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

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STATE OF WASHINGTON,  
Appellant/Cross Respondent,  
  
v.  
  
J.D.,  
Respondent/Cross Appellant.

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**AMENDED OPENING BRIEF OF RESPONDENT/CROSS APPELLANT**

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Appeal From the Superior Court of Pierce County  
The Honorable Elizabeth Martin

No. 17-1-00028-8

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**I. IDENTITY OF RESPONDENT/CROSS APPELLANT**

The Respondent/Cross Appellant is J.D.

**II. INTRODUCTION**

The State of Washington, the Appellant and Cross Respondent in this matter, charged J.D. with three counts of rape of a child in the second degree. CP 2-3. In support of these charges, the State alleged that J.D. engaged in three acts of sexual intercourse with A.G. when J.D. was 16 or 17 years old and A.G. was 12 years old. At the outset of the proceedings, the State entered a stipulation agreeing that the matter should remain subject to the provisions of the Juvenile Justice Act (“JJA”), RCW 13.40.010, et seq.

The State then proceeded through trial, resulting in verdicts of guilty as to all counts. Then, at the hearing set for disposition, the prosecutor requested that the case be dismissed without prejudice so it could recommence prosecution against J.D. as an adult, advising the court that she realized the night prior that J.D. turned eighteen prior to trial and defense counsel failed to formally move for extension of the application of the JJA. Recognizing the “mutual mistake” that was made, the trial court rejected the State’s belated request, instead ordering that JJA application be extended retroactively to J.D.’s 18th birthday, as all parties had intended from the outset. The State now appeals this

determination, arguing that it should be permitted to re-prosecute J.D. as an adult, despite this argument being directly precluded by the Supreme Court's opinion in State v. Maynard, 183 Wn. 2d 253, 351 P.3d 159 (2015) and by basic considerations of justice.

J.D. has also cross appealed. In the event this Court accepts the State's argument on appeal, that the court erred in retroactively extending JJA application, the same result nonetheless ensues because this would necessarily mean that defense counsel was ineffective for failing to move for an extension. Additionally, the trial leading to his conviction was replete with reversible error, warranting reversal for retrial in juvenile court. Specifically, the court allowed the State to elicit testimony from 9 separate witnesses, over repeated objection, regarding A.G.'s "prior consistent statements" despite the inapplicability of any hearsay exception. The court also erroneously allowed the admission of J.D.'s unmirandized custodial statement. Therefore, J.D. respectfully requests that this Court uphold the trial court's retroactive extension of JJA application, reverse J.D.'s convictions and sentence, and remand for further juvenile court proceedings.

### **III. STATEMENT OF FACTS RELATING TO THE STATE'S APPEAL**

On August 7, 2017, J.D. was charged by information with three counts of rape of a child in the second degree for three instances of

alleged sexual intercourse with A.G., a 12-year-old minor at the time of the alleged acts. CP 1-3. The State alleged that these three instances occurred sometime between September 1, 2016 and May 16, 2017. CP 1-2. J.D. was also a minor during this charging period, 16 years of age at the outset and then turning 17 years of age on January 5, 2017.

On September 25, 2017, the parties entered Stipulated Findings of Fact, Court's Waiver of Mandatory Decline Hearing, and Agreed Order Retaining Juvenile Court Jurisdiction. CP 34-38. In the Stipulation, the parties agreed that pursuant to the so-called Kent factors, the matter should remain subject to juvenile court jurisdiction rather than transferring jurisdiction to adult court. CP 34-38 (citing Kent v. United States, 383 U.S. 541, 16 L.Ed.2d. 84, 86 S.Ct 1045 (1966)). Specifically, the parties agreed "that retention of [juvenile court] jurisdiction is in the best interest of [J.D.] and the public". CP 37. The court accepted the parties' stipulation, thus retaining juvenile court "jurisdiction." CP 38.

On January 5, 2018, while the case remained pending, J.D. turned 18 years old. The court and the parties failed to note this event and thus proceeded under the JJA without formally moving for an extension of application of the JJA. See CP 109-113.

The matter came on for trial on February 27, 2018, before the juvenile court sitting without a jury. On March 5, 2018, the court found

J.D. guilty of three counts of rape of a child in the second degree. CP 83, 125; 03.05.2018 VRP 5-6.

On March 23, 2018, the matter proceeded to disposition. 03.23.2018 VRP 1-36. However, at the outset of the hearing, the prosecutor advised the court that she “realized”, for the first time, that J.D. turned 18 during the course of the proceedings and defense counsel failed to extend jurisdiction. 03.23.2018 VRP 2-3. Accordingly, the prosecutor asserted that the court “does not have jurisdiction over this matter”. 03.23.2018 VRP 2-3. She further noted that no one, including the defense and probation, recognized the situation. 03.23.2018 VRP 3. The prosecutor accordingly requested that the court dismiss the matter without prejudice to be refiled in “adult” court, asserting that the proceedings to date were “null and void”. 03.23.2018 VRP 3-4, 6. Defense counsel objected, arguing dismissing the case at this stage and refile in “adult” court would constitute constitutional error. 03.23.2018 VRP 4-5. The court recessed to allow the parties to further research and brief the issue, and a subsequent hearing was held on April 6, 2018. 03.23.2018 VRP 7-9.

Following trial, during a hearing on March 23, 2018, the State advised that it intended to move to dismiss the disposition of guilt with prejudice in juvenile court so it could refile the case in adult court. See

CP 109. Having already proceeded through trial to conviction without raising the issue, the State argued that it was entitled to pursue its prosecution again in adult court because defense counsel failed to move to extend the juvenile court's jurisdiction upon J.D.'s 18th birthday pursuant to RCW 13.40.300(1)(a). CP 109. Defense counsel opposed the State's motion on the grounds that the Supreme Court of Washington expressly foreclosed refiling in adult court on constitutional grounds under materially indistinguishable circumstances in Maynard, 183 Wn. 2d 253. CP109-113.

On April 6, 2018, the matter proceeded to argument on the State's motion to dismiss without prejudice, and then on to disposition. CP 126-132. At the April 6 hearing, the State maintained "both parties clearly intended that this matter stay within the juvenile justice realm". 04.06.18 VRP 3. The State further represented "it seems clear to me that had the State noticed, or probation or the Court, that that order extending jurisdiction would have been granted. We just didn't get there." 04.06.18 VRP 4.

The court ruled, pursuant to Maynard, that it had authority to remedy the failure to extend application of the JJA, which it could do most effectively and efficiently by entering an order retroactively extending JJA application. 04.06.208 VRP 5. In support of this ruling,

the court quoted from Maynard, “[t]he only absolute prohibition we see to applying the Juvenile Justice Act is when the defendant allegedly committed the crime after the age of 18”, and “we see no prohibition to extending the Trial Court's authority to apply provisions of the Juvenile Justice Act as a remedy for the violation of a juvenile's right to effective assistance of counsel.” 04.06.2018 VRP 6-7. The court reasoned further that not applying the Juvenile Justice Act “would be extraordinarily prejudicial to J.D.,” and would effectively deny J.D. of his Sixth Amendment right to effective assistance of counsel. 04.06.2018 VRP 7-8. In response to the court’s ruling, the prosecutor said “that’s perfectly fine with the State”. 04.06.2018 VRP 8.

Accordingly, the court proceeded to disposition under the JJA, imposing a standard range sentence of 15-36 weeks commitment to the Department of Social and Health Services, Division of Juvenile Rehabilitation, as to each count to run consecutively, for a total sentence of 45-108 weeks. CP 126; 04.06.2018 VRP 17-27. In imposing its sentence, the court noted that J.D. was assessed at low risk, but that its discretion was limited by statute. 04.06.2018 VRP 22, 27. The court did however delay J.D.’s report date so that J.D. could finish high school before his period of commitment was to begin. 04.06.2018 VRP 27-29.

The court stated in its written judgment that “JURISDICTION is extended beyond the age of eighteen (18) to accomplish this order” and that “Court extends juvenile jurisdiction retroactively by nature of this matter and intent of all parties as of January 4, 2018”. CP 130.

The State now appeals the court’s extension of JJA application, having filed a notice of appeal on April 12, 2018. CP 140-41.

**IV. SUMMARY OF ARGUMENT IN OPPOSITION TO THE STATE’S APPEAL**

The State’s attempt to prosecute J.D. as an adult after already stipulating to prosecute him as a juvenile, and in fact doing so all the way through trial to conviction, fails on multiple grounds. In addition to basic considerations of justice, the State’s argument must be rejected under controlling Washington law, as this precise argument was explicitly rejected in Maynard. The State’s argument relies on a misreading of that case, believing, incorrectly, that the Court in Maynard remanded for further proceedings treating the defendant as an adult, when in fact it remanded “for further proceedings in accordance with the JJA”, i.e. for further proceedings in juvenile court. The trial court was required by Maynard to retroactively apply the JJA to J.D.’s case to remedy his counsel’s ineffectiveness, and it did not err in so doing.

The State further confuses the concept of juvenile court “jurisdiction”, failing to recognize, as the Supreme Court has

recognized, that “jurisdiction” in this context means authority to apply the JJA, and does not refer to anything like personal, territorial, or subject matter jurisdiction. Thus, there is no basis for the State’s contention that the proceedings below were “null and void” due to the court’s application of the JJA. Pursuant to Maynard, the trial court properly remedied defense counsel’s ineffectiveness by retroactively applying the JJA and should be affirmed on this point. Even if the trial court committed an error, the State is barred from making the arguments it presents on appeal under the doctrines of judicial estoppel, waiver, and/or laches, as it proceeded to prosecute J.D. pursuant to the JJA despite its knowledge of his date of birth.

## V. ARGUMENT

### A. **The trial court had authority to retroactively extend JJA application**

The trial court acted well within its legal authority in retroactively extending application of the JJA after the State raised the issue of J.D.’s 18 birthday after trial and at a hearing intended for disposition. In fact, this was the trial court’s only option, as it would have been reversed if it made J.D. suffer the consequences of his attorney’s failure to extend jurisdiction.

The State’s contrary argument, seeking leave to refile in “adult court”, is based on fundamental misapprehensions of the Court’s decision

in Maynard and of the concept of juvenile court “jurisdiction”.

Specifically, the State incorrectly believes that the Court in Maynard remanded to the superior court to prosecute the defendant as an adult, when in fact the Court remanded “for further proceedings in accordance with the JJA,” i.e. for further proceedings in juvenile court. Pursuant to Maynard, the trial court properly remedied J.D.’s attorney’s deficient performance by retroactively extending JJA application, and the State’s contrary argument must be rejected.

In Maynard, the defendant was arrested for criminal mischief days after his 17th birthday. Maynard, 183 Wash. 2d at 257. The State delayed charging him by information in juvenile court until only a month before his 18th birthday. Id. at 257. Defense counsel failed to recognize that her client’s 18th birthday was rapidly approaching, and thus failed to file for an extension of JJA application. Id. at 257-58. Because the birthday passed without an extension of jurisdiction, the juvenile court dismissed the case without prejudice and the prosecutor refiled in superior court. Id. The defendant moved to dismiss the superior court case, arguing that he was prejudiced by the State’s preaccusatorial delay or, alternatively, that he received ineffective assistance of counsel due to counsel’s failure to extend juvenile jurisdiction. Id. The trial court dismissed the case with prejudice. Id. The Court of Appeals reversed, holding that defense counsel

was ineffective, but that the proper remedy was remand for trial as an adult rather than dismissal with prejudice. Id.

The Supreme Court accepted discretionary review and reversed the Court of Appeals, holding that the remedy of remand for trial as an adult would fail to undue the constitutional harm wrought by defense counsel's ineffectiveness, and thus would be inadequate. Id. at 259. Specifically, the Court held the remedy offered by the Court of Appeals, namely remand for trial as an adult, was "no remedy at all." Id. at 281.

The Court began its inquiry citing the principle that remedies for ineffective assistance of counsel "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Maynard, 183 Wn. 2d at 261 (citing United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)). It then proceeded to analyze what limitations, if any, the provisions of the JJA impose on fashioning such a remedy, ultimately concluding that no such limitations applied under the circumstances. Id. at 262-63.

At the outset of its analysis, the Court recognized that "jurisdiction", as that word is used in the JJA, does not actually mean jurisdiction in the ordinary sense of personal, territorial, or subject matter jurisdiction. This is the point the State's argument fails to appreciate in its appeal in this matter, mistakenly believing that JJA "jurisdiction" is

tantamount to personal jurisdiction. This is not the case. Rather, because juvenile courts and superior courts “are not separate and distinct”, juvenile court “jurisdiction” is more properly understood as “authority”, specifically the court’s authority to apply the provisions of the JJA in a given case. Id. at 262-63.

Given this understanding of the word “jurisdiction” in the context of the JJA, the Court recognized “[t]he only absolute prohibition we see to applying the JJA is when the defendant allegedly committed the crime after the age of 18.” Id. at 263 (citing RCW 13.40.300(4)). Thus, the Court held “[u]nder the circumstances of this case, we see no prohibition to extending the trial court's authority to apply provisions of the JJA as a remedy for the violation of a juvenile's right to effective assistance of counsel”, and remanded “for further proceedings in accordance with the JJA.” Id. at 263-64.

In this appeal, the State is asking this Court to impose the remedy that the Supreme Court expressly rejected in Maynard, namely, remand for trial as an adult. As recognized in Maynard, this course of action would deprive the defendant of his Sixth Amendment right to effective assistance of counsel, as it would fail to offer any remedy for counsel’s failure to promptly extend application of the JJA (also misleadingly referred to as extending “juvenile court jurisdiction”). Instead, the proper remedy for

J.D.'s counsel's deficient performance is precisely the remedy applied by the trial court, namely, retroactively extending application of the JJA. Therefore, the trial court's ruling on this point should be affirmed.

In misreading the holding in Maynard to support a contrary conclusion, the State mistakenly believes there is some sort of difference between juvenile court proceedings and "proceedings in accordance with the JJA". Based on this misunderstanding, the State apparently believes the Court in Maynard remanded to the superior court to have the defendant tried as an adult, but with the JJA's provisions controlling. This is nonsensical. When the JJA controls, the superior court acts in its juvenile court capacity. Indeed, the word "court" under the JJA is defined as "the juvenile court judge(s) or commissioner(s)".

The State is now trying to invent a new hybrid proceeding, where the court can, at its whim, apply various provisions of the JJA, or provisions governing non-juvenile criminal proceedings, or a combination of the two. Specifically, the State believes that applying the remedy fashioned in Maynard to the instant case would mean that, on remand, "[t]he superior court will [...] have the full panoply of appropriate remedies available to it-and the adult J.D. will retain the right to his as-yet-unwaived trial by jury." State's Br. at 8. It is clear from the holding in Maynard, however, that the court on remand was not authorized to employ

“the full panoply of appropriate remedies to it,” and was not authorized to conduct an “adult” trial by jury.

The JJA provides for adjudicatory hearings before the court, sitting without a jury, as the finder of fact. RCW 13.40.130. There is no right to a trial by jury in the course of proceedings under the JJA because such proceedings are not treated as “criminal prosecution” for purposes of the Sixth Amendment. See State v. Tai N., 127 Wash. App. 733, 738, 113 P.3d 19, 22 (2005) (recognizing that “juvenile offenders do not have a right to jury trials under the Washington Constitution” and “[j]uvenile adjudicatory proceedings have never been equated with a "criminal prosecution" for purposes of the Sixth Amendment.) (citing McKeiver v. Pennsylvania, 403 U.S. 528, 541, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987); Monroe v. Soliz, 132 Wn.2d 414, 939 P.2d 205 (1997); State v. Lawley, 91 Wn.2d 654, 591 P.2d 772 (1979)).

Consequently, when the Maynard Court remanded “for further proceedings in accordance with the JJA”, the trial court, pursuant to the JJA, was to conduct a juvenile adjudicatory hearing, as was conducted in J.D.’s case. Additionally, in sentencing the defendant on remand in Maynard, the court was not authorized to employ “the full panoply of appropriate remedies” available to superior courts in non-juvenile

proceedings, but rather was required to sentence the defendant within the confines of the JJA. In other words, on remand in Maynard, the court was to act in its juvenile court capacity and to treat the defendant as a juvenile, which is precisely what the court did in J.D.’s case. To do otherwise, as the State urges here, and allow the court on remand to apply non-juvenile procedures and impose non-juvenile sentences would create the exact prejudice the Court in Maynard sought to undo.

The State’s assertion that the trial court proceedings are “null and void” is a continuation of its fundamental misapprehension of the law in this area, assuming incorrectly that the superior court and the juvenile court are separate and distinct entities governed by separate and distinct requirements with respect to personal jurisdiction. See State’s Br. at 8 (“[t]he Supreme Court recognized that juvenile court jurisdiction was over in Maynard, and fashioned a superior court remedy for a superior court case.”) However, as the Supreme Court has established, “[j]urisdictionally, juvenile courts and superior courts are not separate and distinct; juvenile courts exist as a division of the superior court.” Maynard, 183 Wn.2d at 262 (citing State v. Posey, 174 Wn.2d 131, 141, 272 P.3d 840 (2012); RCW 13.04.021). Accordingly, if one court has jurisdiction, both courts do. The issue of whether the JJA applies is a legal one regarding the court’s available options, not a jurisdictional one. The court in J.D.’s case

did not relinquish, and could not have relinquished, jurisdiction that it otherwise had by applying the provisions of the JJA, as its jurisdiction over J.D. and the charges against him did not hinge on whether it applied the JJA. In no respect were the proceedings below “null and void” for want of personal, territorial, or subject matter jurisdiction.

In advancing this appeal, the State is simply confused on a fundamental level. The Court in Maynard established that the appropriate remedy for defense counsel’s ineffectiveness in failing to move to extend application of the JJA was for the trial court to go ahead and extend application of the JJA, even though the defendant’s 18th birthday had passed. This is precisely what the trial court did in J.D.’s case. There was no error in this respect and the State’s appeal must be rejected.

Maynard controls here and the remaining cases cited in the State’s brief are entirely irrelevant to the issues in this appeal. See State’s Br. at 5-7 (citing State v. Bacon, 190 Wn.2d 458, 415 P.3d 207 (2018); State v. Nicholson, 84 Wn. App. 75, 77, 925 P.2d 637, 639 (1996); State v. Calderon, 102 Wn.2d 348, 351, 684 P.2d 1293, 1295 (1984)).

The Supreme Court in Bacon held that the trial court erred in suspending a juvenile disposition when none of the factors enumerated in RCW 13.40.160(10), the statute providing exemptions to the general prohibition on suspending juvenile dispositions, were present. In

Calderon, the Court rejected a defendant's claim of preaccusatorial delay, which resulted in charges being filed after his 18th birthday and loss of JJA jurisdiction, because the delay was justified by the State's need to investigate before filing charges.

In Nicholson, the State charged a 17 year-old defendant with several crimes and moved for the juvenile court to decline jurisdiction. Nicholson, 84 Wn. App. at 76. The decline hearing was set for a few days following the defendant's 18th birthday. Id. Just after the 18th birthday and prior to the decline hearing, the State moved to dismiss the case and refiled as a non-juvenile case. Id. Concluding that the State acted in bad faith, the trial court entered a nunc pro tunc order reinstating the juvenile proceedings. Id. On appeal, Division II of the Court of Appeals held this exceeded the trial court's authority under the JJA. Id.

First, Nicholson is factually distinguishable because the State in that case sought to prosecute the matter as a non-juvenile proceeding from the outset. Second, to the extent Nicholson provides any support for the State's position, it is inconsistent with Maynard, and is thus no longer good law. Finally, the Court of Appeals committed the same error in Nicholson as the State commits in this appeal, wrongly conflating authority to apply the provisions of the JJA with traditional notions of "jurisdiction", which the Court clarified in Maynard.

None of these cases address the situation presented here – the appropriate remedy for ineffective assistance of counsel due to counsel’s failure to timely extend authority to apply the JJA – and are thus not instructive. The issue presented in this appeal was squarely and decisively addressed in Maynard, and the Court held the appropriate remedy in these circumstances was to retroactively extend the trial court’s authority to apply the provisions of the JJA, which is what the court did in J.D.’s case.

**B. The State is barred from arguing the application of the JJA lapsed under the doctrines of judicial estoppel, waiver, and/or laches**

The State is judicially estopped from arguing now in this case that the trial court lacked jurisdiction over the prosecution that the State filed and pursued through trial to conviction, even if the court somehow improperly applied the JJA. “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). “There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time.” Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 861, 281 P.3d 289 (2012). In

evaluating whether judicial estoppel applies, courts look to three “core” factors:

(1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Taylor v. Bell, 185 Wash. App. 270, 281-84, 340 P.3d 951, 958-59 (2014) (citing Anfinson, 174 Wn.2d at 861). Each of these factors applies to the State’s new position on appeal. The State’s position on appeal, that the JJA does not apply, is clearly inconsistent with its prosecution of J.D. through trial to conviction under the provisions of the JJA in the trial court proceedings, and entry into a stipulation declaring that application of the JJA is in the best interests of J.D. and the community.

Acceptance of the State’s appeal would further lead to the perception that it misled the trial court into believing the JJA applied. If its appeal were to be accepted, it will have gained an unfair advantage, allowing it to try J.D. first in juvenile court, then declare those proceedings null and void, then try again in “adult” court, where it could seek greater punishment. To illustrate the untenable nature of the State’s position, it is helpful to imagine where this matter would stand in the event

of an acquittal. Were J.D. acquitted by the juvenile court, the State would now be arguing that the proceedings resulting in J.D.'s acquittal were "null and void", thus allowing the State a second chance to seek convictions. The injustice attendant to allowing the State to pursue this tactic is manifest.

Additionally, the State waived any argument it may have that the JJA does not apply by knowingly and intentionally proceeding through trial to conviction when it should have known J.D. turned 18 in the interim. See Schneckloth v. Bustamonte, 412 U.S. 218, 238-39, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) ("A waiver is an intentional relinquishment or abandonment of a known right or privilege."). The State's conduct in this case is no different from that of a party who proceeds to litigate in state courts without asserting a right to arbitrate, only to later insist on arbitration. Washington courts have held this conduct to constitute waiver. See Schuster v. Prestige Senior Mgmt., LLC, 193 Wash. App. 616, 634, 376 P.3d 412, 422 (2016) (holding a party waives its right to arbitrate by proceeding in court proceedings without asserting the right).

For the same reasons discussed above, the State's argument on appeal is also barred by laches, as it had opportunity to discover the occurrence of J.D.'s birthday, it unreasonably delayed in acting on this discovery, and J.D. will be prejudiced greatly if the State is permitted to

now refile the charges and prosecute J.D. as an adult. See Buell v. Bremerton, 80 Wash. 2d 518, 522, 495 P.2d 1358, 1361 (1972) (“The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.”). Thus, even if the State’s argument had merit, which it does not, it is precluded from now pursuing these arguments on grounds of judicial estoppel, waiver, and/or laches.

**VI. ASSIGNMENTS OF ERROR ON CROSS APPEAL**

- A. The trial court erred in allowing the State to introduce testimony from nine witnesses regarding A.G.’s prior out-of-court allegations against J.D.
- B. The trial court erred in denying J.D.’s CrR 3.5 motion to suppress his pretrial statement to Sgt. Temple.
- C. These cumulative errors deprived Mr. Dunga his right to a fair trial.
- D. In the event the Court accepts the State’s position on appeal that the trial court erred in extending JJA application, J.D. was denied effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, due to counsel’s failure to timely seek extension of the JJA.

**VII. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. Did the trial court commit reversible error by allowing the State to introduce testimony from nine witnesses regarding A.G.’s prior out-of-court allegations against J.D.?

2. Did the trial court commit reversible error by denying J.D.'s CrR 3.5 motion to suppress his pretrial statements made when he was summoned into the assistant principal's office and presented with accusations and questioning from Sgt. Temple, in the presence of Sgt. Temple, the assistant principal, and the school resource officer?
3. Was J.D. prejudiced by the cumulative effect of the trial court's errors in allowing the State to present extensive "bolstering" testimony and J.D.'s unmirandized pretrial statements?
4. In the event the Court accepts the State's argument that the trial court erred in retroactively extending JJA application, was J.D. deprived of his right to effective assistance of counsel, in violation of his rights under the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington State Constitution, due to counsel's failure to timely seek extension of the JJA?
5. In the event the Court accepts the State's argument that the trial court erred in retroactively extending JJA application, is the proper remedy remand for further proceedings under the JJA?

## **VIII. STATEMENT OF FACTS RELATING TO J.D.'S CROSS APPEAL**

### **A. The evidence at trial**

J.D. met A.G. after A.G.'s friend, identified as J.B., established a relationship with J.D. via "Snapchat," an online social media platform. VRP<sup>1</sup> 114-16. On one occasion, J.B. invited J.D. to pick her and A.G. up from her home in the middle of the night and go to the Des Moines

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<sup>1</sup> The trial in this matter took place between February 27, 2018 and March 1, 2018. The transcripts of the proceedings are consecutively paginated. All trial transcripts are referred to collectively as "VRP" without reference to date.

waterfront together. VRP 116. After this outing, A.G. asked J.B. for J.D.'s Snapchat contact information, which J.B. provided. VRP 118.

When asked if she disclosed her age to J.D., J.B. admitted that she was "pretty sure we [J.B. and A.G.] said a different age from what we actually are" because they were young, and admitted that they told J.D. they were 15 years old and were high school freshmen. VRP 117, 127-28. A.G. also testified that they lied to J.D., telling him they were 15 years old "[b]ecause we wanted to be able to hang out with him, and we didn't think that -- like we didn't want to seem like we were younger, I guess." VRP 136. She also testified that she later told him her true age, after they had been in a "dating" relationship for some time, but she could not remember when she told him the truth. VRP 140-41. She could not remember how long the "dating" relationship lasted, but testified it probably lasted "like a week or two", "[p]robably longer than that", but not "over a year or anything". VRP 159-60.

J.D. testified that A.G. and J.B. advised they were 16 years of age. VRP 266. J.D. admitted to picking up A.G. and J.B. in his vehicle when they initially contacted him on Snapchat and testified that he subsequently met up with A.G. on two other occasions. VRP 267-68. After the second meeting, J.D.'s friend, who knew J.B. because he dated J.B.'s older sister, told J.D. that A.G. and J.B. were only 12 years

old. VRP 269, 273-74. Two weeks later, in response to a Snapchat invitation from A.G., J.D. picked up A.G. in the afternoon after school to confirm her true age. VRP 269-70, 279.

When J.D. confronted her with the information he obtained from his friend, A.G. adamantly denied being 12 years old, but then eventually confessed. VRP 270. In response, J.D. told her they could not have any further contact or communication with each other and he took her straight home. VRP 271. He denied having sexual intercourse, kissing, or otherwise touching A.G. in a sexual manner on any occasion. VRP 268, 71-72. J.D. testified further it was possible that A.G. was upset with him for ceasing contact in response to revelations of A.G.'s true age, supplying a motive to make false allegations of rape. VRP 281.

A.G.'s rape allegations came to light when she confided in some friends, who then reported the allegations to the school counselor, Donna Knutsen. VRP 24-52. The counselor then made contact with A.G., who was at first denied the allegations, was reluctant to speak, and was angry with her friends for making the report. VRP 25-29. However, Ms. Knutsen pressed the issue, advising A.G. that she was a mandatory reporter and needed to know the truth:

[I]f she felt she had been violated in any way, I needed to know. And if she hadn't, I felt I had an obligation to the

other students to share that she -- that had not happened because that's a lot for other seventh graders to have to carry around with them.

VRP 29. A.G. then agreed that she has been sexually violated. VRP 29.

The allegations made their way through the reporting chain, from the counselor to the assistant principal, then to the school resource officer, who routed the matter to the investigations department of the Sumner Police Department, which placed Detective Jason Temple (promoted to Sargent by the time of trial) in charge of the investigation. VRP 24-63.

#### **B. Prior consistent statement testimony**

During trial, the court permitted no less than nine witnesses to testify to A.G.'s prior allegations of rape. As to each witness, defense counsel objected on hearsay grounds but was overruled.

Ms. Knutsen was permitted to testify, over hearsay objection, that A.G.'s friends told her that A.G. "told them that she had been raped". VRP 27. The court allowed this statement "for the purpose of what the counselor did". VRP 27. Ms. Knutsen further testified that A.G. told her

I am really mad at you guys [the friends who reported the allegations to the counselor], but yes, Ms. Knutsen, it did happen.' And I said, 'So let me hear you right; you've been sexually violated?' 'Yes.'

VRP 29.

One of A.G.'s friends who made the report to the counselor, D.S., testified that A.G. told her that "she had a relationship with an older guy". VRP 86. As a follow-up question, the State asked D.S. to specify what A.G. told her, to which defense counsel objected. VRP 87. The court allowed D.S. to answer the question, ruling "I will allow it for potential prior consistent statement, and if it proves not to be satisfied, then I will disregard it." VRP 87. D.S. went on to testify that A.G. told her "that she had sex in the car" with "a guy named J.D.". VRP 87.

M.S., another one of A.G.'s friends who reported the allegations to Ms. Knutsen, likewise testified that A.G. told her "that she got raped." VRP 97-98. Defense counsel again objected on hearsay grounds, but the court overruled the objection, stating "I will allow it for purposes of consistent statement. It is hearsay and it would – it may be that there is an exception that applies, and if I ultimately determine that the exception is not applicable here, I will disregard." VRP 98. The State went on to elicit further details, to which defense counsel again objected. VRP 99-100. The court again allowed the testimony, and M.S. proceeded to testify that A.G. told her that "she met a boy and she got in the car with him and he raped her." VRP 100.

J.B., the friend who introduced J.D. to A.G., was also asked a series of questions regarding A.G.'s initial allegations of rape. VRP 120-27. Defense counsel repeatedly objected, but the court again allowed the testimony, stating that although the testimony is "clearly hearsay, the court "believe[d] it is subject to an exception for the limited purpose of prior consistent statements", so the court would allow it for that purpose. VRP 121-24. Defense counsel then stated his concern that the court was allowing multiple witnesses to bolster A.G.'s anticipated testimony. VRP 123-24. The court maintained its position, noting defense counsel's continuing objection for the record. VRP 124. J.B. thus testified "that [J.D.] had tried to like do stuff with her and did stuff with her." VRP 123.

A.G. testified to two incidents involving multiple acts of intercourse with J.D. in his vehicle after they had been "dating" for some time. VRP 144-49. She also testified extensively regarding all of the friends to whom she disclosed these incidents, along with the school counselor, and the details of what she disclosed to each individual. VRP 149-55. Defense counsel again objected on hearsay grounds, and the court again overruled, stating "I think it goes back to the original consistent statement". VRP 151.

Keri Arnold, the forensic child interviewer, was also permitted to testify, over defense counsel's hearsay objection, that A.G. disclosed sexual abuse to her during the forensic interview. VRP 184. Only when the State asked Ms. Arnold how many incidents occurred did the court uphold the hearsay objection. VRP 185. However, the State then proceeded to presume a report of rape, asking Ms. Arnold whether A.G. "seem[ed] at any point unsure of what happened to her", "seem[ed] in any way confused about who had done these things to her", was "able to tell [Ms. Arnold] about when these things occurred", was "certain about who had done these things to her", and "was able to identify who had done these things", VRP 187-89. Defense counsel objected throughout this line of inquiry, but to no avail. VRP 187-89. The State further asked "[s]he was able to tell you what had happened?", "[s]he was able to tell you when it happened?", "[s]he was able to tell you who it happened with?", which questions the court allowed over objection and to which Ms. Arnold responded in the affirmative. VRP 192.

Shawna Hood, a registered nurse practitioner who evaluated A.G. following her disclosures, also testified as to what A.G. told her, stating "[s]he told me she was here because she had told a couple friends at school that she had been raped a few months ago". VRP 201.

Ms. Hood further testified that A.G. told her “at the time of the assaults, she had had some vaginal discharge, some vaginal discomfort, dysuria which is kind of burning when she peed, but that they didn't last -- you know, they weren't present currently, and they were only, you know, right after the incident.” VRP 202-03. She testified also that she did not observe any physical signs of intercourse during the examination due to the passage of time, and that A.G.'s hymen remained intact. VRP 203-04, 206. Ms. Hood further testified A.G. identified the perpetrator as an individual outside, rather than inside, the home, that A.G. was able to identify who the perpetrator was, and that she was certain and clear about her identification. VRP 204-05.

A.G.'s father testified that Ms. Knutsen called him to tell him that she had heard from A.G.'s friends that something involving “the ‘R’ word” occurred with his daughter. VRP 214-15. The State then presumed A.G. told her father she had been raped, asking him his reaction when he “found out that [A.G.] had been sexually active with somebody”. VRP 224-25.

Sgt. Temple testified that he listened in on A.G.'s forensic interview from an adjacent room and that A.G. described an incident of “sexual intercourse”. VRP 247. This time, the court sustained the

objection initially, but then changed course and allowed the testimony.

VRP 247-48.

The State emphasized this “prior consistent statement” testimony in its closing argument, telling the court:

[A.G.] was perplexed, and she shared with a friend or two and then three or four, and the friends that came into court testified that when she spoke with them, she seemed concerned, bothered. One friend in particular said she cried as she told about what happened. I believe it was Jaiden, her friend who introduced her, how she met the respondent through Snapchat. Jaiden was at Amelia's house and saw some notes Amelia had taken on a sheet of paper or sheets of paper, and asked Jaiden -- excuse me, asked Amelia what was going on, and Amelia told her what happened. But of particular concern or notice, I would like to point out to the Court, the two incidents that I believe bothered or rattled Amelia the most were her conversation with her friend Avery, who, again, she said Avery kept -- or he kept talking to her and made her see that what she was doing was wrong. But a second contact that Amelia testified to, that she spent the night at Daniela's house, and when she spent the night, they had gone to church, and they sat in church and the person -- and I don't know who that person was -- but they were speaking on sex before marriage and how it was wrong. And when she got to Daniela's house, she was bothered and she talked with Daniela about what she was doing with J.D.

VRP 288-89. The prosecutor stressed also that A.G. “has been consistent as to what happened, how it happened, how she felt.” VRP 293-94. The prosecutor made these points again in rebuttal, telling the court:

The witnesses that came in, the prior consistent statements, the significance of those statements are that before any adults knew anything about what was going on,

Amelia had told her friends what had happened. Before there was a counselor who knew or before the investigators, before the court system, Amelia was consistent with friends that she had at the time and even the friends that are no longer friends with her because she distanced herself from them were all consistent that prior to adults knowing anything, she had reported in a very upset way what had happened to her, what was going on, what she was involved in.

VRP 305. Defense counsel objected to this rebuttal statement on the grounds that she was improperly relying on prior consistent statements for the truth of the matter asserted, but the court overruled, ruling “I think it’s consistent with the court’s prior rulings.” VRP 308.

### **C. The CrR 3.5 hearing**

Prior to trial, defense counsel moved to suppress J.D.’s pre-Miranda statements made to Sgt. Temple in his school’s assistant principal’s office and requested a hearing pursuant to CrR 3.5. VRP 7-8. During the hearing, the State presented testimony that on June 8, 2017, Sgt. Temple travelled to Puyallup High School to make contact with J.D. VRP 63, 70. Sgt. Temple, who was a detective at that time, was dressed in plain clothes. VRP 63.

Upon Sgt. Temple’s arrival, Mr. Harris, the assistant principal, “summoned [J.D.] down to [his] office”. VRP 70. J.D. obeyed and, upon entering the office, was met with the school resource officer, the

assistant principal, and Sgt. Temple. VRP 70. The school resource officer, Matthew Eller, was dressed in full police uniform. VRP 56.

Sgt. Temple purportedly advised J.D. that he would like to speak with him regarding a case, but that J.D. “did not have to talk to” the officers. VRP 63, 70. Sgt. Temple did not, however, advise J.D. of his Miranda rights at any time because Sgt. Temple believed he was not subjecting J.D. to a custodial interrogation. VRP 63-64, 74. Sgt. Temple also did not advise J.D. of his right to speak to an attorney. VRP 74. J.D. agreed to speak with the officers because he felt compelled to do so, as he “was basically cornered by three grown men” and “had not been given the opportunity to leave”. VRP 63, 74.

Sgt. Temple proceeded to ask J.D. if he knew A.G. or J.B. VRP 65-66. He specifically mentioned that there were allegations that J.D. had been sexually involved with A.G. In response, J.D. denied knowing A.G. or J.B., bringing the interview to a close. VRP 65-66. J.D. testified at the 3.5 hearing, and during trial, that the officer misstated J.B.’s name, causing J.D. to believe Sgt. Temple was inquiring about someone else whom he did not know. VRP 74-75, 272.

On June 21, 2017, Sgt. Temple arranged a second interview at J.D.’s counsel’s office. VRP 67-68. During this interview, Sgt. Temple again did not Mirandize J.D., this time because the matter “was past the

initial investigation”. VRP 67. On this occasion, J.D. advised that he knew A.G. and the mutual friend, and the investigation did not proceed beyond that point. VRP 68-69.

At the conclusion of the CrR 3.5 hearing, the court ruled J.D.’s statement, specifically his denial of knowing A.G. and the mutual friend, was admissible because “at that point in time he was not under arrest”. VRP 78-79.

During the trial portion of the proceedings, Sgt. Temple then testified that, when confronted with allegations of sexual contact with A.G., J.D. denied knowing A.G. or J.B. VRP 256. Sgt. Temple then handed J.D. his business card and ended the interview. VRP 256-57. The prosecutor underscored this testimony in her closing argument, telling the court:

The respondent first denies he knows Amelia. Detective Temple says, "There are allegations that you had sex with Amelia, sexual interaction, sexual relationships with Amelia. I am here to investigate." "I don't know an Amelia." "Jaiden, Taya's sister, Zach's girlfriend's sister." "I don't know Haiden." But the detective not only gave the girl's name, but gave her relationship to a party that he does know or the relationships that he knows. Later he is like, "Yes, I know the girls, and we hung out once, and we just talked."

VRP 294.

**IX. SUMMARY OF ARGUMENT RE: CROSS APPEAL**

J.D. was denied his right to a fair trial when the court made repeated erroneous evidentiary rulings, allowing the State to put on a case amounting to little more than bolstering the alleged victim's testimony, while also presenting J.D.'s unmirandized statements obtained during a custodial interrogation. This erroneously admitted evidence prejudiced J.D. because this case hinged on the credibility of competing testimony, that of J.D. versus that of A.G., and the impermissible bolstering and admission of J.D.'s unmirandized statement improperly boosted A.G.'s credibility while tarnishing J.D.'s. Accordingly, J.D.'s conviction and sentence should be reversed and the matter should be remanded for further juvenile court proceedings.

**X. ARGUMENT**

**A. The trial court erred in allowing nine of the State's witnesses to testify as to A.G.'s prior rape allegations**

The trial court erred in allowing the State, over objection, to ask nine witnesses to recount A.G.'s out-of-court statements accusing J.D. of rape. This testimony, coming from nine of the State's witnesses, served no purpose other than to bolster A.G.'s testimony, merely showing that A.G. said the same thing on numerous prior occasions. Such testimony is inadmissible, and J.D. was prejudiced by its improper admission at trial.

Whether or not statements introduced at trial constitute hearsay is a question of law reviewed de novo on appeal. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001). “Prior consistent statements are not admissible to merely reinforce or bolster the testimony.” State v. Purdom, 106 Wash. 2d 745, 750, 725 P.2d 622, 624-25 (1986) (citing Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983)). This rule exists because “[r]epetition generally is not a valid test of veracity.” Purdom, 106 Wn. 2d at 750 (citing State v. Harper, 35 Wn. App. 855, 670 P.2d 296 (1983)).

While prior consistent statement evidence offered to rebut a suggestion that the witness changed her story in response to some event, such as a threat, scheme, or bribe, may be admissible,

[e]vidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force ‘for the simple reason that mere repetition does not imply veracity.’

Purdom, 106 Wn.2d at 750 (citing Harper, 35 Wn. App. at 858 (citing 4 J. Weinstein & M. Berger, Evidence para. 801(d)(1)(B)[01], at 801-117 to -118 (1981)); State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d 231 (1984)).

ER 801(d)(ii) allows admission of prior consistent statements, but only when they are “offered to rebut an express or implied charge against the declarant of *recent* fabrication or improper influence or motive”. ER

801(d)(ii) (emphasis added). Thus, as a threshold matter, “there must be an express or implied charge of recent fabrication or improper influence or motive” for prior consistent statements to be admitted. Peralta v. State, 191 Wash. App. 931, 952-53, 366 P.3d 45, 55-56 (2015) (citing Harper, 35 Wn. App. at 858). This exemption from the hearsay rules applies only when “the witness's prior consistent statements were made before the date of facts from which the motive to falsify can be inferred”. Peralta, 191 Wash. App. at 952-53 (citing Harper, 35 Wn. App. at 857).

In this case, the defense implied A.G. had a motive to falsify the allegations of rape against J.D. because J.D. broke off their relationship when he discovered she was 12 years old. VRP 281. There was no evidence of any rape allegation made by A.G. prior to the termination of their relationship. Rather, all of the “prior consistent statements” testified to by the State’s nine witnesses to testify on this issue were made weeks or months following the last date of contact between A.G. and J.D. Thus, the prior consistent statements were not “made before the date of facts from which the motive to falsify can be inferred”, i.e. the termination of the relationship between A.G. and J.D., and are consequently inadmissible. Peralta, 191 Wash. App. at 952-53.

The State argued in closing that “the significance of those [prior consistent] statements are that before any adults knew anything about what

was going on, Amelia had told her friends what had happened.” VRP 305. Even if this were to be considered a valid justification for the introduction of A.G.’s prior consistent statements, it would only apply to statements made prior to A.G.’s disclosure to Ms. Knutsen. Of the 9 witnesses who testified to A.G.’s prior consistent statements, only D.S. and M.S. testified to statements made prior to Ms. Knutsen’s involvement. J.B.’s testimony indicated she was discussing disclosures made prior to the counselor’s involvement, but this was not explicit in her testimony. A.G. testified to prior statements made both before and after her disclosure to Ms. Knutsen. Thus, giving the State the benefit of the doubt, four witnesses testified to prior consistent statements made by A.G. prior to her disclosure to Ms. Knutsen. Six witnesses, namely Ms. Knutsen, Ms. Arnold, Ms. Hood, Sgt. Temple, A.G.’s father, plus A.G. with respect to a portion of her testimony, testified to disclosures A.G. made after “adults knew [...] what was going on.” For these six witnesses, the State offers no explanation as to how this testimony meets the ER 801(d)(ii) exemption requirements, and there is no conceivable explanation discernable from the record. This evidence was inadmissible hearsay and should not have been admitted.

Furthermore, it is clear J.D. was prejudiced by the wrongful admission of these prior consistent statements. When hearsay testimony is improperly admitted, reversal is required unless the untainted evidence

(untainted by the offending hearsay) is so overwhelming that any error is harmless. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The court misapprehended ER 801(d)(ii), as evidenced by its statement that although prior consistent statements are “clearly hearsay”, the court would nonetheless “believe[d they were] subject to an exception for the limited purpose of prior consistent statements”. VRP 121-24. However, under ER 801(d)(ii), prior consistent statements meeting the prerequisites under the rule are not hearsay, and thus are admitted for the truth of the matter asserted therein, not for some limited purpose. Indeed, there could be no purpose for introducing the prior consistent statements other than for the truth of the matter asserted therein – the court relied on A.G.’s out-of-court allegations of rape as evidence that A.G. was raped. By allowing this “prior consistent statement” testimony, the court entered it into evidence as non-hearsay substantive evidence, which it took into consideration in determining J.D.’s guilt.

Without this tainted evidence, it cannot be said the evidence against J.D. was overwhelming. The State’s case depended entirely on A.G.’s credibility, as its only evidence was the fact that A.G. accused J.D. of having sexual intercourse with her. The State was improperly permitted to bolster A.G.’s testimony with the extensive evidence of prior statements, tipping the scale in the State’s favor as the court weighed

A.G.'s credibility against that of J.D. Therefore, reversal and remand for further proceedings in juvenile court is necessary to remedy the trial court's error.

**B. The trial court erred in allowing Sgt. Temple to testify as to J.D.'s pretrial statements**

The trial court further erred in allowing Sgt. Temple to testify that J.D. told him, when confronted with A.G.'s allegations, that he did not know A.G. or J.B. This error violated J.D.'s constitutional protection against coerced self-incrimination and prejudiced J.D. at trial, as it greatly damaged his credibility in a case in which the State represented "[t]he issue here is the credibility of the parties." VRP 293.

To protect against the coerced self-incrimination prohibited by the Fifth Amendment, the U.S. Supreme Court requires that, before being subjected to custodial interrogation, a person must be advised of the right to silence, the right to counsel, and the right to appointed counsel in case the person cannot afford counsel. Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Statements made without these protections requires are generally inadmissible at trial. Id. Miranda protections apply any time there exists the danger of coercion that is inherent in custodial police interrogation. Id. at 477-78; Berkemer v. McCarty, 468 U.S. 420, 428, 104 S. Ct. 3138, 3144, 82 L. Ed. 2d 317 (1984). In general, the Miranda rule applies when "the interview or

examination is (1) custodial (2) interrogation (3) by a state agent." State v. Post, 118 Wn. 2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing State v. Sargent, 111 Wn. 2d 641, 649-53, 762 P.2d 1127 (1988)).

Interrogation occurs when an officer asks questions or makes-statements designed to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). When a police practice is designed to elicit an incriminating response, it is highly likely that the practice amounts to interrogation under Miranda. Innis, 446 U.S. at 301 n. 7.

In the context of Miranda, custody is a term of art delineating circumstances that present a serious danger of coercion. Howes v. Fields, 565 U.S. 499, 508-09, 132 S. Ct. 1181, 1189-90, 182 L. Ed. 2d 17 (2012). The test for custody is objective, asking whether a reasonable person would have felt that his or her freedom of movement was restricted to a degree associated with formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 s.ct. 3517, 77 L.Ed.2d 1275 (1983); State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986) (citing Berkemer, 468 U.S. 420). To determine whether an individual was in custody, courts look to whether a reasonable person in the circumstances would have believed he could freely walk away from the interrogators. United States v. Barnes, 713 F.3d 1200, 1204 (9th Cir. 2013) (citing United States v. Kim, 292 F.3d 969, 973-74 (9th

Cir. 2002)). In making this determination, courts consider the totality of the circumstances. Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1530, 128 L. Ed. 2d 293 (1994).

When J.D. was summoned to the assistant principal's office to meet with Sgt. Temple, the assistant principal, and the school resource officer, and confronted with allegations of rape, he was subject to a custodial interrogation. As a preliminary matter, the State challenged only the custody element, not the interrogation element, and the trial court ruled only on that ground, both presuming the interrogation element was met. As implicitly recognized by the court and the State, the interrogation element was in fact met, as Sgt. Temple confronted J.D. with the allegations against him in an apparent attempt to elicit an incriminating response, thus constituting an interrogation. See Innis, 446 U.S. at 301-02.

The court's ruling on the custody element was erroneous, however, as Division III of this Court has found the custody element satisfied under nearly identical circumstances in a published decision. See State v. D.R., 84 Wash. App. 832, 835-39, 930 P.2d 350, 352-54 (1997). In D.R., a juvenile was suspected of incest. Id. at 834. As in the case *sub judice*, the investigating detective went to the school in plain clothes and had the suspect summoned to the assistant principal's office. Id. When the suspect appeared at the assistant principal's office, he was met with the plain-

clothed detective, the assistant principal, and a social worker. Id.

The detective told the suspect he did not have to answer the detective's questions, but did not advise the suspect of his Miranda rights because he believed the suspect was not in custody at that time. Id. Again as in the case *sub judice*, the suspect testified that despite the detective's advisement that he did not need to answer questions, he felt that he was not free to leave. Id.; see also VRP 63, 74. The detective confronted the suspect with the allegations against him, and the suspect ultimately confessed. Id. at 834-35. The trial court held the confession was admissible because the juvenile suspect was not in custody at the time of the interrogation. Id.

The Court of Appeals reversed, holding the suspect was in custody when the confession was made in light of:

Detective Matney's failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation.

Id. at 838. Given these factors, the Court held the detective was required to advise the suspect of his Miranda rights, and his failure to do so rendered the confession inadmissible as having been obtained in violation of the suspect's Fifth Amendment rights. Id.

The only significant difference between the facts of this case and

the facts in D.R. is that, in addition to the plain-clothed detective and assistant principal, J.D. was also “cornered” by a school resource officer in full police uniform, as opposed to the social worker present in D.R. Accordingly, if anything, the environment in which J.D. was confronted with the allegations against him was more coercive than that found to constitute custody in D.R. As in D.R., J.D. was not told he was free to leave, was young, was summoned to the “naturally coercive” environment of the school principal’s office, and was confronted with the allegations against him. Therefore, as in D.R., J.D. was in custody and the failure to advise him of his Miranda rights violated his Fifth Amendment protections against self-incrimination.

The error in admitting this constitutionally contaminated incriminating statement warrants reversal. A court's error in admitting a defendant's statement in violation of Miranda is harmless only "if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt." State v. Ng, 110 Wn. 2d 32, 38, 750 P.2d 632 (1988) (citing Guloy, 104 Wn. 2d at 426). In this case, the only evidence of guilt was A.G.’s accusation. It was a “he said, she said” case hinging on the credibility of A.G. versus that of J.D.

Under these circumstances, it cannot be said that the “untainted evidence alone [was] so overwhelming that it necessarily leads to a

finding of guilt.” Id. To the contrary, the tainted evidence was a key component of the State’s case, severely undermining J.D.’s credibility with the court in the face of evidence, including his own admission, that he knew A.G. and J.B. The State emphasized this evidence, telling the court to disbelieve J.D. due to his dubious denial of knowing A.G. and J.B. followed by his retraction of the denial. VRP 294.

The constitutional error was not harmless and requires reversal and remand to the juvenile court for entry of an order suppressing J.D.’s statements, followed by further proceedings. See D.R., 84 Wash. App. at 838 (citing State v. Valdez, 82 Wn. App. 294, 298, 917 P.2d 1098, *review denied*, 130 Wn.2d 1011, 928 P.2d 416 (1996)).

**C. The cumulative error deprived J.D. of his right to a fair trial**

“Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.” State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); see State v. Alexander, 64 Wash. App. 147, 150-51, 822 P.2d 1250, 1253 (1992) (holding that “the cumulative effect of all the errors, preserved and not preserved, denied [the defendant] his constitutional right to a fair trial”) (citing State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). In this case, the errors described above would each, individually, warrant reversal of J.D.’s convictions. Even if the Court concludes otherwise, the

accumulation of error was all the more prejudicial. J.D. was denied his right to a fair trial by the cumulative errors in this case, necessitating reversal of his convictions and remand for a new trial in juvenile court.

**D. In the event this Court accepts the State’s argument on appeal, J.D. was deprived of his right to effective assistance of counsel and the proper remedy is nonetheless to retroactively extend application of the JJA**

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. See U.S. Const. Amend. VI; Const. Art. I, § 22. To show ineffective assistance of counsel, a defendant must demonstrate (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this case, the State admits defense counsel was ineffective for failing to move to extend application of the JJA prior to J.D.’s 18th birthday. See State’s Br. at 8 (“Appellant agrees that there was ineffective assistance of counsel in this case ...”) Nonetheless, J.D. also asserts this issue on appeal in the alternative. Even in the event this Court determines the trial court committed some sort of procedural error in the manner in which it retroactively extended application of the JJA, the remedy sought by the State – refile in superior court - is nonetheless unavailable because it would leave J.D. with no remedy at all for his counsel’s

deficient performance. See Maynard, 183 Wn. 2d at 261. J.D. was deprived his right to effective assistance of counsel. As described hereinabove, and as established in Maynard, the remedy for J.D.'s constitutional injury is to retroactively apply the JJA. The trial court already did so in this case. However, if it committed some error in the manner in which it did so, the remedy under Maynard is remand for further juvenile court proceedings under the JJA. The only other possible remedy for the constitutional harm would be dismissal of the case with prejudice.

## **XI. CONCLUSION**

For the reasons stated herein, the State's appeal is without merit and must be denied. Additionally, J.D.'s convictions and sentence are tainted by the State's admission of J.D.'s unmirandized pretrial statement and testimony of nine witnesses regarding A.G.'s prior consistent statements. Therefore, this matter should be reversed and remanded for further proceedings in juvenile court. Alternatively, in the event the court rejects the arguments in J.D.'s cross appeal, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted this 28th day of January, 2019.

LAW OFFICE OF COREY EVAN PARKER

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**CERTIFICATE OF SERVICE**

I, Corey Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on January 28, 2019 I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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