



form of STATEMENT OF ADDITIONAL GROUNDS FOR  
REVIEW.

Respectfully submitted on this 22<sup>th</sup> day, August 2011.



COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

No. 41005-2-II

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

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OZIEL VILLEAR SUAREZ,  
APPELLANT,

v.

STATE OF WASHINGTON,  
RESPONDENT.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THE COUNTY OF PIERCE  
THE HONORABLE JUDGE LINDA LEE PRESIDING

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PRO SE MEMORANDUM BRIEF TO SUPPORT THE  
STATEMENT OF ADDITIONAL GROUNDS

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APPELLANT/PRO SE  
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GROUND ONE

The assault charge must be **dismissed** because it violates due process when the charge was not defined in initial indictment.

The Constitution of the United States Amendment V states in part that an accused will not be deprived of liberty without due process, XIV alludes the same rights to an accused.

The Constitution of the State of Washington Article 1 section 3 invokes the same regarding due process.

Appellant was convicted of a crime that was not defined in his initial indictment/information. The charge in question is assault in the first degree.

The legislature has criminalized assault; however it has not defined that crime. Instead, it has allowed the Judiciary branch to define the core meaning of the crime; the judiciary has done so, enlarging the definition over a period of many years. This violates the separation of powers, thus violating due process because of not being define by the legislature branch.

At the turn of the last century, Washington's criminal code included a definition of assault. In 1906 the Supreme Court noted that "An assault is defined by the code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." State v. McFadden, 42 Wash. 1 at 3, 84P. 401 (1901). In 1901, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code §§ 2746) "was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act." Howell v. Winters, 58 Wash. 436 at 438, 108 Pac. 1077 (1901). In the absence of a statutory definition from the common law, quoting from treatise on torts:

"An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the

pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; 'a right to live in society without being put in fear of personal harm.'" Cooley, Torts (3d ed.) P.278  
Howell v. Winters, at 438.

The common law definition was broader in scope than the pre- 1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by Howell v. Winters was approved by the Supreme Court for use in a criminal case. In State v. Shaffer, 120 Wash. 345 at 348-350, 207 P.229 (1922), the Supreme Court, consistent with its holding in Howell v. Winters, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases

from 1942. Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; State v. Rush, 14 Wh. 2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from Shaffer, supra. State v. Rush, at 140.

Thirty years later the core definition of "assault" expanded further, again without any input from the legislature. This expansion appeared in dicta in the Supreme Court's opinion in State v. Frazier, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case the Court (in dicta) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in United States v. Rizzo, 409 F.2d 400, 403 (7th Cir. 1969). cert. denied, 396 U.S 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault.

The second concept is that an assault is 'committed merely by another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

State v. Frazier, at 630-631.

Following Frazier, Washington's judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). See, e.g., State v. Garcia, 20 Wn. App. 401 at 403, 579 P.2d 1034 (1978); State v. Strand, 20 Wn. App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. See WPIC 35.50; see also State v. Nicholson, 119 Wn. App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the

judiciary has stepped in to fill the vacuum and has undertaken to define the crime. Thus violating appellant's right to be informed of what the crime is by the Legislature. Violating Due Process. The statutory and judicial scheme under which appellant was convicted is unconstitutional; his conviction must be reversed and the charge dismissed with prejudice.

#### GROUND TWO

##### INEFFECTIVE ASSISTANCE OF COUNSEL

The issue on this ground is the fact that Cleary gave inconsistent statements to law enforcement. The statements were inconsistent to his testimony on the witness stand. His testimony was a fact of consequence to the action. Yet the attorney remained seated lethargically & oblivious to the prejudice that was occurring. He did not object or move to impeach the witness under ER 607.

The witness at the stand had reason and motive to fabricate because the state had provided a plea agreement if he testified against appellant. Had he not accepted the plea agreement Cleary would

have faced charges with its complete consequence of a double firearm enhancement for previously being convicted with a gun enhancement and facing a long prison sentence due to a lot of points in his record regarding previous convictions.

Defense attorney had the evidence to move to impeach this witness on credibility because it was a fact of consequence to the action. Credibility of witness was dubious and would have helped appellant so that jury can assess the inconsistent statements and plea agreement which was evidence to impeach.

Because defense attorney did nothing to impeach, appellant was prejudiced in the eyes of the jury making him appear guilty on all charges. Which resulted in a finding of guilty verdicts on all counts, rendering ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls

bellow an objective standard of reasonableness.

Statev. Stenson, 132 Wn. 2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 532 U.S. 1008 (1998).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyer's performance was so deficient that he was deprived "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudice his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996).

a. Failure To Impeach

Appellant's trial counsel performance was deficient when he did not challenge the witness of his credibility. It was relevant because this was an adverse witness. This adverse witness gave statements in the initial proceedings. However at the stand he had changed his story.

The performance of the attorney was deficient because trial counsel should have used the initial statements and call the officers who took the statements; then could have compared the statements to the testimony

which were inconsistent to each other. Counsel had every arsenal of legal procedure to discredit the adverse witness under ER 607, 608, 609 and impeach the witness. He should have alluded to the fact that witness had reason to fabricate any tale against appellant by showing the plea agreement that the state dispensed to witness in return that he testify against appellant.

Either counsel was oblivious of the ER impeach procedure or his glaring deficient performance was done callously not concerned about the defense of appellant.

If the jury does not see a defendant's attorney participate to defend against a state witness; the jury would assume that what the adverse witness is testifying is true. Not taking in consideration that the adverse witness had reason to be mendacious because he would have faced a double firearm enhancement and a long sentence due to his criminal history which would score high in the point system. This prejudiced appellant because Cleary was not impeached.

Reasonable probability that the outcome of trial would be different if the adverse witness would

have been impeached & the plea agreement that the adverse witness accepted be brought to the attention to the jury. This would have discredit the witness resulting in reasonable doubt.

b. Failure To Confront Witness

Both the federal and state constitution guarantee the right to confront adverse witnesses. U.S. Const. Amend. VI; Wash. Const. Art. I §22; State v. Darden, 145 Wn. 2d 612, 620, 41 P.3d 1189 (2002). Great latitude must be allowed in cross examining a key prosecution witness, particularly an accomplice who has turned States witness, to show motive for testimony. State v. Brooks, 25 Wn. App. 550, 551, 611 P.2d 1274 (1980). The right of cross-examination allows more than asking general questions concerning bias, it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974).

The record is clear that the adverse witness picked up appellant on his truck. He saw appellant approached the vehicle during broad daylight. He alleged that he had no knowledge of a crime was about to happened; and that somehow appellant sneaked an Ak 47 into his

truck. It would be impossible to hide in his person a rifle nearly the size of 2 1/2 ft., unless he was wearing a trench coat.

The statements & testimony that Cleary gave were knowingly to be inconsistent and reasonably given to save himself to the full prosecution of the state. Although the judge, state, & defense knew the glaring inconsistencies of criminal participation & history of Cleary; the jury was not apprised to these facts of the adverse witness.

The defense attorney was deficient because he did not perform at a reasonable level to confront witness and make the jury aware of this adverse witness's dubious background.

Because of the passive performance by defense attorney in not performing the right to confront an adverse witness, appellant was prejudiced because it appeared that the adverse witness was not being reasonably confronted. The result was guilty on all counts.

c. Cumulative Prejudice

The 9th Cir. has found on Harris By and Through

Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995) that counsel's numerous deficiencies amount to cumulative prejudice.

In addition to a, b, issues of ineffective assistance of counsel, appellant's counsel demonstrated other numerous deficiencies that resulted in prejudice.

They are:

- (i) failed to request a separate trial from a co-defendant.
- (ii) failed to file a motion in limine to impeach a witness with prior criminal history.
- (iii) failed to request a WPIC 5.06 Jury Instruction of Prior-Conviction-Impeachment of Witness.
- (iv) failed to acquire the medical records when appellant was at hospital being interviewed while heavily medicated. Thus resulted that judge allowed the statements be admissible because defense did not provide proof appellant was medicated during interview.

With the issues of a, b, & c, the total is six deficiencies that counsel prejudiced appellant. The plethora and gravity of counsel's deficiencies rendered appellant's trial fundamentally unconstitutional of right to effective counsel. Absent the

deficiencies the outcome of trial might well have been different.

Because of the two standard prong of Strickland being met. This Honorable Court should remand for a new trial.

### GROUND THREE

STATUTE RCW 9.94A.509 & RCW 9.94A.535(2)  
ARE REPUGNANT TO BLAKELY. RCW 9.94A.535  
(2) CONFLICTS WITH THE BLAKELY DECISION,  
VIOLATING DUE PROCESS

The U.S. Const. V. Amend. & Wash. state Const. Art. I § 3 guarantees Due Process in a criminal trial procedure. This has been fortified with the Blakely v. Washington precedent.

Appellant asserts that his right to Due Process has been violated when the court imposed consecutive sentences. Consecutive sentences are allotted pursuant to RCW 9.94A.509, which states in part...."imposed on the exceptional sentence provision of RCW 9.94A.535." However RCW 9.94A.535 (2) states in part ...."The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury." This clause is flawed according to the decision in Blakely v. Washington, 542 U.S. 296, 124

S.Ct. 2531, 159 L.Ed 2d 403 (2004).

ANALYSIS:

A. Repugnancy:

RCW 9.94A.589

...consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535

RCW 9.94A.535 (2)

....The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury

When the above RCWs are applied according to its law, the contradiction manifest itself to Blakely because RCW 9.94A.589 implies that consecutive sentences may only be imposed under an aggravated exceptional sentence without a finding of fact by a jury. The part which states without a finding of fact by a jury has been struck down by the Blakely decision. But RCW 9.94A.599 infers clearly that consecutive sentences are exceptional sentences.

Blakely v. Washington does not allow exceptional sentences to be impose without a finding of fact by jury. Blakely specifically states a jury must find the fact finding to impose an exceptional sentence. RCW 9.94A.589 specifies consecutive sentences to be impose under exceptional sentences under RCW 9.94A.535 (2) which states the clause 'without a finding of fact by a jury', contradicting Blakely.

Due to this contradiction appellant's sentence stands invalid on its face. Remedy for this issue is to remand so that sentences be run concurrently. This would remedy the violation of Due Process because appellant recieved consecutive setences which according to RCW 9.94A.509 language indicates that it is an exceptional sentence.

B. DUE PROCESS

RCW 9.94A.509 clearly states that "consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535."

Appellant Due process was violated because the judge found a factor that made her decide arbitrarily to impose consecutive sentences. What factor the judge found is unbeknownst to appellant?

Due Process requires that whatever factor the judge found to impose a consecutive sentence should be also found by the jury because there is a difference between consecutive & concurrent sentences,

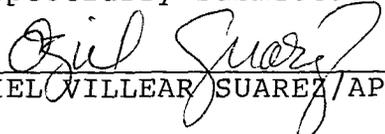
The only recourse to ameliorate this issue is to remand for resentencing because both RCWs contravenes the Due Process law & the precedent of Blakely which now both RCWs contradict the Blakely decision.

This Honorable court should remand for resentencing on the merit of this issue and run the sentences concurrent.

#### CONCLUSION

Due to the merits of these issues stated in SAG appellant request that this Honorable grant what is requested on each issue.

Respectfully submitted this 29th day of August 2011.

  
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OZIEL VILLEAR SUAREZ/APPELLANT PRO SE

**DECLARATION OF SERVICE BY MAIL  
GR 3.1(c)**

I, OZIEL VILLEAR SUAREZ, declare that, on this 22 day of August, 2011. I deposited the forgoing documents:

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW  
with  
Pro Se Memorandum Brief

or a copy thereof, in the internal legal mail system of  
Clallam Bay Corrections Center

COURT OF APPEALS  
DIVISION II  
11 AUG 24 AM 11:38  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

And made arrangements for postage, addressed to: (name & address of court or other party.)

<u>Court Clerk</u>	<u>Carol Elewski</u>	<u>Prosecuting Attorney</u>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Clallam Bay, Wa on 08/22/11  
(City & State) (Date)

  
Signature  
OZIEL VILLEAR SUAREZ  
Type / Print Name

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AUG 25 2011

#41005-2

Mr. David Ponzona,

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

I'm writing to inform you that I've made two simple errors in the brief that I missed to correct before sending the brief.

1) 3rd to the last page of brief, center of last paragraph I meant RCW 9.94A.589 and not .599

2) That there is 16 pages in the brief and not 15 pages.

Please forgive me for my errors. Thank you for your time.

Sincerely  
Oziel Suarez  
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