No. 85469-6

Stephens J. (concurring)—While I agree with the majority that Brian Siers's conviction stands, I disagree with its analysis. The majority is too quick to seize this opportunity to overrule *Powell*. In doing so, it overlooks the fact that *Powell*'s rule does not even apply to this case.

In *State v. Powell*, five justices agreed that aggravating factors must be charged in the information and proved to a jury before an enhanced sentence may be imposed. 167 Wn.2d 672, 688, 223 P.3d 493 (2009) (plurality opinion) (Stephens, J., concurring). This requirement stems from the Sixth Amendment, which endows criminal defendants with the right "to be informed of the nature and cause of the accusation" so they might defend against it. U.S. Const. amend. VI. As the Supreme Court has recognized, "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason.'" *Blakely v. Washington*, 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)

(quoting 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 87, at 55 (2d ed. 1872)).

An "accusation in reason" requires simply this: any fact essential to the punishment is essential to the charge. The notion that it is permissible for prosecutors to charge only bare-bones crimes in the formal charging document, while amassing aggravators elsewhere, is at odds with the guarantee of an "accusation" notifying the defendant of its "nature." To comport with the Sixth Amendment, a defendant must be able to discern—from the charging document alone—his maximum potential sentence. This is evident from the constitutional text, which speaks of a (singular) "accusation." *Cf. Blakely*, 542 U.S. at 311 ("Any evaluation of *Apprendi*'s[1] 'fairness' to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment.").

It is equally clear that when a defendant's ultimate sentence is in accordance with the allegations in the charging document, there is no Sixth Amendment violation. Our decision in *Powell* explained that aggravating factors must be charged "*in order to obtain an enhanced sentence*." *Powell*, 167 Wn.2d at 690 (Stephens, J., concurring) (emphasis added); *see also id.* at 694 (Owens, J. dissenting) ("All of these [aggravating] factors expose defendants to increased

[1] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

punishment beyond the statutory maximum. Thus, the aggravating circumstances must be considered essential elements of the crime."); *accord Apprendi*, 530 U.S. at 490 ("Other 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." (emphasis added)).

In short, nothing in *Powell* intimates that failing to charge an aggravating factor, when that factor is not relied on to impose an enhanced sentence, is reversible error. As Judge Stephen Dwyer noted in his dissent, *Powell* is not implicated here. *State v. Siers*, 158 Wn. App. 686, 706, 244 P.3d 15 (2010) (Dwyer, C.J., dissenting). Siers was convicted and sentenced in accordance with the jury's verdict on second degree assault, following the proper charging of that crime in the information—no enhanced sentence was sought or imposed. Simply put, this case does not present a *Powell* problem. Because there was no *Powell* error, the court should reverse the Court of Appeals and reinstate the trial court's judgment and sentence.

Because this case does not implicate *Powell*'s holding, reconsideration of that holding is completely unnecessary. We should not lightly accept invitations to overrule precedent. *See State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). Instead, we ought to acknowledge the important "stabilizing effect" of stare decisis. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). We have been mindful to respect this doctrine's role to "'"promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on

judicial decisions, and contribute to the actual and perceived integrity of the judicial process."'" *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quoting *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720, *reh'g denied*, 501 U.S. 1277, 112 S. Ct. 28, 115 L. Ed. 2d 1110 (1991))). Lest our law "become subject to incautious action or the whims of current holders of judicial office," we have required a clear showing that precedent is incorrect and harmful before abandoning it. *Stranger Creek*, 77 Wn.2d at 653. Stare decisis counsels courts to maintain fidelity to precedent and to reconsider decisions with only the greatest of caution and reluctance.

But here, the majority eagerly discards a decision whose rule is not even implicated by the case being reviewed. In electing to abandon our precedent, the majority grasps to find our previous decision "harmful." It does so by predicting a parade of horribles—a parade which *Powell* itself ensures will never come to pass.

To show harm, the majority concurs with an Alabama intermediate appellate court's concern that convictions will be voided if sentencing enhancements are considered essential elements. Majority at 13. As discussed above, nothing in *Powell* suggests that an underlying conviction is impaired when an aggravating circumstance is not charged. *Powell* plainly holds aggravating factors are the functional equivalent of elements that need be charged only "to obtain an enhanced sentence." *Powell*, 167 Wn.2d at 690 (Stephens, J., concurring).

The majority also raises the specter of overcautious prosecutors burdening

defense counsel by needlessly charging "all possible aggravators" only to drop them prior to trial or at sentencing. Majority at 12. The majority warns that defense counsel will then be forced to overprepare, "wast[ing] valuable judicial resources and impos[ing] too heavy a burden on the criminal justice system." Majority at 13.

This argument proves too much. As an initial matter, RCW 9.94A.537(1) requires pretrial notice of any aggravating factors. All that *Powell* changed was to require this notice appear in the information, as opposed to some other document. Given that the information can be amended anytime prior to verdict where the defendant's substantial rights are not prejudiced, *State v. Barnes*, 146 Wn.2d 74, 81-82, 43 P.3d 490 (2002), it is hard to see how the *Powell* rule would create extra work. Moreover, prosecutors frequently charge defendants with substantive crimes that they ultimately dismiss, before or during trial, for strategic reasons. I daresay defense counsel greatly prefer over-preparation to a last-minute scramble.

In short, the majority exaggerates the "harm" at issue to justify overruling *Powell*, instead of laying bare the fact that a majority of this court has simply reconsidered the same arguments heard—and rejected—in *Powell*. This approach is at cross-purposes with the values underlying stare decisis, which is "'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.'" *Citizens United v. Fed. Election Comm'n*, ___ U.S. ___, 130 S. Ct. 876, 920-21, 175 L. Ed. 2d 753 (2010) (quoting *Vasquez v. Hillery*¸ 474 U.S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)).

Erratic changes in the law trivialize our precedent and undermine our

institutional integrity. While I would uphold the rule in *Powell* on its merits, I am presently more concerned with the ease with which the majority unsettles the law. Siers's appeal should be resolved without resorting to the *Powell* rule. Moreover, I am unconvinced that *Powell* was both incorrect and harmful. I would affirm Siers's conviction on the ground that there is no error implicating *Powell* and leave our precedent intact.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

Justice Charles W. Johnson

Justice Tom Chambers

Justice Susan Owens