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STATE OF WASHINGTON

No. 33240-0-II

BY [Signature]
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

A.C.,

Appellant.

Clallam County Superior Court

Cause No. 04-8-00333-9

The Honorable Judge George Wood

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. A.C. was denied his constitutional right to a jury trial.
2. The statutory and judicial scheme criminalizing assault in the second degree violates the separation of powers doctrine.
3. The trial court erred by admitting A.C.'s custodial statements.
4. The trial court erred by admitting the 911 tape without proper foundation.
5. The trial court erred by adopting Finding of Fact No. 2 following the CrR 3.5 hearing. This Finding reads:

Very soon after the end of the pursuit and his arrest, the respondent was properly advised of his *Miranda* and Constitutional rights by Washington State Patrol Trooper Keith Nestor. The respondent indicated he understood his rights and wished to waive them. He was calm, rational, and oriented, did not appear under the influence of any drugs or alcohol, and no threats or promises were made to induce him to waive his rights. The respondent spoke briefly with Trooper Nestor. The respondent knowingly, voluntarily, and intelligently waived his rights, and his statements to Trooper Nestor were voluntary.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

6. The trial court erred by adopting Finding of Fact No. 3 following the CrR 3.5 hearing. This Finding reads:

The respondent was then transported to the police station by Clallam County Sheriff's Deputy William Benedict. Deputy Benedict properly advised the respondent of his *Miranda* and Constitutional rights, which the respondent stated he understood and was willing to waive. He was rational and oriented, did not appear under the influence of any drugs or alcohol, and no threats or promises were made to induce him to waive his rights. The respondent made a statement to Deputy Benedict. The respondent knowingly, voluntarily, and intelligently waived his rights, and his statements to Deputy Benedict were voluntary.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

7. The trial court erred by adopting Finding of Fact No. 4 following the CrR 3.5 hearing. This Finding reads:

The respondent was then transported to the Clallam County Juvenile Detention Facility. The next day, October 31, 2004, while still at the Detention Facility, the respondent was again advised of his *Miranda* and Constitutional rights, this time by Clallam County Sheriff's Deputy Ralph Edgington. The respondent stated he understood his rights and was willing to waive them. He was rational and oriented, did not appear under the influence of any drugs or alcohol, and no threats or promises were made to induce him to waive his rights. The respondent made a statement to Deputy Edgington. The respondent knowingly, voluntarily, and intelligently waived his rights, and his statements to Deputy Edgington were voluntary.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

8. The trial court erred by adopting Conclusion of Law No. 1 following the CrR 3.5 hearing. This Conclusion reads:

The respondent's statements to Trooper Nestor are admissible.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

9. The trial court erred by adopting Conclusion of Law No. 2 following the CrR 3.5 hearing. This Conclusion reads:

The respondent's statements to Deputy Benedict are admissible.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

10. The trial court erred by adopting Conclusion of Law No. 3 following the CrR 3.5 hearing. This Conclusion reads:

The respondent's statements to Deputy Edgington are admissible.

Supp. CP, Findings of Fact and Conclusions of Law on 3.5 Hearing.

11. The trial court erred by adopting Finding of Fact No. 9 following the Factfinding hearing. This Finding reads:

The respondent mentioned Coach Wiker to his stepmother. At trial, Joan could not remember some of what the respondent said to her. James Gambell heard Joan ask the respondent, "Why are you mad at these people?" and the respondent responded, "It's the only way." The respondent also said, "I'm going to start with you if you don't get out of my way." This latter finding is supported by that portion of Joan's 911 call which was played into the record, which, given the totality of the circumstances, accurately states what the respondent said.

Supp. CP, Findings of Fact and Conclusions of Law.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Fourteen-year-old A.C. was charged with First Degree Robbery, Assault in the Second Degree, Unlawful Possession of a Firearm in the Second Degree, Taking a Motor Vehicle Without Permission in the Second Degree, and three counts of Attempted Murder in the First Degree. Because of the seriousness of his charges, he was ineligible for all of the rehabilitative programs ordinarily available through the juvenile system. By statute, he was tried by a judge sitting without a jury.

1. Do juvenile offenders have the right to a jury trial under the Sixth Amendment to the Federal Constitution? Assignment of Error No. 1.
2. Do juvenile offenders have the right to a jury trial under Article I, Section 21 of the Washington State Constitution? Assignment of Error No. 1.
3. Do juvenile offenders have the right to a jury trial under Article I, Section 22 of the Washington State Constitution? Assignment of Error No. 1.

4. Does a juvenile charged with serious offenses have the right to a jury trial under the Federal and State Constitutions, even if other juveniles do not? Assignment of Error No. 1.

The Washington legislature has criminalized assault, but has not defined the elements of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

5. Does the lack of a legislative definition of the elements of the crime of assault violate the separation of powers doctrine? Assignment of Error No. 2.
6. Does the judicially created definition of the elements of the crime of assault violate the separation of powers doctrine? Assignment of Error No. 2.

A.C. was taken into custody, read his *Miranda* rights, and interrogated. At a hearing to determine the admissibility of A.C.'s statements, the trial court did not inquire into his experience, education, background, intelligence or ability to comprehend to warnings and his rights. Furthermore, the State did not present evidence on any of these issues. The court had previously found that A.C. was not old enough to waive his attorney's alleged conflict of interest.

7. Using a *de novo* standard of review, did the State fail to meet its heavy burden of establishing that A.C. knowingly, intelligently and voluntarily waived his *Miranda* rights with full awareness of the nature of those rights and the consequences of his decision to abandon them? Assignment of Error No. 3-10.
8. Using a *de novo* standard of review, did the trial court err by admitting A.C.'s custodial statements without a full inquiry into the totality of the circumstances surrounding the three custodial interrogations? Assignment of Error No. 3-10.

The trial court admitted a 911 tape as a recorded recollection of witness Joan Chavez. There was no testimony that Ms. Chavez had insufficient

recollection to testify fully and accurately. Nor was there a showing that the tape reflected her knowledge correctly.

9. Applying an abuse of discretion standard, did the trial court err by admitting the 911 tape without proper foundation?
Assignment of Error No. 11.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On October 30, 2004, 14-year-old A.C. painted his face black, took a gun and van from his home, and drove around Clallam County; he was eventually chased by law enforcement and arrested after an accident in Kitsap County. RP (3-7-05) 19, 53-57, 100-104, 121-123, 137. He had previously told family members and two friends of his dislike for three coaches, and had told the friends that he planned to kill these coaches. RP (3-7-05) 10-15; RP (3-8-05) 18-25, 34.

After his car rammed a police car near the Hood Canal Bridge, A.C. was read his rights and interrogated by law enforcement. RP (3-8-05) 56-57; RP (3-9-05) 55-57. He was also interrogated at the police station and at the juvenile detention facility. RP (3-9-05) 82-84, 68-70.

He was charged in Clallam County Juvenile Court with three counts of Attempted Murder, Taking a Motor Vehicle Without Owner's Permission in the Second Degree, Assault in the Second Degree with a Firearm Enhancement, Robbery in the First Degree with a Firearm Enhancement, and Unlawful Possession of a Firearm in the Second Degree. CP 16-18.

The assault charge alleged that "Respondent did intentionally assault another person, to-wit: Joan Chavez, with a deadly weapon, to-wit: a shotgun...". Count II, CP 17.

The juvenile court kept jurisdiction over the case, and A.C. was tried before a judge sitting without a jury. CP 7. Before trial, the State moved to have A.C.'s attorney removed due to a conflict. The court granted the motion, and noted that A.C. was too young to make a valid waiver of the conflict. RP (2-9-05) 2-11, 9.

At a hearing to determine the admissibility of A.C.'s statements to law enforcement, the court found that A.C. was in custody and voluntarily waived his rights. RP (2-22-05) 14, 22; RP (3-9-05) 72. The court's oral findings did not address A.C.'s age, experience, education, background, intelligence, or his capacity to understand the warnings and his rights. RP (2-22-05) 5-22; RP (3-9-05) 61-73. The State did not submit any evidence on these factors (although the defense did bring out A.C.'s age at the hearing). RP (2-22-05) 5-22; RP (3-9-05) 61-73.

During the fact-finding hearing, the State sought to introduce a recording of the 911 call from A.C.'s mother (Joan Chavez), the alleged victim in the Robbery and TMVOP counts. RP (3-7-05) 64-69. The state's attempt to lay the foundation for admission of the tape through the testimony of Ms. Chavez was as follows:

- Q. Do you remember what you told the 911 operator?
- A. I remember telling them that my son had left in my van and that I didn't know which direction that he was going.
- Q. Do you remember telling the 911 operator what Azel said?
- A. I remember -- I don't remember telling him what he said, but I remember telling what he was wearing so that they would be aware and I gave them the license plate.
- Q. Is it fair to say, you just said you don't remember what you told the 911 operator in terms of what Azel said?
- A. Yeah, I remember what I said.
- Q. And, is it also fair to say that today you don't have a complete recollection of every word that Azel used that day?
- A. No.
- Q. And, is it true that when you were telling the 911 operator what had happened, you were trying to give her a full and complete picture what had happened?
- A. Yeah, I was trying to let them know, you know, like I said, I didn't know which direction he was heading.
- Q. But, you were trying to give them a complete description of what had happened?
- A. What had happened right there at the house, yes.
- Q. And, when you called 911, it was right after Azel left?
- A. Had left, yeah.
- Q. So, is it fair to say that everything that had just happened was fresh in your mind?

A. Yes.
RP (3-7-05) 64-65.

The court over-ruled defense objections and admitted the tape as a past recorded recollection under ER 803(a)(5). RP (3-7-05) 69.

The court found A.C. guilty on all counts. He was found to have no criminal history, and was sentenced on June 15, 2005. CP 7-15. This timely appeal followed. CP 3.

ARGUMENT

I. RCW 13.40.021(2) IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees an accused “the right to a speedy and public trial, by an impartial jury. . . .” However, RCW 13.04.021(2) proscribes jury trials in juvenile court. Two recent United States Supreme Court cases undermine Washington courts’ prior analysis of juvenile jury trials under the Sixth Amendment, and call into question the constitutionality of RCW 13.04.021(2).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Court analyzed the Sixth Amendment’s Confrontation Clause, and said it was compelled to “turn to the historical background of the Clause to understand its meaning.” 124 S. Ct. at 1359.

Justice Scalia, writing for the majority, surveyed the history of the concept of confronting one's accusers from Roman times to the revolution. *Crawford*, 124 S. Ct. 1360-63. From this historical review, he concluded that the Supreme Court's prior attempts to define the scope of the clause's protections had strayed from the Framers' intent. *Crawford*, 124 S. Ct. at 1369-72. *Crawford* righted the course and returned to the "Framers' design" by holding that: "Where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 124 S.Ct. at 1374.

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the Court analyzed the Sixth Amendment in order to "give intelligible content to the right of jury trial." *Blakely*, 124 S.Ct at 2538. Again, the Court returned to the historical context in which the Sixth Amendment was drafted, and referencing writings of the drafters of the Federal Constitution:

That right [the right to trial by jury] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control of the judiciary.

Blakely, 124 S.Ct. at 2538-39.

The Court emphasized:

Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. . . .

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

Blakely, 124 S.Ct. at 2543.

Finally, the Court concluded, "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." *Blakely* 124 S.Ct. at 2540.

Blakely and *Crawford* make clear that the protections afforded by the Sixth Amendment, including the right to a jury trial, can be no less than that which the framers intended in their design. If the text of the Amendment does not resolve an issue relating to the jury trial right, then proper analysis requires examination of the historical context in which the Amendment was adopted.

The text of the Sixth Amendment makes no distinction between adults and juveniles. In fact, at the time the Sixth Amendment was drafted, there was no such distinction:

Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike. The fundamental thought in our criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers. The child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act -- nothing else -- and if it had, then of visiting the punishment of the state upon it. Mack, Julian, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909).

The original Juvenile Court Act of Illinois (1899) was a model quickly followed by almost every state in the Union. See Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. L. Rev. 167, 174.

Constitutional challenges to these new juvenile systems, which did not provide the full panoply of constitutional rights to juveniles, were rebuffed by "insisting that the proceedings were not adversary, but that the State was proceeding as *parens patriae*." *In Re Gault*, 387 U.S. 1, 16, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

That rationale was questionable:

How could the reformers create this kind of court within a constitutional framework that insisted upon many of the institutions and procedures then thought to be irrelevant or subversive of the job of protecting children? First, because most of

the objectionable constitutional provisions applied only to criminal cases, they could be avoided by insisting that the proceedings in juvenile court were "civil" and not "criminal." Second, the inventive Illinois group invoked a variant of well-established principle of the courts of equity. The writers of a Children's Bureau pamphlet of the 1920's described the idea: "The conception that the State owes a duty of protection to children that it does not owe to adults was established by the old courts of equity. . . . The crown was *parens patriae* and exercised its prerogative to aid unfortunate minors through the great seal." Never mind that the doctrine of the crown as *parens patriae* had been applied only to protect children in respect to their property against the acts of greedy adults or to assure a child a proper upbringing but never to immunize a child against the consequences of criminal conduct. It was close enough to do a job. "In short, the Chancery practice was substituted for that of the criminal procedure."

Paulsen at 173.¹

Nonetheless in *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971), a fractured court found that a state juvenile justice scheme that did not provide for a jury trial was constitutionally permissible. Writing for a four-member plurality, Justice Blackmun concluded that juvenile proceedings in Pennsylvania and North Carolina were not "yet" considered "criminal prosecutions" and thus the due process requirements of fundamental fairness did not impose the Sixth Amendment guarantee of a right to trial by jury on juvenile courts.

¹ Providing juveniles with jury trials does not mean that, at sentencing, the concerns of the "reformers" cannot be implemented. Education, treatment, less restrictive prison settings and other services can still be provided without regard to whether the trier of fact is a judge or a jury.

McKeiver, 403 U.S. at 541. The plurality questioned the necessity of a jury to accurate fact-finding and emphasized the unique attributes of the juvenile system that, 35 years ago, still differentiated it from adult criminal prosecutions. *McKeiver*, 403 U.S. at 543-51.

Given the recent decisions in *Crawford* and *Blakeley*, however, and the historical provision for jury trials in criminal matters for all persons of sufficient capacity to commit a crime, *McKeiver* is questionable precedent. The current United States Supreme Court cases demonstrate that in interpreting the Federal Constitution issues of reliability, efficiency and semantics are unimportant. The only relevant question is “What was the intent of the Framers?” The language of the Sixth Amendment made no distinction between adults and juveniles in regard to the right to a jury trial, and at the time the amendments were adopted, all persons over the age of 7 and charged with criminal activity were tried by a jury. Thus, no matter what rationale or label is applied to avoid the constitutional guarantee, where a person is charged with an act that results in loss of liberty, the only safeguard envisioned by the Framers was a jury trial.²

² Division I has recently rejected a challenge to the juvenile system in the aftermath of *Crawford* and *Blakeley*. *State v. Tai N.*, 127 Wn.App. 733, 113 P.3d 19 (2005); that case is pending acceptance of review by the Washington Supreme Court.

The U.S. Supreme Court's recent Sixth Amendment requires a return to the historical practice of affording jury trials for juvenile offenders; thus RCW 13.04.021(2) is unconstitutional. Since A.C. was denied his constitutional right to a jury trial under the Sixth Amendment, his conviction must be reversed and his case must be remanded for a jury trial.

II. RCW 13.40.021(2) VIOLATES ARTICLE I, SECTION 21 AND ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION.

Under Article I, Section 21 of the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Article I, Section 22 provides that "the accused shall have the right . . . to have a speedy public trial by an impartial jury." Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Washington's State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Absent controlling precedent, a party asserting that the State Constitution provides more protection than the Federal Constitution must analyze the issue under *Gunwall*. *State v.*

Ladson, 138 Wn.2d 343, 979 P.2d 833 (1999). Since this issue does not fall squarely within any controlling precedent, the *Gunwall* factors must be examined. Analysis under *Gunwall* supports an independent application of Wash. Const. Article I, Sections 21 and 22 to this case and mandates reversal of the conviction.

A. The language of the State Constitution requires jury trials for juveniles.

The first *Gunwall* factor requires examination of the text of the State Constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolat

...e’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection, and the provisions reference to “criminal prosecutions” does not distinguish between adult and juvenile prosecutions.

Thus juveniles who are “accused” in “criminal prosecutions...shall have the right to. . . trial by an impartial jury” (under the plain language of

Article I, Section 22), and a juvenile's right to a jury trial as it existed in 1889 "must not diminish over time," *Sofie v. Fibreboard Corp.*, at 656. The current statutory scheme, requiring bench trials in juvenile court, directly violates both provisions of the Constitution. *Gunwall*, factor one favors an independent application of these provisions.

- B. Significant differences in the texts of parallel provisions of the Federal and State Constitutions favor an independent application of the State Constitution in this case.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and State Constitutions. Wash. Const. Article I, Section 21, which declares "[t]he right of trial by jury shall remain inviolate" has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace, supra*, found the difference between the two Constitutions significant, and determined that the State Constitution provides broader protection. The court held that under the Washington Constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." This is in contrast to the more limited protections available under the Federal Constitution. *Pasco v. Mace*, at 99-100. This difference in language between also favors an independent application of the State Constitution.

C. State constitutional history, state common law history, and pre-existing state law require jury trials for juveniles.

Under the third and fourth *Gunwall* factors this Court must look to state common law history, State constitutional history, and other pre-existing state law.

Wash. Const. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, *supra*, at 96. See also *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Hobbie*, *supra*; *State v. Smith*, 150 Wn.2d 135 at 151, 75 P.3d 934 (2003). In 1889, juveniles in Washington were entitled to trial by jury. Code of 1881, ch. 87, Section 1078.

A separate juvenile court developed in 1905; however, juveniles retained the right to a jury trial until 1937. Laws of 1905, Ch. 18, Section 2; Laws of 1937, Chapter 65, Section 1. Cases analyzing the constitutionality of the juvenile system have weighed the extent to which juvenile court differs from adult court. In essence, nonjury trials have been permitted because juveniles were not convicted of crimes.

In *Estes v. Hopp*, 73 Wn.2d 263, 268, 438 P.2d 205 (1968), the Washington Supreme Court described the juvenile system as rehabilitative and nonadversarial, and noted that a primary benefit was the system’s private and informal character. *Estes v. Hopp* at 268. In *State v. Lawley*, 91 Wn.2d

654, 591 P.2d 772 (1977), the Supreme Court noted a shift from rehabilitation toward punishment, and warned that jury trials would be required once “juvenile proceedings [became] akin to an adult criminal prosecution.” *Lawley* at 656. In *State v. Schaaf, supra*, the Court examined amendments to the act and concluded that “Juvenile proceedings remain rehabilitative in nature and distinguishable from adult criminal prosecutions.” *Schaaf*, 109 Wn.2d at 4. In *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997), the Court again suggested that juveniles would be entitled to a jury trial once juvenile proceedings “substantively” resembled adult criminal trials or when juveniles were “encumbered with the far more onerous ramifications of... adult conviction.” *Monroe v. Soliz, supra*, at 427.

Division I of the Court of Appeals has reexamined the issue and reached the same conclusions, relying on the reasoning of *Schaaf* and *Monroe v. Soliz*. See, e.g., *State v. Tai N., supra*; *State v. J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999).

Significant changes have occurred in Washington’s system over the last decade. Amendments to the statutes and new court decisions have eliminated many of the distinctions between the juvenile system and the adult criminal system. The emphasis has shifted from rehabilitation to punishment, and the conditions referenced in *Lawley* and *Soliz* have come

into play. The present incarnation of the juvenile system resembles the adult system, just as it did when the Constitution was adopted in 1889.

First, under RCW 13.04.011(1), a juvenile “[a]djudication’ has the same meaning as ‘conviction’ in RCW 9.94A.030, and the terms must be construed identically and used interchangeably.” Because of this, a former distinguishing benefit of the juvenile system has vanished. The distinction is not merely linguistic: it is permissible to deny jury trials only if juvenile proceedings are civil rather than criminal. The *Schaaf* court believed the distinction to be vital. *Schaaf* at 7-8.

Second, amendments to the Juvenile Justice Act have lengthened the minimum period of JRA commitment, added a “clearly too lenient” aggravating factor, and eliminated flexibility in imposing restitution. *See* RCW 13.40.

Third, the goals of the juvenile system and the adult system have converged, and now both systems strike a similar balance between punishment and rehabilitation. Every rehabilitative aspect of the juvenile system has an adult counterpart. For example, juvenile sex offenders may be eligible for SSODA; adult sex offenders may be eligible for SSOSA. Both programs favor treatment over incarceration. *Compare* RCW 13.40.160(3) with RCW 9.94A.670. Similarly, juveniles with drug problems may be eligible for treatment under the CDDA program (RCW

13.40.0357 and RCW 13.40.165) while their adult counterparts may be eligible for treatment under DOSA (RCW 9.94A.660) or, where available, under Drug Court (RCW 2.28.170). Juvenile offenders can be eligible for diversion (RCW 13.40.070) or deferred disposition (RCW 13.40.127), while adult offenders can go through local pre-filing diversion programs (if charged with felonies)³ or can resolve misdemeanors through “Agreed Orders of Continuance,” deferred sentences (RCW 35.50.255, RCW 3.66.068, RCW 3.50.330), and deferred prosecutions (RCW 10.05).

Fourth, juveniles adjudicated in the juvenile system are increasingly housed in adult prison. Provisions have been added to RCW 13.40.280 easing the transfer process when assaults on staff or other youth are alleged—the burden now shifts to the juvenile to show he or she should *not* be transferred to adult prison. RCW 13.40.280(4). Thus a juvenile can be incarcerated in adult prison until the age of 21, without benefit of a jury trial.

Fifth, confidentiality and privacy have disappeared from juvenile proceedings, and juvenile offenders are now stigmatized in the same manner as adults. Proceedings and records are open to the public (RCW

³ Although not created by statute, such programs are clearly contemplated. See RCW 9.94A.411.

13.40.140(6); RCW 13.50.050(2)); furthermore, juvenile records can generally not be destroyed,⁴ and can only be sealed under circumstances equivalent to SRA provisions allowing adult felonies to be vacated. RCW 13.50.050; RCW 9.94A.640. Juvenile conviction records can be disseminated without restriction, RCW 10.97.050, and listed on background checks under RCW 43.43.830(4). Juveniles convicted of Class A sex offenses must generally register as sex offenders for life, juveniles convicted of Class B sex offenses must generally register for at least 15 years, and juveniles convicted of Class C sex offenses must generally register for at least 10 years.⁵ RCW 9A.44.130; RCW 9A.44.140. The current scheme also requires community and school notification whenever juveniles convicted of stalking, sex offenses, or violent offenses leave JRA custody. RCW 13.40.215.

⁴ The sole exception is where the entire criminal record consists of only one referral for diversion. RCW 13.50.050.

⁵ There are three exceptions to these rules: First, adults and juveniles who stay out of trouble for ten years may petition for relief of the registration requirement. Second, juveniles who were 15 or older at the time of the offense may petition for relief, which will be granted "only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of" the registration statute. RCW 9A.44.140. Juveniles who were under age 15 may petition and be granted relief if they haven't been adjudicated of any additional sex or kidnapping offenses within the 24 months following the conviction and can prove by a preponderance of the evidence that future registration will not serve the purposes of the registration statute. RCW 9A.44.140.

Sixth, the juvenile courts invade a juvenile offender's privacy by collecting personal data, including fingerprints, DNA, and blood for HIV testing. RCW 70.24.340 and RCW 43.43.754.

Seventh, Juvenile convictions play a significant role in adult sentencing. The SRA's definition of "criminal history" now specifically includes juvenile adjudications and no longer draws any distinction between juvenile and adult convictions. All juvenile adjudications (including misdemeanors) are to be included in an adult's criminal history, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.030(12). In 1997, the Legislature dispensed with special treatment for juvenile felony adjudications in calculation of an adult offender score.⁶ Under the current system, all juvenile felonies count in the calculation of the adult offender score, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.525. Juvenile convictions "wash out" of the offender score in the same manner as adult offenses. RCW 9.94A.525. Multiple prior juvenile convictions are now scored under the "same criminal conduct" analysis used to weigh multiple adult prior convictions, rather than the more lenient method previously in effect. RCW 9.94A.525. Furthermore,

⁶ The only exceptions are for nonviolent offenses and for drug convictions scored against current drug offenses. RCW 9.94A.

serious juvenile traffic convictions and felony traffic offenses enhance a sentence for vehicular homicide and vehicular assault in the same manner as adult convictions. RCW 9.94A.525. Juvenile felony convictions for violent offenses or sex offenses also count as if they were adult convictions, and score as multiple points against other violent or sex offenses. RCW 9.94A.525. Adults with juvenile records are now ineligible for some of the special programs available under the SRA. *See, e.g.,* RCW 9.94A.690(1)(a)(ii) (work ethic camp), RCW 9.94A.660 (DOSA), RCW 9.94A.650 (First time offender waiver).

Juvenile convictions result in a broader range of collateral consequences than ever before. RCW 9.41.040 now prohibits children convicted of a juvenile felony from possessing a firearm, even under circumstances where other children are allowed to do so. RCW 9.41.042. Felony drug offenses disqualify juveniles for public assistance and food stamps. RCW 74.08.025(4). Juveniles convicted of alcohol or drug offenses lose their driver's licenses for at least one year. RCW 46.20.265.

Juvenile court is a formal, adversarial system with serious consequences. Refusal to allow juvenile cases to be tried to a jury reflects indifference to individual rights, and is antithetical to our State Constitution's strong jury protections. The framers of our State Constitution would not have tolerated this result.

In summary, the legal context surrounding adoption of the State Constitution and the development of the law in Washington since territorial days support a juvenile criminal defendant's right to a jury trial. *Gunwall* factors 3 and 4 favor an independent application of Article I, Sections 21 and 22. In order to give the proper interpretation to these constitutional provisions, juveniles must be restored the right to trial by jury.

- D. Differences in structure between the Federal and State Constitutions favor an independent application of the State Constitution.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that "[t]he fifth *Gunwall* factor... will always point toward pursuing an independent State Constitutional analysis because the Federal Constitution is a grant of power from the states, while the State Constitution represents a limitation of the State's power." *State v. Young*, at 180. The *Schaaf* Court did not have the benefit of this decision.

- E. The right to a jury trial is a matter of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial for a juvenile criminal defendant is a matter of State concern; clearly there is no need for national uniformity on the issue. *Schaaf*, 109 Wn.2d at 16.

Indeed, several states provide jury trials to juveniles on independent State

Constitutional grounds. *See e.g. State v. Eric M.*, 122 N.M. 436, 925 P.2d 1198, 1199-1200 (N.M. 1996); *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 789 (Tenn. 1980); *RLR v. State*, 487 P.2d 27, 35 (Alaska 1971).⁷ *Gunwall* factor number six thus also points to an independent application of the State Constitutional provision in this case.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our State Constitution provides greater protection to juveniles charged with a criminal offense than does the Federal Constitution, and requires that the critical facts be submitted to a jury. The failure to provide a jury trial mandates reversal of A.C.'s conviction.

III. JUVENILES CHARGED WITH SERIOUS OFFENSES HAVE THE RIGHT TO A JURY TRIAL, EVEN IF OTHER JUVENILES DO NOT.

Schaaf and the other cases addressing the issue of juvenile jury trials have all compared the two systems as a whole; they have not focused on the way the juvenile justice system treats the individual defendant in a given case. This is not the correct comparison. Instead, the focus should be on the deprivation of the appellant's constitutional rights. The appellant's particular circumstances, including the offenses charged,

⁷ Other states provide for jury trials by statute. *See, e.g.*, Massachusetts General Laws Chapter 119 Section 55A.

should be compared with the offenses that trigger an adult defendant's constitutional right to a jury trial.⁸ It is of little import that some theoretical juvenile charged with minor offenses might have rehabilitative options available; instead, the actual concrete facts of an individual juvenile's case must be evaluated to see if the jury right applies.

Applying this test to the facts of this case, it is clear that A.C. should have been afforded a jury trial. A.C.'s charges made him ineligible for all of the special rehabilitative programs available to other juveniles. Despite the complete absence of any criminal history, he could not participate in Diversion or Youth Court (RCW 13.40.070, RCW 13.40.580 *et seq.*), Deferred Disposition (RCW 13.40.127), the Suspended Disposition Alternative ("Option B," RCW 13.40.0357), the Chemical Dependency Disposition Alternative ("Option C," RCW 13.40.0357, RCW 13.40.160(4), and RCW 13.40.165), the Mental Health Disposition Alternative (RCW 13.40.160(5) and RCW 13.40.167), the Community Commitment Disposition Alternative Pilot Program (now expired, RCW 13.40.160(6) and former RCW 13.40.169), or the Juvenile Offender Basic Training Camp program ("boot camp," RCW 13.40.320).

⁸ The Washington Supreme Court has decided that the right to a jury trial attaches to any offense, no matter how petty, that constitutes a crime rather than an infraction. *Pasco v. Mace*, at 99.

In the absence of these key rehabilitative options, the juvenile system's treatment of A.C. does not differ from the adult system's treatment of adults charged with petty crimes. Indeed, adults charged with misdemeanors and gross misdemeanors have a greater range of rehabilitative options available than A.C., but are still guaranteed jury trials under the State and Federal Constitutions.

A.C. should have been granted a jury trial. His conviction must be reversed, and his case remanded for a jury trial.

IV. THE ASSAULT CHARGED IN COUNT II MUST BE DISMISSED BECAUSE THE JUDICIAL DEFINITION OF ASSAULT VIOLATES THE SEPARATION OF POWERS.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The State Constitution divides political power into legislative authority (article II, section 1), executive power (article III, section 2), and judicial power (article IV, section 1). *Moreno*, at 505. Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the "fundamental functions" of another. *Moreno*, at 505. A violation of

separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno at 506, citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wash.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized assault; however it has not defined that crime. *See, generally*, RCW 9A.36.⁹ Instead, it has allowed the judiciary to define the core meaning of the crime; the judiciary has done

⁹ There are some sections of the statute, not applicable here, which specifically define the elements of certain types of assaults. *See, e.g.*, RCW 9A.36.011(1)(b): “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance.”

so, enlarging the definition over a period of many years. This violates the separation of powers. *Moreno, supra*.

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, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 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 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a 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.

This 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 Wn.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 putting 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. This violates the separation of powers because it encroaches on a core legislative function. *Moreno, supra; Wadsworth, supra*. The statutory and judicial scheme under which A.C. was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

V. THE TRIAL COURT ERRED BY ADMITTING A.C.'S CUSTODIAL STATEMENTS.

The Fifth Amendment to the U.S. Constitution provides that "No person shall... be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. This privilege against self-incrimination is applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964). Similarly, Article I, Section 9 of the Washington State Constitution, provides that "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section 9.

The law presumes that statements made by a suspect while in custody were compelled in violation of the privilege against self-

incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Corn*, 95 Wn. App. 41 at 57, 975 P.2d 520 (1999). Advice of the right to remain silent and the right to counsel must precede custodial interrogation. *Miranda, supra; Corn*, at 57.

An accused may waive her or his *Miranda* rights provided the waiver is made voluntarily, knowingly and intelligently. *Corn*, at 57. The waiver “must be made with ‘full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” *Corn*, at 58, quoting *Miranda*, at 444. The State must show that the defendant was fully advised of his rights, understood them, and knowingly and intelligently waived them. *State v. Reuben*, 62 Wn. App. 620 at 625, 814 P.2d 1177 (1991). The court must examine the totality of the circumstances surrounding the interrogation when making the determinations concerning the uncoerced nature of the choice and the level of comprehension of the right being relinquished. *Corn*, at 58. This totality of the circumstances approach “mandates inquiry into all the circumstances surrounding the interrogation [, including] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving

those rights. *Fare v. Michael C.*, 442 U.S. 707 at 725, 61 L.Ed.2d 197, 99 S.Ct 2560 (1979).

When the State seeks to admit custodial statements obtained in the absence of an attorney, the State bears the “heavy burden” of establishing the defendant's waiver. *Corn*, at 58. In 2000, the United States Supreme Court reaffirmed *Miranda*, and held (for the first time) that the *Miranda* warnings were constitutionally required (rather than merely “prophylactic.”) *Dickerson v. U.S.*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

An alleged *Miranda* violation is reviewed *de novo*. *State v. Dykstra*, 127 Wn.App. 1 at 7, 110 P.3d 758 (2005). Failure to comply with *Miranda* is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Spotted Elk*, 109 Wn.App. 253 at 261, 34 P.3d 906 (2001).

Here, the court did not inquire into all the circumstances surrounding the three interrogations of A.C. Almost nothing was presented regarding A.C.’s age, experience, education, background, intelligence, capacity to understand the warnings, capacity to understand his rights, and capacity to understand the consequences of waiving those rights. RP (2-22-05) 5-22; RP (3-9-05) 61-73. The only information that

was presented showed that A.C. was only fourteen, and that was brought out by the defense. RP (2-22-05) 12.

Furthermore, the court had previously ruled that A.C. was too young to execute a valid waiver of his attorney's potential conflict of interest. RP (2-9-05) 9.

The court should not have found that A.C. waived his *Miranda* rights, and his statements should not have been admitted. The erroneous admission of his custodial statements violated his Fifth Amendment privilege against self-incrimination. Because of this, the statements must be suppressed, the conviction must be reversed, and the case must be remanded for a new trial.

VI. THE TRIAL COURT ERRED BY ADMITTING THE 911 TAPE WITHOUT PROPER FOUNDATION UNDER ER 803(A)(5).

The admission of evidence is reviewed for abuse of discretion. *State v. Saavedra*, ___ Wn. App. ___, 116 P.3d 1076 at 1080 (2005). A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. *Saavedra*, at 1080.

Under ER 803(a)(5), recorded recollections are not excluded under the hearsay rule. To qualify as a recorded recollection, the proffered evidence must be "A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection

to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly." ER 803(a)(5).

Here, the State introduced Joan Chavez' 911 call as a recorded recollection; however, there was no showing that she had "insufficient recollection to enable [her] to testify fully and accurately..." In fact, Ms. Chavez testified repeatedly to the contrary:

Q. Do you remember what you told the 911 operator?

A. I remember telling them that my son had left in my van and that I didn't know which direction that he was going.

Q. Do you remember telling the 911 operator what Azel said?

A. I remember -- I don't remember telling him what he said, but I remember telling what he was wearing so that they would be aware and I gave them the license plate.

Q. Is it fair to say, you just said you don't remember what you told the 911 operator in terms of what Azel said?

A. Yeah, I remember what I said.

Q. And, is it also fair to say that today you don't have a complete recollection of every word that Azel used that day?

A. No.
RP (3-7-05) 64-65.

Furthermore, there was no foundational testimony indicating the 911 tape "reflect[ed] [her] knowledge correctly" as required by ER

803(a)(5). Because of this, A.C.'s objection should have been sustained and the tape should not have been admitted. His convictions must be reversed, and the case remanded for a new trial.

CONCLUSION

If an adult defendant were forced to go through proceedings modeled on Washington's juvenile system, her or his conviction would be reversed, regardless of the informality of the proceedings and the rehabilitative options made available. The legislature could not constitutionally force an adult charged with a crime through the juvenile system. The only difference between an adult forced through the system and a juvenile forced through the system is a difference in age, but there is no exception based on age in the language or history of the Sixth Amendment to the Federal Constitution, or in the language or history of Article I, Section 21 and Article I, Section 22 of the Washington State Constitution.

The requirement of nonjury trials found in RCW 13.04.021(2) is unconstitutional under the Sixth Amendment because it contradicts the Framers' design. It is unconstitutional under Article I, Section 22 because it violates that provision's plain language. It is unconstitutional under Article I, Section 21 because it is a diminution of the right as it existed in

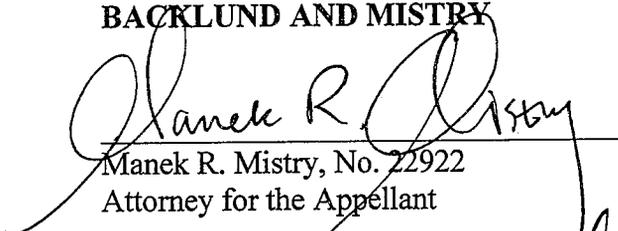
1889. For all these reasons, A.C.'s conviction was unconstitutional and must be reversed; his case must be remanded for a jury trial.

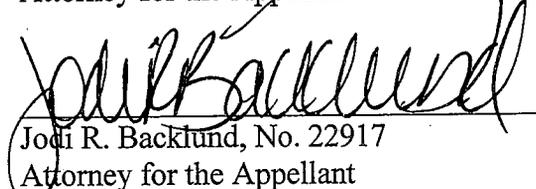
Furthermore, Count II of the Information must be dismissed because the judicially created definition of the crime of assault violates the separation of powers.

Finally, the conviction must be reversed and the case remanded for a new trial because the trial court erroneously admitted A.C.'s custodial statements (in violation of his Fifth Amendment privilege against self-incrimination) and the 911 tape (in violation of ER 803(a)(5)).

Respectfully submitted on November 13, 2005.

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CERTIFICATE OF MAILING

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I certify that I mailed, postage prepaid, a copy of Appellant's
Opening Brief to: ~~BY DEPUTY~~

Azel Chavez
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33010 SE 99th St.
Snoqualmie, WA 98065

And to the office of the Clallam County Prosecutor,

And that I personally delivered the original and one copy to
the Court of Appeals, Division II, for filing;

All on November 14, 2005.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Tacoma, Washington, on November 14, 2005.


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