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Division III
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No. 35571-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

SAWNAY TAW

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT..... 1

B. ASSIGNMENT OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 2

D. STATEMENT OF THE CASE 2

E. ARGUMENT 4

 1. Mandatory “automatic decline” of juveniles accused
 of specified offenses violates due process..... 4

 a. *Due process requires a hearing before juvenile
 jurisdiction may be denied to a youth charged with a
 crime. 4*

 b. *It is no longer acceptable for courts to automatically
 treat youth like adults. 6*

 c. *Automatic decline fails to adequately protect the
 significant interests of juveniles charged with crimes..... 9*

 d. *In re Boot is no longer good law, as it violates due
 process rights established by both the United States and
 Washington State Supreme Court. 10*

 e. *Sawnay’s conviction should be reversed and the trial
 court should be ordered to hold a decline hearing. 13*

 2. The 2018 amendments to RCW 13.04.030 are
 remedial should be applied retroactively to Sawnay..... 14

F. CONCLUSION 18

TABLE OF AUTHORITIES

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 3..... 11

Article IV, section 6..... 16

FEDERAL CASES

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)..... 4

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)..... 7, 11, 13

J.D.B. v. North Carolina, 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011)..... 6

Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966)..... passim

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)..... 4

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)..... passim

Montgomery v. Louisiana, __ U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599 (2016)..... 7, 11

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)..... 6, 11, 13

Stanford v. Kentucky, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989)..... 11

WASHINGTON CASES

Addleman v. Bd. of Prison Terms & Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986)..... 15

Dillenburg v. Maxwell, 70 Wnh.2d 331, 413 P.2d 940, 422 P.2d 783 (1967)..... 16

In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996)passim

In re F.D. Processing, Inc., 119 Wn.2d 452, 832 P.2d 1303 (1992).... 15

In re Pers. Restraint Petition of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004)..... 17

In re Personal Restraint of Mota, 114 Wn.2d 465, 788 P.2d 538 (1990)..... 15

Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984)..... 15

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997) 15

State v. Chavez, 163 Wn.2d 262, 180 P.3d 1250 (2008)..... 10

State v. Dixon, 114 Wn.2d 857, 792 P.2d 137 (1990)..... 10

State v. Heath, 85 Wn.2d 196, 532 P.2d 621 (1975)..... 16

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). ...passim

State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999)..... 15

State v. Kane, 101 Wn.App. 607, 5 P.3d 741 (2000) 15

State v. Maynard, 183 Wn.2d 253, 351 P.3d 159 (2015) 10, 12

State v. McClendon, 131 Wn.2d 853, 935 P.2d 1334 (1997) 14

State v. O’Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)..... 8, 12

State v. Rice, 98 Wn.2d 384, 655 P.2d 1145 (1982)..... 9

<i>State v. S.J.C.</i> , 183 Wn.2d 408, 352 P.3d 749 (2015)	6, 11
<i>State v. Saenz</i> , 175 Wn.2d 167, 283 P.3d 1094 (2012)	9
<i>State v. Werner</i> , 129 Wn.2d 485, 918 P.2d 916 (1996).....	17
OTHER STATE CASES	
<i>State in Interest of N.H.</i> , 226 N.J. 242, 141 A.3d 1178, 1184 (2016)	9
<i>State v. R.G.D.</i> , 108 N.J. 1, 527 A.2d 834 (1987)	9
STATUTES	
RCW 13.04.030	passim
RCW 13.40.127	10
RCW 13.50.260	10
RCW 7.68.035	10
RCW 9.94A.030	14
RULES	
JuCR 7.12	10
TREATISES	
Hahn, P., <i>The Juvenile Offender and the Law</i> , 180 (3d ed.1984).....	9

A. SUMMARY OF ARGUMENT

Seventeen-year-old Sawney Taw was charged in adult court with attempted first degree burglary with a firearm enhancement when the juvenile court automatically declined to take jurisdiction over his case. Sawney was entitled to a hearing before juvenile court jurisdiction was declined, and because he was deprived of the ability to present evidence of why he should remain in juvenile court, he was deprived of due process of law.

Further, the recently amended decline statute eliminating the offenses for which Sawney was convicted must be applied retroactively to him. This Court should reverse and remand to juvenile court for a decline hearing.

B. ASSIGNMENT OF ERROR

Sawney was deprived of his due process rights under the United States and Washington Constitutions when juvenile court jurisdiction was automatically declined and no hearing was held to determine whether the juvenile court should retain jurisdiction.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Due process requires an individualized assessment of amenability to juvenile court jurisdiction before juvenile court jurisdiction may be declined and the charged youth may be prosecuted in adult superior court. Juvenile court jurisdiction is automatically declined when juveniles of a certain age are charged with specific offenses. Was Sawney denied his due process rights when he was prosecuted in adult court without a court first making an individualized assessment of whether juvenile court jurisdiction should be declined?

2. Should the 2018 amendments to RCW 13.04.030, deleting first degree robbery from automatic decline of juvenile court jurisdiction, apply retroactively to Sawney, thus requiring remand of Sawney's matter to the juvenile court?

3. Are the 2018 amendments to RCW 13.04.030 remedial thus allowing retroactive application?

D. STATEMENT OF THE CASE

Sawney Taw was 16 years old when he and others attempted to rob an individual with a firearm and the individual was shot during the course of the robbery. Sawney was subsequently charged with first degree assault, first degree robbery and conspiracy to commit first

degree robbery; all counts also alleged use of a firearm. CP 36-37. Because of the nature of the charges and his age, RCW 13.04.030 mandated automatic transfer of the case from juvenile to adult court without a hearing to determine whether such transfer was appropriate.

Sawnay objected to the automatic transfer and asked the trial court to find that a hearing was required before the juvenile court could decline jurisdiction. CP 4-10; 11/3/2016RP 3-6. In a written order, the court denied Sawnay's motion, relying on the decision in *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996). CP 18-19.

Sawnay subsequently pleaded guilty to one count of first degree robbery and one count of conspiracy to commit robbery. CP 130-40; 7/6/2017RP 403-19.

Sawnay asked for a sentence below the standard range based upon Sawnay's youth as authorized by the decision in *State v. Houston-Sconiers*.¹ CP 65-109. The trial court held an exhaustive sentencing hearing at the conclusion of which the court sentenced Sawnay to 75 months in prison, the low end of the standard range, on attempted burglary and 36 months for the firearm enhancement. CP 26; 2/17/2017RP 6.

¹ 188 Wn.2d 1, 391 P.3d 409 (2017).

E. ARGUMENT

1. **Mandatory “automatic decline” of juveniles accused of specified offenses violates due process.**²

- a. *Due process requires a hearing before juvenile jurisdiction may be denied to a youth charged with a crime.*

Due process requires a hearing before juvenile court jurisdiction is declined for a youth charged with a crime. “[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.” *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). At a minimum, compliance with due process and fundamental fairness requires the court to identify the private interest affected by the official action, the risk of erroneous deprivation, the probable value of additional safeguards and, finally, the State’s interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). To satisfy this due process requirement, courts must conduct an inquiry

² This issue is currently before the Washington Supreme Court in *State v. Watkins*, No. 94973-5. Oral argument was held on March 13, 2018, and a decision is pending.

into the youth's needs, amenability to treatment, and the underlying facts to determine whether decline is appropriate. *Miller v. Alabama*, 567 U.S. 460, 489, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Kent v. United States*, 383 U.S. 541, 546, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); see also *In Re Gault*, 387 U.S. 1, 31, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

In *Kent*, the United States Supreme Court held that the transfer of a youth from juvenile court to adult criminal court imposes a significant deprivation of liberty and warrants substantial due process protection. *Kent*, 383 U.S. at 554. Juvenile court offers “special rights and immunities” to youth lost upon transfer to the adult system. *Id.* at 556. For many youth, decline can mean the difference between confinement until the age of twenty-one and the harshest sentences imposed upon adults. *Kent*, 383 U.S. at 557. In light of those circumstances, the Court found it “clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile,” and thus it must “satisfy the basic requirements of due process and fairness.” *Id.* at 553, 556.

- b. *It is no longer acceptable for courts to automatically treat youth like adults.*

Procedures for adults do not automatically satisfy the constitutional requirements for youth. In *J.D.B. v. North Carolina*, the Supreme Court recognized that, because juveniles lack the maturity and experience of an adult, procedures put in place for adults must instead adapt to the attributes of youth. 564 U.S. 261, 272-74, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). *J.D.B.* acknowledged a fact the non-judicial world had long understood: children do not have the education, judgment, and experience of adults and are not simply “miniature adults.” *Id.* at 274. Likewise, the Washington Supreme Court has recognized the attributes of youth are legally significant and justify maintaining the longstanding rehabilitative purpose of juvenile court. *State v. S.J.C.*, 183 Wn.2d 408, 434, 352 P.3d 749 (2015).

Youth is now clearly recognized as a mitigating factor for culpability, based on the same legal principles relevant to a due process analysis. *Roper v. Simmons* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). In *Graham v. Florida*, the Supreme Court held a life sentence could not be imposed without the creation of a procedure, which would provide a

meaningful opportunity for release. 560 U.S. at 75. These decisions incorporate both common sense – what “any parent knows” – and recent developments in brain science supporting the lesser culpability of youth. *Miller*, 132 S.Ct. at 2464. Courts have made abundantly clear that the law can no longer simply assume adult sentences apply to youth; to the contrary, long adult sentences like those at issue here are presumptively invalid for youth unless “irreparable corruption” is proven. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016).

Likewise, Washington courts have recognized that because “children are different,” courts must take a defendant’s youthfulness into account and have absolute discretion to depart below otherwise applicable sentence ranges and sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there. *Houston-Sconiers*, 188 Wn.2d at 9.

Even when a young adult is convicted of a crime, the Washington Supreme Court has recognized that it must consider the person’s lesser ability to control emotions, identify consequences and make reasoned decisions about actions, while at the same time having greater capacity for rehabilitation. *State v. O’Dell*, 183 Wn.2d 680,

692-93, 358 P.3d 359 (2015). Where these attributes are identified, a sentencing court must at least consider whether a sentence below the standard range is warranted for the young adult. *Id.*

There are good reasons for this trend. Youth who remain in juvenile court are more likely to be rehabilitated. Those who are prosecuted in the adult system are 34 percent more likely to recidivate and with more violent offenses. Ziedenberg, J., *You're An Adult Now, Youth in the Criminal Justice System*, U.S. Dep't of Justice, National Institute of Corrections, 4 (2011).³ Youth who are sentenced to adult facilities are also 36 times more likely to commit suicide and to be victims of physical and emotional abuse, including sexual assault. Campaign for Youth Justice, *The Impact of Mandatory Transfer Rules*, 1 (2016).⁴ It is counterproductive to transfer most youth to adult court. They are unable to access necessary services, are likely to be abused by adult prisoners, and are more likely to recidivate. Ziedenberg, at 4.

Without holding a hearing, juvenile court jurisdiction should not be declined. Because of the increased likelihood of rehabilitation within

³ <http://static.nicic.gov/Library/025555.pdf>.

⁴ http://campaignforyouthjustice.org/images/factsheets/Mandatory_Transfer_Fact_Sheet_FINAL.pdf.

the juvenile system, courts should hold a hearing to determine amenability before declining a child to adult court. It is only by conducting an individualized assessment of whether a child should be transferred to adult court that due process can be satisfied. *See Miller*, 132 S. Ct. at 2475; *Kent*, 383 U.S. at 546.

c. *Automatic decline fails to adequately protect the significant interests of juveniles charged with crimes.*

For a youth like Sawney, the most important question is which court will hear the case. *State v. R.G.D.*, 108 N.J. 1, 4-5, 527 A.2d 834 (1987). Transfer of a juvenile to adult court is “the single most serious act that the juvenile court can perform.” *State in Interest of N.H.*, 226 N.J. 242, 252, 141 A.3d 1178, 1184 (2016), *quoting* Hahn, P., *The Juvenile Offender and the Law*, 180 (3d ed.1984). There is a “fundamental difference between juvenile courts and adult courts—unlike wholly punitive adult courts, juvenile courts remain ... rehabilitative.” *State v. Saenz*, 175 Wn.2d 167, 173, 283 P.3d 1094 (2012). Our Supreme Court has many times recognized the importance of this distinction. *State v. Rice*, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982).

The Supreme Court has also recognized the important benefits a juvenile receives by remaining in juvenile court. *State v. Maynard*, 183

Wn.2d 253, 259, 351 P.3d 159 (2015). While the clearest difference between adult and juvenile court is the length of time a youth will serve if convicted of a crime, many other differences also exist. *See State v. Chavez*, 163 Wn.2d 262, 271, 180 P.3d 1250 (2008). Youth may seek a deferred disposition for eligible offenses. RCW 13.40.127. Most youth who remain in juvenile court are entitled to have their records sealed. RCW 13.50.260(4); JuCR 7.12(c)-(d). Legal financial obligations are mostly eliminated. RCW 7.68.035. Many evidence-based programs exist which seek to rehabilitate the youth and reduce recidivism. *See, e.g., Washington State Department of Social and Health Services, Juvenile Justice Evidence Based Programs: Evidence Based Programs – Research Based Programs – Promising Practices* (2016).⁵

d. *In re Boot* is no longer good law, as it violates due process rights established by both the United States and Washington State Supreme Court.

Washington's courts have also long recognized the important benefits of juvenile court and applied due process principles to youth. *See Maynard*, 183 Wn.2d at 259, citing *State v. Dixon*, 114 Wn.2d 857, 860, 792 P.2d 137 (1990). Even prior to the United States Supreme Court ruling in *Kent* and *Gault* that juvenile offenders were entitled to

⁵ <https://www.dshs.wa.gov/ra/juvenile-rehabilitation/juvenile-justice-evidence-based-programs>.

fundamental due process, Washington’s juvenile courts employed most of the required practices. *S.J.C.*, 183 Wn.2d at 424; *see also* Const. art. 1, § 3. Washington courts “have built a constitutional wall around juvenile justice; and while the dimensions of this wall have changed, its structural integrity has not.” *S.J.C.*, 183 Wn.2d at 417.

Despite the substantial due process required by *Kent* and recognized by the courts, the Washington Supreme Court held automatic decline constitutional in its decision in *Boot*. 130 Wn.2d at 557-58. The court relied upon *Stanford v. Kentucky* to justify automatic decline, arguing that since the Eighth Amendment did not preclude the death penalty for 16 and 17-year-old defendants, it did not require hearings for youth of the same age who were automatically declined to adult court. *Boot*, 130 Wn.2d at 571, *citing Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

Stanford has, of course, been abrogated by *Roper*. 543 U.S. at 574. Since *Roper*, the United States Supreme Court has consistently made clear that youth who are charged with crimes must be treated differently than adults. *Graham*, 560 U.S. 48; *Miller*, 132 S.Ct. 2455; *Montgomery*, 136 S.Ct. 718. These cases have overruled almost all of the cases relied upon to justify automatic decline, demonstrating that

both the law and newer scientific information no longer support transferring youth to adult court without a hearing.

Likewise, Washington's Supreme Court has recognized the special status juveniles have in the criminal justice system. Most recently, the court recognized in *Houston-Sconiers* that "children are different." 188 Wn.2d at 8. The recognition led to the court to hold that sentencing courts must have absolute discretion in sentencing juveniles who have been declined to adult court. *Id.* *Houston-Sconiers* is consistent with other recent opinions where the Washington Supreme Court has examined youthfulness. In *O'Dell*, the court held that a sentencing court may consider a defendant's youth as a mitigating factor justifying an exceptional sentence below the sentencing guidelines of the Sentencing Reform Act, even when the youth is over 18. 183 Wn.2d at 688-89. Likewise, in *Maynard*, the Washington Supreme Court required the prosecutor to reoffer a plea proposal only available to juveniles, even though juvenile court jurisdiction had lapsed before *Maynard* had attempted to take advantage of the offer. 183 Wn.2d at 264. No such disposition would have otherwise been available in adult superior court. *Id.*

While the Supreme Court did not reach the issue of whether

automatic decline was constitutional in *Houston-Sconiers*, the court recognized that the cases on which the constitutionality of automatic decline was premised were no longer good law. 188 Wn.2d at 26. The court acknowledged that the holding in *Boot* “stands in tension” with United States Supreme Court holdings in *Roper*, *Graham*, and *Miller*. *Houston-Sconiers*, 188 Wn.2d at 26. As *Stanford* has been abrogated, there is no longer a basis to find automatic decline is still constitutional. *Boot* is no longer good law.

e. *Sawnay’s conviction should be reversed and the trial court should be ordered to hold a decline hearing.*

For all juveniles, including Sawnay, due process requires a hearing before juvenile court jurisdiction is declined. The liberty interests at stake are “critically important” and call for heightened procedural protections not provided to youth who are not provided a hearing before juvenile court declines to take jurisdiction over their case. *Kent*, 383 U.S. at 553-54.

Boot is no longer good law. Its underpinnings have been overturned and it stands not only in “tension” with United States Supreme Court precedence, but also in direct contradiction to the requirement that children are different and must be accorded individualized assessment of their amenability to juvenile court before

they are declined to adult court. *Miller*, 132 S. Ct. at 2475; *Houston-Sconiers*, 188 Wn.2d at 26.

This Court should reverse Sawnay's conviction and remand for a decline hearing.

2. The 2018 amendments to RCW 13.04.030 are remedial should be applied retroactively to Sawnay.

In March 2018, the Legislature passed, and the Governor signed, Engrossed Second Substitute SB 6160 (ESSSB), which amended RCW 13.04.030. Laws of 2018, Ch. 162. (A copy of ESSSB 6160 is in the Appendix). Specifically, the amendment deleted the offenses eligible for automatic decline of juvenile court jurisdiction, including first degree robbery. Laws of 2018, ch. 162, §§ 1-2.⁶ Sawnay asserts these amendments are merely remedial in nature and should be applied retroactively to his matter.

It is generally presumed that a statutory amendment applies prospectively, absent some legislative indication to the contrary. *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997). But if the statute is remedial in nature, the presumption is it applies retroactively.

⁶ Conspiracy to commit first degree robbery is not an offense for which automatic decline is available because it is neither a violent nor serious violent offense. RCW 9.94A.030(46), (55); RCW 13.04.030(1)(e)(v)(A)-(C).

State v. Blank, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). Courts will retroactively apply a statutory amendment if it is curative or remedial, even though the amendment is silent as to any legislative intent regarding retroactive application. *State v. Kane*, 101 Wn.App. 607, 613, 5 P.3d 741 (2000).

A statute is deemed remedial when it relates to practice, procedure or remedies, and the statute does not affect a substantive or vested right. *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999); *In re Personal Restraint of Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990). The amendment should be applied retroactively when doing so would further the remedial purpose. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 463, 832 P.2d 1303 (1992). Remedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment. *Miebach v. Colasurdo*, 102 Wn.2d 170, 180-81, 685 P.2d 1074 (1984). “This is especially true when the remedial statute favorably reduces punishment laws applied to previously convicted criminal defendants.” *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 510, 730 P.2d 1327 (1986).

An additional reason for holding the legislation to operate retroactively is that it, in effect, reduced the penalty for a crime. When this is so, the legislature is presumed to have determined that the new penalty is

adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity ...

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975).

Here, the amendments to RCW 13.04.030 were merely procedural in nature and thus, remedial. They did not impose an additional penalty or increase the quantum of punishment the State could impose on violators of the law. The amendments merely changed the method for determining whether a juvenile will be tried in adult or juvenile court. Therefore, the statute is remedial.

The amendments do not affect any substantive rights of the Sawney or the State. There is no constitutional right for a juvenile to be tried in juvenile or adult court; the right attaches only if a court is given statutory discretion to assign juvenile or adult court jurisdiction. *In re Boot*, 130 Wn.2d at 570-71.

Juvenile courts are not separate and distinct from superior courts. Properly understood, “the superior court, sitting in juvenile court ‘session,’ grants to prosecuting officials the ‘authority to proceed,’ in an appropriate case, with the criminal prosecution of a child under 18 years of age.” *Dillenburg v. Maxwell*, 70 Wn.2d 331, 353, 413 P.2d 940, 422 P.2d 783 (1967). “[U]nder Article IV, § 6, the

Legislature has not vested jurisdiction exclusively in some court other than the superior court by enacting RCW 13.04.030 because the juvenile court is a division of the superior court, not a separate court.” *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996). It is only by statute that the juvenile division of the superior court has the power to hear and determine certain juvenile matters. RCW 13.04.030(1); *In re Pers. Restraint Petition of Dalluge*, 152 Wn.2d 772, 779, 100 P.3d 279 (2004).

The 2018 amendment to RCW 13.04.030 is remedial in nature and should be applied retroactively. Accordingly, Sawney is entitled to reversal of his conviction and sentence and remand for a decline of jurisdiction hearing.

F. CONCLUSION

For the reasons stated, Sawney asks this Court to reverse his convictions and sentence and remand to juvenile court for a decline hearing.

DATED this 27th day of June 2018.

Respectfully submitted,

s/Thomas M. Kummerow

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APPELLANT.)	

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