.94A.533(7) because the court determined Anderson had a prior reckless driving conviction that was originally charged as a DUI as defined by RCW 46.61.5055.

Anderson appealed to this court arguing that the trial court violated his Sixth Amendment right to a jury trial under Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) in imposing a sentence enhancement without special jury findings supporting it. Anderson I, 9 Wn. App. 2d at 447. This court agreed with Anderson. Id. at 447-48. The Anderson I court ordered remand for the superior court to strike the DNA fee and to empanel a jury to decide whether Anderson's prior reckless driving conviction qualifies as a "prior offense" for purposes of enhancing his term of imprisonment for vehicular homicide. Id. at 462. A majority of the court, in a concurrence, also held that the State had to prove to a jury that drugs or alcohol were involved in the prior offense in order to satisfy due process. Id. at 463 (dissenting opinion of Chun, J.).

The State petitioned for review. The Washington State Supreme Court granted discretionary review but remanded to this court for reconsideration in light of State v. Wu, 194 Wn.2d 880, 453 P.3d 975 (2019), which was decided after this court published Anderson I. The Supreme Court in Wu held, regarding a conviction for felony DUI

based on prior offenses, that (1) because the prior conviction raised the level of crime from a misdemeanor to a felony based on the defendant's prior criminal conviction, it is an element that must be proved to the jury beyond a reasonable doubt; and (2) the involvement of alcohol or drugs in the prior conviction was not an essential element. Wu, 194 Wn.2d at 889-90.

On remand, this court reversed the part of Anderson I that required a jury on remand to find the reckless driving conviction involved alcohol or drugs and again remanded to the superior court to empanel a jury to strike the DNA fee and decide whether Anderson's prior reckless driving conviction qualifies as a "prior offense" for enhancement purposes. State v. Anderson (Anderson II), No. 76672-4-I, slip op. at 3 (Wash. Ct. June 8, 2020) (unpublished), https://www.courts.wa.gov/opinions/pdf/766724.pdf.

The State moved for this court to reconsider, arguing that the fact of the prior conviction was a "recidivist fact" that fell under an exception to Apprendi and did not require a jury finding before a sentence enhancement could be imposed. Anderson opposed the motion, advocating instead for this court to maintain its holding and remand the case to superior court for trial solely on the questions of fact underlying the sentence enhancement. This court denied the State's motion. The State then petitioned for review by the Washington Supreme Court on the same grounds. The supreme court denied the petition.

On remand from Anderson II, the parties returned to superior court for trial on the sole question of whether Anderson had a prior reckless driving conviction that was amended from DUI. Anderson waived his right to a jury trial and a bench trial

proceeded before a judge that was not the same judge who presided over the original trial. The State presented no witnesses and admitted four certified copies of documents containing information regarding a 2005 conviction of "Nicholas Anderson"[1] for reckless driving, as amended from the original charge of DUI. The trial court found that "yes, [Anderson] was originally charged under this cause number with driving under the influence and ultimately was convicted on the amended charge of reckless driving."

The court issued a "confirmation of judgment and sentence post-remand" maintaining the original sentence imposed other than the imposition of the DNA fee.

Anderson appeals.

DISCUSSION

Review

Both the State and Anderson argue, for different reasons, that it was improper for this court to remand to the trial court to empanel a jury to determine if Anderson had a prior reckless driving conviction that was amended from a DUI. Anderson argues that the trial court had no statutory authority to empanel a jury and hold a new trial on the issue of whether his prior reckless driving conviction had been originally charged as a DUI. The State argues that the issue is in the province of the trial court and did not require a jury finding because it is a fact pertaining to a prior conviction.

The State argues that because Anderson raises the issue of the lack of legislative authority for the first time on appeal that issue is waived. Generally, we will

[1] The complaint names the defendant as "Nicholas Anderson." The statement of defendant on plea of guilty states, "My true name is Nicholas Anderson." The signature appears to include a "W" as a middle initial. The order of judgment and sentence identifies the defendant as "Anderson, Nicholas." What appears to be docket entries identify the case title as "City of Woodinville vs. Anderson, Nicholas Windsor."

not consider issues raised for the first time on appeal. RAP 2.5(a). Parties are permitted to raise issues for the first time on appeal under certain exceptions to this rule where the claimed error is (1) lack of trial court jurisdiction; (2) failure to establish facts upon which relief can be granted; or (3) manifest error affecting a constitutional right. RAP 2.5(a). A party demonstrates manifest constitutional error by showing that the issue before this court affects that party's constitutional rights and that he suffered actual prejudice. State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020) (citing State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)). To show actual prejudice, the party must make a "'plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

Anderson does not attempt to argue how an exception to RAP 2.5(a) applies. The trial court's ability to empanel a jury on remand to consider aggravating circumstances is grounded in statute. RCW 9.94A.537(4). It is the legislature that holds the power to sculpt sentencing practices. State v. Pillatos, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007). Whether the trial court had the authority to empanel a jury for consideration of sentence enhancements is a statutory question, not a constitutional question.

This exception typically would not allow this court to review Anderson's claim. However, under RAP 1.2(c), the panel generally may waive or alter any rule of appellate procedure "to serve the ends of justice." Moreover, "[i]n a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not

prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

Because both Anderson and the State have requested that this court review the trial court's authority to remand the issue of sentencing enhancement to a jury, we will waive the rule under the authority provided by RAP 1.2(c) and consider the merits of the issue raised by the parties.

Jury Determination

Anderson argues that a trial court has no statutory authority to empanel a jury for a trial on sentencing enhancements under RCW 9.94A.533(7). The State argues that because the sentence enhancement required only the fact of a prior conviction, it does not require a jury determination. Both are correct.

A. Statutory Authority

RCW 9.94A.535(3) provides "an exclusive list of factors that can support a sentence above the standard range." The legislature provides courts the authority to empanel juries to find facts supporting aggravating circumstances.

> In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in *RCW 9.94A.535(3)*, that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

RCW 9.94A.537(2) (emphasis added). However, the enhancement at issue in this appeal was not imposed under the authority of RCW 9.94A.535(3), but under RCW 9.94A.533(7). The legislature made no such provision to allow for a jury to find facts supporting an enhancement on remand under this provision, despite the fact that it did

so for the aggravating factors outlined in RCW 9.94A.535(3). See State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005) (rejecting remand for a jury determination at resentencing on aggravating factors because the legislature had not created an avenue that would allow "juries to be convened for the purpose of deciding aggravating factors either after conviction or on remand after an appeal"). The Washington Supreme Court in Hughes specifically declined to itself create such a procedure because "the fixing of legal punishments for criminal offenses is a legislative function" and that it is not a function of the "judiciary to alter the sentencing process." Id. (citing State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986)); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975). Hughes was published prior to the legislature amending RCW 9.94A.537 to its current form. See LAWS OF 2007, ch. 205, § 1. But the reasoning in Hughes otherwise continues to apply to other circumstances such as sentencing enhancements under RCW 9.94A.533(7).

Thus, the plain language of the statue does not provide a procedure to empanel a jury to consider sentence enhancements on remand. The trial court did not have authority to empanel a jury for the purpose of deciding a sentencing enhancement under RCW 9.94A.533(7).

B. Fact of a Prior Conviction

The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" in order to comply with the Sixth Amendment right to a jury trial. Apprendi, 530 U.S. at 490. It further explained that the statutory maximum is the maximum sentence a

judge may impose without any additional findings. Blakely, 542 U.S. at 303-04. In other words, in order to impose a sentence enhancement or aggravating factor that would increase the penalty faced by the defendant beyond the statutory maximum, any facts supporting such an increase in penalty need to be proved to a jury beyond a reasonable doubt.

In interpreting Apprendi and Blakely, the Washington Supreme Court has held that the exception to the jury requirement under Apprendi applies "*only* for prior convictions" and that where an enhancement requires findings of "new factual determinations and conclusions" beyond "mere criminal history," those findings are required to be made by a jury. Hughes, 154 Wn.2d at 141-42.

However, the Washington Supreme Court has recognized that where a sentence is increased because of prior convictions, as provided by Apprendi, the fact of those prior convictions need not be found by a jury. State v. Wheeler, 145 Wn.2d 116, 123-24 P.3d 790 (2001). In Wheeler, two defendants challenged the trial court's use of two prior convictions to prove the defendants' status as "persistent offenders" under the Persistent Offender Accountability Act of chapter 9.94A RCW. 145 Wn.2d at 117. The defendants argued that under Apprendi, the existence of those prior convictions was required to be proved beyond a reasonable doubt to a jury before the sentence enhancement could be imposed. Wheeler, 145 Wn.2d at 119. The Supreme Court disagreed, noting that while the State is required to prove every element of an offense beyond a reasonable doubt, "traditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime." Id. at 120. "All that is required by the constitution and the statute is a sentencing hearing

where the trial judge decides by a preponderance of the evidence whether the prior convictions exist." Wheeler, 145 Wn.2d at 121 (citing State v. Thorne, 129 Wn.2d 736, 782, 921 P.2d 514 (1996), abrogated on other grounds by State v. Reynolds, 2 Wn.3d 195, 209-10, 535 P.3d 427 (2023)).

The Wheeler court explained that federal cases had redefined some sentence enhancements as elements of a crime that must be proved beyond a reasonable doubt, such as "serious bodily injury" and "death resulting." 145 Wn.2d at 121-22 (citing Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999)). It also noted that the hate crime sentence enhancement at issue in Apprendi required that the sentencing judge find that the "defendant acted with certain prohibited motivations" in order to impose the enhancement. Wheeler, 145 Wn.2d at 122. None of those circumstances apply here.

In the instant case, the sentencing enhancement at issue is not based on existing facts of the current case or even underlying facts of the prior conviction, but on the existence of a prior offense. RCW 9.94A.533(7) provides

> An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

Under RCW 46.61.5055, "prior offense" is one in which a defendant was initially charged with DUI, but ultimately convicted of reckless driving. RCW 46.61.5055(14)(a)(v). The existence of a prior offense is analogous to the prior conviction considered by the court in Wheeler. RCW 9.94A.533(7) and RCW 46.61.5055 provide a definition of a prior offense that qualifies for the sentence enhancement, it does not require a finding regarding the underlying facts of the instant

case, such as a finding of serious bodily injury, death resulting, or motivations behind the crime that would require a jury finding. We conclude that a jury finding was not required to impose the sentence enhancement under RCW 9.94A.533(7) because the prior offense is essentially the same as a prior conviction and both the Washington and United States Supreme Courts have held that it need not be proved beyond a reasonable doubt to a jury in order to impose the enhancement.

In a statement of additional authorities, Anderson cites to the recent Supreme Court of the United States opinion, Erlinger v. United States, No. 23-270 (June 21, 2024), https://www.supremecourt.gov/opinions/23pdf/23-370_8n59.pdf. Erlinger pled guilty to possession of a firearm in violation of 18 U.S.C. § 922(g) and faced a sentence up to 10 years in prison. Id. at 1. However, the government charged Erlinger under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which increased his prison term to a minimum of 15 years and to a maximum of life if he had three prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." Id. at 1-2. At a resentencing hearing,[2] the government based its request for a 15-year sentence based on decades-old burglaries that spanned multiple days. Id. at 3. Erlinger maintained the burglaries had not occurred on four separate occasions but during a single criminal episode. Id. The district court, rejecting Erlinger's request for a jury determination, found the burglaries occurred on distinct occasions. Id. The United States Supreme Court reversed and held that whether the past offenses occurred on three or more different occasions is a fact-laden task to be

[2] The district court vacated Erlinger's previous sentence because the Seventh Circuit issued decisions indicating that two of three prior offenses the government relied on to support a 15-year sentence did not qualify under the ACCA. Id. at 2.

determined by a jury. Id. at 10.

Notably, the Court held that "[w]hile recognizing Mr. Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt, we decide no more than that." Id. at 11. Although the Court criticized its previous holding in Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) (permitting a judge to find the fact of a prior conviction), it recognized that "no one in this case has asked us to revisit Almendarez-Torres." Erlinger, 601 U.S. at 14.

The "Court's opinion in Almendarez-Torres resolves the question of whether a judge may decide if the defendant committed his prior violent offenses on different occasions." In that case, the Court squarely held that either a judge or a jury may apply sentence enhancements based on 'recidivism.'" Id. at 4 (dissenting opinion of J. Kavanaugh) (citing Almendarez-Torres, 523 U.S. at 247). The Alamendarez-Torres court recognized that federal and state governments have long taken different approaches to applying recidivism sentencing enhancements (some provide a jury trial while others assign recidivism enhancements to the sentencing judge) and concluded that the choice between those methods was left to the legislature, not governed by "a federal constitutional guarantee." Id. (citing Almendarez-Torres, 523 U.S. at 246-47).

Erlinger's holding is limited to resolving ACCA's occasions inquiry and does not overrule our state's well-established precedent in Wheeler, 145 Wn.2d. We are not persuaded that a determination as to whether a reckless driving conviction was procedurally amended from a charge of DUI is analogous to an inquiry of the underlying facts of the prior conviction as held in Erlinger.

We agree with the State that Wu, 194 Wn.2d 880, does not suggest that the sentence enhancement imposed on Anderson required a jury determination regarding qualifying prior offenses. In Wu, the Washington Supreme Court held that because an element of the crime of felony DUI in that case is the existence of a prior offense, the jury is required to find those prior offenses beyond a reasonable doubt. Id. at 893. Wu did not address sentence enhancements based on a prior offense and is inapposite here.

We conclude that the courts in Anderson I and Anderson II improperly remanded for the trial court to empanel a fact-finding jury because (1) the issue of a prior offense is a determination of the fact of a prior conviction, which may be found by the trial court and does not require a jury finding; and (2) the trial court had no statutory authority to empanel a jury under RCW 9.94A.533(7). However, this is not an appeal of Anderson II, it is an appeal of the sentence imposed after remand. We affirm that sentence.

Sufficiency

Despite having remanded to the trial court for a jury determination as to whether Anderson's reckless driving conviction was amended from a DUI, Anderson waived what was understood at the time to be his right to a fact-finding jury. Nonetheless, Anderson challenges the sufficiency of the evidence presented at the sentencing hearing. Anderson argues that there was no evidence that allowed the trier of fact to reach the conclusion that the documents admitted as evidence of his prior convictions proved beyond a reasonable doubt that the Anderson at the defense table was the Anderson referred to in the documents because the only connection was the name.

In order to impose the sentence enhancement under RCW 9.94A.533(7), the State was required to show that Anderson had a prior conviction of reckless driving that had originally been charged as a DUI. The best evidence of a prior conviction is a certified copy of a judgment and sentence. State v. Goggin, 185 Wn. App. 59, 70, 339 P.3d 983 (2014) (citing State v. Santos, 163 Wn. App. 780, 784, 260 P.3d 982 (2011)).

In criminal trials, the State generally has the burden of establishing, beyond a reasonable doubt, the identity of the accused as the person who committed the offense. State v. Huber, 129 Wn. App. 499, 501, 119 P.3d 388 (2005). However, we hold here that a fact-finder's determination beyond a reasonable doubt was not required to find the existence of prior offenses required for the sentence enhancement. As a result, the trial court was only required to find the prior offenses by a preponderance of the evidence. Wheeler, 145 Wn.2d at 121.

To support this enhancement, the State admitted four certified documents related to a 2005 conviction of "Nicholas Anderson" for reckless driving. The State provided no other evidence and introduced no witnesses. The documents show that the defendant in that case was originally charged with DUI, which was subsequently amended to reckless driving prior to a plea of guilty. Anderson presented no rebuttal evidence, but argued in closing that the State's evidence was insufficient.

In State v. Ammons, a group of appellants challenged the State's use of certified copies of prior convictions to support sentence enhancements, arguing that the State was required to make "some showing that the defendant before the court for sentencing and the person named in the prior conviction are the same person." 105 Wn.2d at 190. The Ammons court held, under a preponderance of the evidence standard, "the identity

of names is sufficient proof" to support the sentence enhancement, but a defendant could rebut that evidence with a "declaration under oath that he is not the same person named in the prior conviction." Id. at 190. Should the defendant submit such an oath, the State is required to prove the identity of the defendant by independent evidence. Id.

Here, as in Ammons, Anderson did not argue that he was not the same person as the one named in the prior offenses, but argued that the State had not met its burden to prove identity. Anderson presented no evidence asserting that he was not the person named in the certified copies of prior convictions used to prove the prior offenses for the purpose of the sentence enhancement.

We conclude that the State's use of certified copies of Anderson's prior convictions was sufficient evidence to support the sentence enhancement under the applicable preponderance of the evidence standard.

Restitution Interest

Anderson next argues that the trial court erred in imposing restitution interest on him in his judgment and sentence because he is an indigent defendant.

The State argues that restitution interest is not a "cost" under the holding of Ramirez. This court has previously found that "restitution interest is analogous to costs for purposes of applying the rule that new statutory mandates apply in cases . . . that are on direct appeal" because "[l]ike the costs imposed in Ramirez, restitution interest is a financial obligation imposed on a criminal defendant as a result of a conviction." State v. Reed, 28 Wn. App. 2d 779, 782, 538 P.3d 946 (2023).

Restitution interest was imposed on Anderson in the judgment and sentence entered in 2017. While Anderson's appeal was pending, the legislature amended RCW

10.82.090, authorizing the superior court to elect not to impose interest on any court-ordered restitution based on factors such as indigency. LAWS OF 2022, ch. 260, § 12; RCW 10.82.090(2). Relying on State v. Ramirez, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018), Division Two of this court determined that this amendment applies to cases on direct appeal at the time it came into effect. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (citing Ramirez, 191 Wn.2d at 748-49).

As in Reed, Anderson is indigent and his case was pending on direct appeal when the amendment to RCW 10.82.090 went into effect. Accordingly, we remand for the trial court to consider the application of the amendment and exercise its discretion.

VPA

Anderson also challenges the imposition of the VPA because he is an indigent defendant. The State does not object to the striking of the VPA.

Under RCW 7.68.035(4), enacted in July 2023, trial courts are required to waive the VPA if the defendant is indigent as defined in RCW 10.01.160(3). This court has applied this waiver to cases pending direct appeal at the time the law went into effect. See Ellis, 27 Wn. App. 2d at 16-17 (citing Ramirez, 191 Wn.2d at 748-49).

We remand to the trial court to strike the VPA.

Statement of Additional Grounds

In a Statement of Additional Grounds, Anderson challenges the use of blood test evidence in his trial, arguing that his attorney provided ineffective assistance of counsel for failing to object to the evidence. Anderson also argues that he was not advised of his rights before the police responding to the scene of the vehicle accident obtained a blood sample, therefore the sample did not support probable cause for his arrest.

We cannot consider matters outside the record on a direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition.").

CONCLUSION

We remand to the trial court to strike the VPA and reconsider the order for restitution interest following amendments to RCW 10.82.090. We otherwise affirm.

Coburn, J.

WE CONCUR:

Brennan, J.

Smith, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84550-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 21, 2024

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