

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 1

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

D. STATEMENT OF THE CASE 4

E. ARGUMENT 6

1. THE STATE DID NOT PROVE EACH ELEMENT OF SECOND DEGREE ASSAULT BEYOND A REASONABLE DOUBT 6

 a. Due Process requires the State prove each element of an offense beyond a reasonable doubt..... 6

 b. The State did not prove Mr. McKague inflicted substantial bodily injury 7

 c.. The Court must dismiss Mr. McKague’s conviction 9

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO PERMIT MR. McKAGUE TO WAIVE HIS RIGHT TO A JURY TRIAL 9

 a. The trial court refused to accept Mr. McKague’s knowing, intelligent and voluntary waiver of his right to jury trial..... 10

 b. A defendant may waive his right to a jury trial 10

 c. The trial court abused its discretion when it refused Mr. McKague’s request to waive his right to a jury trial 12

3.	THE TRIAL COURT DEPRIVED MR. MCKAGUE OF HIS RIGHTS TO A JURY TRIAL AND PROOF BEYOND A REASONABLE DOUBT WHEN IT IMPOSED A SENTENCE OVER THE MAXIMUM TERM BASED UPON PRIOR CONVICIONS THAT WERE NOT FOUND BY THE JURY BEYOND A REASONABLE DOUBT.....	14
	a.	Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence 15
	b.	This issues is not controlled by prior by federal decisions 17
	c.	The trial court denied Mr. McKague his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment 22
4.	THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED MR. MCKAGUE'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION	24
F.	CONCLUSION.....	31

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. amend XIV	passim
U.S. Const. amend. VI.....	passim

Washington Constitution

Const. Art. I, § 12	3
---------------------------	---

Washington Supreme Court Cases

<u>Bellevue v. Acrey</u> , 103 Wn.2d 203, 691 P.2d 957 (1984).....	11
<u>State ex rel. Carroll v. Junker</u> , 79 Wash.2d 12, 482 P.2d 775 (1971)	12
<u>State v. Cross</u> , 156 Wn.2d 580, 132 P.3d 80, <u>cert. denied</u> , 549 U.S. 1022 (2006).....	14
<u>State v. Furth</u> , 5 Wn.2d 1, 104 P.2d 925 (1940).....	21, 22
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6, 9, 15
<u>State v. Jones</u> , 70 Wn.2d 391, 494 P.2d 665 (1967).....	11
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	22
<u>State v. Oster</u> , 147 Wn.2d 141, 52 P.3d 26 (2002).....	26
<u>State v. Roswell</u> , 165 Wn.2d 186, 196 P.3d 705 (2008).....	25, 26, 30, 31
<u>State v. Smith</u> , 117 Wn.2d 117, 814 P.2d 652 (1991)	29
<u>State v. Smith</u> , 150 Wn.2d 135, 75 P.3d 934 (2003) <u>cert.</u> <u>denied</u> , <u>Smith v. Washington</u> , 124 S.Ct. 1616 (2004)	9, 20, 24

<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994)	11
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1994)	28, 29
<u>State v. Tongate</u> , 93 Wn.2d 751, 613 P.2d 121 (1980)	22
<u>State v. Wheeler</u> , 145 Wn.2d 116, 34 P.2d 799 (2001)	20, 24

Washington Court of Appeals Cases

<u>State v. Argueta</u> , 107 Wn.App. 532, 27 P.3d 242 (2001)	9
<u>State v. Oakley</u> , 117 Wn.App. 730, 72 P.3d 1114 (2003), review denied sub nom., <u>State v. Northeast District Court</u> , 151 Wash.2d 1007 (2004)	11
<u>State v. Williamson</u> , 100 Wn.App. 248, 996 P.2d 1097 (2000)	13

United States Supreme Court Cases

<u>Almendarez-Torres v. United States</u> 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)	passim
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)	passim
<u>Blakely v. Washington</u> , 542 US. 296, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004)	passim
<u>Bush v. Gore</u> , 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000)	28
<u>City of Cleburne v. Cleburne Living Center, Inc.</u> , 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)	28
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	6, 15

<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	9
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)	11
<u>Jones v. United States</u> , 526 U.S. 227, , 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)	11, 18, 19
<u>McMillan v. Pennsylvania</u> , 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)	19
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), <u>reversed on other grounds, Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)	9
<u>Patton v. United States</u> , 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930)	11
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 Ed.2d 556 (2002)	16, 17, 20
<u>Singer v. United States</u> , 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965)	11
<u>United States v. Gaudin</u> , 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)	6, 15
<u>Washington v. Recuenco</u> , 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)	26

Other Cases

Washington Sentencing Guidelines Comm'n, <u>Adult Sentencing Manual 2008</u>	27
--	----

Statutes

RCW 9.94A.57023

RCW 9A.36.0217

Rem. & Bal.Code, §§ 217721

Rem.Rev.Stat. § 228621

Court Rules

CrR 6.1 11

Other Authorities

Colleen P. Murphy, The Use of Prior Convictions After *Apprendi*, 37
U.C. Davis L. Rev. 973 (2004) 19

Ind. Code Ann. § 35-50-2-823

Mass. Gen. Laws Ann. ch. 278 § 11A23

N.C. Gen. Stat. § 14-7.523

S.D. Laws § 22-7-1223

W.Va. Code An.. § 61-11-1923

A. INTRODUCTION

Jay McKague, a homeless man, stole a can of smoked oysters from an Olympia convenience store for breakfast. As Mr. McKague left the store, the store's owner, Kee Ho Chang, chased after him and confronted him in the parking lot. Mr. McKague pushed Mr. Chang to the ground, causing him to bump his head. Mr. Chang suffered a mild concussion (without loss of consciousness) and a strained shoulder. Mr. McKague was convicted of second degree assault and was sentenced to serve the rest of his life in prison as a persistent offender.

On appeal Mr. McKague contends a concussion, without a loss of consciousness, is not "substantial bodily harm" and thus cannot support a conviction of second degree assault. Mr. McKague also contends the imposition of a persistent offender sentence denied him his Sixth Amendment right to a jury trial, and Fourteenth Amendment rights to due process and equal protection of the law.

B. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence to prove each element of the offense beyond a reasonable doubt, the court

deprived Mr. McKague of his Fourteenth Amendment right to due process by entering a conviction of second degree assault.

2. The trial court abused its discretion when it refused Mr. McKague's knowing intelligent and voluntary waiver of his right to a jury trial.

3. The trial court violated Mr. McKague's Sixth and Fourteenth Amendment right to a jury trial.

4. The trial court deprived Mr. McKague the equal protection guaranteed by the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington constitution, when the court, and not a jury, found the facts necessary to sentence him as a persistent offender.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. To convict Mr. McKague of second degree assault the State had to prove he inflicted substantial bodily injury on Mr. Chang. Where the State's evidence does not establish Mr. Chang suffered any impairment or loss of any bodily function is there sufficient evidence to support Mr. McKague's conviction of second degree assault?

2. So long as he does so knowingly, intelligently and voluntarily, a defendant may waive any of the several constitutional rights to which he is entitled at trial. However, because there is no right to a nonjury trial a court has the discretion to refuse a waiver of jury. Did the trial court abuse its discretion when it refused to accept Mr. McKague's knowing and voluntary waiver of his right to a jury based solely upon the potential sentence which might result from his conviction of second degree assault?

3. The Sixth and Fourteenth Amendment rights to a jury trial and due process of law guarantee an accused person the right to a jury determination beyond a reasonable doubt of any fact necessary to elevate the punishment for a crime above the otherwise-available statutory maximum. Were Mr. McKague's Sixth and Fourteenth Amendment rights violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

4. The Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, section § 12 of the Washington constitution require that similarly situated

people be treated the same with regard to the legitimate purpose of the law. With the purpose of punishing more harshly recidivist criminals, the Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances, the Legislature has labeled the prior convictions 'elements,' requiring they be proven to a jury beyond a reasonable doubt, and in other instances has termed them 'aggravators' or 'sentencing factors,' permitting a judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly-situated recidivist criminals differently, and the effect of the classification is to deny some recidivists the Sixth and Fourteenth Amendment protections of a jury trial and proof beyond a reasonable doubt, does the arbitrary classification violate equal protection?

D. STATEMENT OF THE CASE

One morning in Olympia, Jay McKague entered the Shop Fast Grocery picked up a can of smoked oysters and left without paying for the food. 3/30/09 RP 57-59. Outside the store Mr. McKague quickly ate his stolen breakfast and was confronted by Mr. Chang, the owner of the store. 3/31/09 RP 119, 144-45. Angry about the theft he had observed, Mr. Chang repeatedly

demanded "why did you steal my item?" 3/30/09 RP 62. Mr. Chang grabbed Mr. McKague. 3/30/09 RP 63; 3/31/09 RP 145. Mr. Chang testified that Mr. McKague punched him about six times. 3/19/09 RP 62-63. Mr. McKague then pushed Mr. Chang away, causing Mr. Chang to fall and strike his head on the ground. 3/30/09 RP 63, 76. When he fell, Mr. Chang bumped the back of his head on the ground. As a result, Mr. Chang suffered a cut on his head and felt dizzy, but he remained conscious. 3/19/09 RP 65-66.

Mr. Chang suffered a contusion to his scalp, a strained shoulder, and a concussion without a loss of consciousness. Ex 34, pp.3, 6.

The State charged Mr. McKague with one count of first degree robbery and in the alternative one count of second degree assault. CP 6. A jury acquitted Mr. McKague of the robbery charge but convicted him of the assault. CP 60-61.

Finding he had two prior convictions for most serious offenses, the trial court sentenced Mr. McKague to life without the possibility of parole. CP 68, 71.

E. ARGUMENT

1. THE STATE DID NOT PROVE EACH ELEMENT OF SECOND DEGREE ASSAULT BEYOND A REASONABLE DOUBT.

a. Due Process requires the State prove each element of an offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [she] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77, quoting Gaudin, 515 U.S. at 510.

To convict Mr. McKague of second degree assault the State was required to prove he intentionally assaulted Mr. Chang and

“thereby recklessly inflict[ed] substantial bodily harm.” RCW

9A.36.021(1)(a). CP 45.

b. The State did not prove Mr. McKague inflicted substantial bodily injury.

“Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

In the light most favorable to the State, the evidence does not establish Mr. Chang suffered substantial bodily harm.

Mr. Chang testified that when he confronted Mr. McKague, Mr. McKague punched him about six times and pushed him to the ground. 3/19/09 RP 62-63. When he fell, Mr. Chang bumped the back of his head on the ground. 3/19/09 RP 63, 76. As a result, Mr. Chang suffered a cut on his head and felt dizzy, but he remained conscious. 3/19/09 RP 65-66.

Mr. Chang did not suffer a fracture. The medical records stated that while Mr. Chang’s symptoms potentially indicated an occult fracture, following a CT scan, “no definite fracture [was] identified.” Id. The State did not offer records of any follow-up examinations of Mr. Chan at which the potential occult fracture was identifiable.

There was neither a substantial disfigurement nor loss of function in this case. While Mr. Chang suffered a contusion to his scalp, the medical records described it as not indicating any “sign of serious injury.” Ex. 34, p. 6. Mr. Chang also suffered a strained shoulder, Ex. 34, p.3, but there is no indication that injury resulted in either disfigurement or loss of use of his shoulder for any period of time.

Finally, Mr. Chang suffered a concussion without a loss of consciousness. Ex. 34, p.3. The State offered no evidence that Mr. Chang’s concussion caused any lack of function or impairment. The State did offer the discharge summary which Mr. Chang received outlining the potential symptoms of post-concussion syndrome, such as dizziness and nausea, but there was no evidence that Mr. Chang suffered these symptoms. Further, Mr. Chang did not testify that he was unable to perform any task.

In its best light, the State’s evidence proved that Mr. McKague assaulted Mr. Chang. The State’s evidence does not establish, however, that Mr. McKague inflicted substantial bodily harm. By entering a conviction in the absence of proof beyond a reasonable doubt of each element the court violated Mr. McKague’s Fourteenth Amendment right to due process.

c.. The Court must dismiss Mr. McKague's conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State failed to prove the elements that Ms. McKague inflicted substantial bodily harm the Court must reverse his conviction.

However, because the jury was explicitly instructed on the elements of the lesser offense of third degree assault, CP 53-55, the Court may reform the verdict to a conviction on the lesser offense. Green. 94 Wn.2d at 234-35; State v. Argueta, 107 Wn.App. 532, 539, 27 P.3d 242 (2001).

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO PERMIT MR. McKAGUE TO WAIVE HIS RIGHT TO A JURY TRIAL

a. The trial court refused to accept Mr. McKague's knowing, intelligent and voluntary waiver of his right to jury trial.

Prior to trial Mr. McKague waived his right to a jury trial. Mr. McKague explained he understood what the right entailed and that he had spoken at length with his attorney regarding the decision to waive jury. 3/30/09 RP 10-11. Mr. McKague explained "I think I would have a more fair bench trial than I would a jury trial." Id. at 10.

Defense counsel stated he had explained to Mr. McKague his right to a jury trial and had discussed the benefits and risks of a jury and bench trial to Mr. McKague. 3/30/09 RP 5-6, 8. Defense counsel represented to the court that he believed Mr. McKague's waiver was made knowingly, intelligently, and voluntarily. Id. at 8-9.

The trial court refused to permit the waiver saying:

Given the seriousness of the charge, given my preference that you not have any issues about any potential steps that one person, meaning me, the judge, would take as opposed to a jury of twelve of your peers, I think the stakes, frankly, are too high have a bench trial, and I'm not going to allow the waiver.

3/30/09 RP 11-12.

b. A defendant may waive his right to a jury trial. As with any constitutional right, a defendant may waive his right to a

jury trial as long as the waiver is voluntary, knowing, and intelligent. Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). The Supreme Court has held waiver cannot be presumed from a silent record; instead the record must show “the express and intelligent consent of the defendant.” Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). CrR 6.1(a) provides: “Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”

The Supreme Court has held there is no Sixth Amendment right to a nonjury trial. Singer v. United States, 380 U.S. 24, 36, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). Washington courts have similarly concluded Article I, §§ 21 and 22 do not provide a right to a nonjury trial. State v. Oakley, 117 Wn.App. 730, 743-44, 72 P.3d 1114 (2003), review denied sub nom., State v. Northeast District Court, 151 Wash.2d 1007 (2004). Instead, the question of whether a defendant will be permitted to waive his right to a jury trial is left to the trial court’s discretion. State v. Jones, 70 Wn.2d 391, 494 P.2d 665 (1967). The court in the present case abused its discretion

when it refused Mr. McKague's knowing and voluntary waiver of his right to a jury trial.

c. The trial court abused its discretion when it refused Mr. McKague's request to waive his right to a jury trial. A court abuses its discretion if its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

The trial court did not refuse Mr. McKague's waiver because it found the waiver was made involuntarily or unknowingly. Nor did the court refuse the waiver because the court found it was equivocal or because the court sensed it was based upon some misperception by Mr. McKague. Instead the court denied his request because the court was not comfortable with the responsibility of determining his guilt where it would lead to a sentence as a persistent offender.

Simply reciting "abuse of discretion" as a standard of review is not helpful. At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses his or her discretion. The range of those discretionary choices is, therefore, a question of law. For example, on one end, the judge abuse his or her discretion when findings of fact supporting the discretionary decision are not supported by the evidence. And on the other end, the judge abuses his or her discretion if the discretionary decision is contrary to law.

State v. Williamson, 100 Wn.App. 248, 257, 996 P.2d 1097 (2000).

Here the question of what factors a court can consider in refusing a knowing, intelligent and voluntary waiver of the right to a jury trial, i.e., defining the range of the court's discretionary choices, is a question of law.

Mr. McKague was facing a Class A and a Class B felony. Under the current state of the law, Mr. McKague was not entitled to have the jury determine whether he was a persistent offender, and thus the stakes he faced at a jury trial were no higher than any other Class A or B felony. Courts routinely allow defendants to plead guilty to such offenses, thereby waiving not only the right to jury trial, but several other constitutional rights as well. By the court's logic a defendant cannot waive jury, nor plead guilty to a Class A or B felony. That is plainly not the standard of practice in Washington courts.

Even if one considers the potential punishment which might follow a conviction, there are numerous examples of defendants pleading guilty, thereby waiving the right to a jury trial, to offenses which either expressly carry a term of life or as a practical matter will result in confinement for the remainder of the defendant's life.

See, State v. Cross, 156 Wn.2d 580, 648-50, 132 P.3d 80
(Johnson, C., dissenting), cert. denied, 549 U.S. 1022 (2006)
(discussing guilty plea of Gary Ridgeway to 48 counts of
aggravated first degree murder and guilty plea of Robert Yates to
13 counts of murder resulting in sentence in excess of 400 years).
Plainly then, the fact that a conviction might result in Mr. McKague's
confinement for the remainder of his life is not a proper basis on
which to refuse his knowing, intelligent and voluntary waiver of his
right to a jury trial.

The trial court abused its discretion in refusing Mr.
McKague's knowing, intelligent and voluntary waiver of his right to a
jury trial. The Court must reverse Mr. McKague's conviction and
remand to permit him to waive his right to a jury.

3. THE TRIAL COURT DEPRIVED MR.
McKAGUE OF HIS RIGHTS TO A JURY TRIAL
AND PROOF BEYOND A REASONABLE
DOUBT WHEN IT IMPOSED A SENTENCE
OVER THE MAXIMUM TERM BASED UPON
PRIOR CONVCITIONS THAT WERE NOT
FOUND BY THE JURY BEYOND A
REASONABLE DOUBT

Having denied Mr. McKague's motion to waive his right to a
jury trial, the court nonetheless proceeded to deny him that right
when it did not charge the jury with finding beyond a reasonable

doubt that Mr. McKague had two prior convictions for most serious offenses, and instead made that determination on its own and only by a preponderance of the evidence. Mr. McKague's sentence as a persistent offender therefore deprived him of his Sixth and Fourteenth Amendment rights to due process and to a jury trial and must be vacated.

a. Due process requires a jury find beyond a reasonable doubt any fact that increases a defendant's maximum possible sentence. The due process clause of the United States Constitution ensures that a person will not suffer a loss of liberty without due process of law. U.S. Const. amend. XIV. The Sixth Amendment also provides the defendant with a right to trial by jury. U.S. Const. amends. VI, XIV. It is axiomatic a criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely, 542 U.S. at 300-01; Apprendi, 530 U.S. at 476-77; Winship, 397 U.S. at 364; Green, 94 Wn.2d at 220-21. The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77, quoting Gaudin, 515 U.S. at 510.

In recent cases, the Supreme Court has recognized this principle applies not just to the essential elements of the charged offense, but also extends to facts labeled “sentencing factors” if the facts increase the maximum penalty faced by the defendant. In Blakely, the Court held that an exceptional sentence imposed under Washington’s Sentencing Reform Act (SRA) was unconstitutional because it permitted the judge to impose a sentence over the standard sentence range based upon facts that were not found by the jury beyond a reasonable doubt. Blakely, 542 U.S. at 304-05. Likewise, the Court found Arizona’s death penalty scheme unconstitutional because a defendant could receive the death penalty based upon aggravating factors found by a judge rather than a jury. Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 Ed.2d 556 (2002). And in Apprendi, the Court found New Jersey’s “hate crime” legislation unconstitutional because it permitted the court to give a sentence above the statutory maximum after making a factual finding by the preponderance of the evidence. Apprendi, 530 U.S. at 492-93.

In these cases, the Court rejected arbitrary distinctions between sentencing factors and elements of the crime “Merely using the label ‘sentence enhancement’ to describe the [one act]

surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S., at 476. Ring pointed out the dispositive question is one of substance, not form. “If a State makes an increase in defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” 536 U.S. at 602 (citing Apprendi, 530 U.S. at 482-83). Thus, a judge may only impose punishment based upon the jury verdict or guilty plea, not additional findings. Blakely, 542 U.S. at 304-05.

b. This issues is not controlled by prior by federal decisions. Almendarez-Torres v. United States held recidivism was not an element of the substantive crime that needed to be pled in the information, even though the defendant’s prior conviction was used to double the sentence otherwise required by federal law. 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Almendarez-Torres pleaded guilty and admitted his prior convictions, but argued that his prior convictions should have been included in the indictment. 523 U.S. at 227-28. The Court determined Congress intended the fact of a prior conviction to act as a sentencing factor and not an element of a separate crime. Id.

The Court concluded the prior conviction need not be included in the indictment because (1) recidivism is a traditional basis for increasing an offender's sentence, (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range and judges have typically exercise their discretion within a permissive range, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade" the Constitution. Id. at 244-45.

Almendarez-Torres, however, expressed no opinion as to the constitutionally-required burden of proof of sentencing factors that increase the severity of the sentence or whether a defendant has a right to a jury determination of such factors. Id. at 246.

Since Almendarez-Torres, the Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

Apprendi distinguished Almendarez-Torres because that case only addressed the indictment issue. 530 U.S. at 488, 495-96.

Apprendi noted "it is arguable that Almendarez-Torres was

incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested.” 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a “narrow exception” to the rule that a jury must find any fact that increases the statutory maximum sentence for a crime beyond a reasonable doubt. Id.

In Blakely, Apprendi, and Jones, the Court stated that, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” This statement, however, cannot be read as a holding that prior convictions are necessarily excluded from the Apprendi rule. Rather, it demonstrates only that the Court has not yet considered the issue of prior convictions under Apprendi. Colleen P. Murphy, The Use of Prior Convictions After Apprendi, 37 U.C. Davis L. Rev. 973, 989-90 (2004). For example, Justice Thomas, who was one of five justices signing the majority opinion in Almendarez-Torres, wrote in a concurring opinion in Apprendi that both Almendarez-Torres and its predecessor, McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), were wrongly decided. 530 U.S. at 499. Rather than focusing on whether something is a

sentencing factor or an element of the crime, Justice Thomas suggested the Court should determine if the fact, including a prior conviction, is a basis for imposing or increasing punishment. *Id.* at 499-519; accord, Ring v. Arizona, 536 U.S. 610 (Scalia, J. , concurring) (“I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute call them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.”).

The Washington Supreme Court has noted the United States Supreme Court’s failure to embrace the Almendarez-Torres decision. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing Ring) cert. denied, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing Apprendi). The Washington Supreme Court, however, has felt obligated to “follow” Almendarez-Torres. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24. Since Almendarez-Torres only addressed the requirement that elements be included in the indictment, however, this Court is not bound to follow it in this case, which attacks the use of prior convictions on

other grounds. Moreover, the Blakely decision makes clear that the Supreme Court's protection of due process rights extends to sentencing factors that increase a sentence, not over the statutory maximum provided at RCW 9A.20.021, but over the statutory standard sentence range, a decision not anticipated by the Washington courts. Blakely, 542 U.S. at 305.

Further, the reasons given by Almendarez-Torres to support its conclusion that due process does not require prior convictions used to enhance a sentence to be pled in the information do not apply to the POAA. First, Almendarez-Torres looked to the legislative intent and found that Congress did not intend to define a separate crime. But Congressional intent does not establish the parameters of due process.

Here, the initiative places the persistent offender definition within the sentencing provisions of the SRA, thus evincing a legislative intent to create a sentencing factor. This is in stark contrast to the prior habitual criminal statutes, which required a jury determination of prior convictions as consistent with due process. Chapter 86, Laws of 1903, p. 125, Rem. & Bal.Code, §§ 2177, 2178; Chapter 249, Laws of 1909, p. 899, § 34, Rem.Rev.Stat. § 2286; State v. Furth, 5 Wn.2d 1, 19, 104 P.2d 925 (1940).

Blakely makes clear that the judicial finding by a preponderance of the sentencing factor used to elevate Mr. McKague's maximum punishment to a life sentence without the possibility of parole violates due process. The "narrow exception" in Almendarez-Torres has been marginalized out of existence. This Court should revisit Washington's blind adherence to that now-disfavored decision and remand for a jury determination of the prior convictions.

c. The trial court denied Mr. McKague his right to a jury trial and proof beyond a reasonable doubt of the facts establishing his maximum punishment. Almendarez-Torres held prior convictions need not be pled in the information for several reasons. First the court held that recidivism is a traditional, and perhaps the most traditional, basis for increasing a defendant's sentence. 118 S.Ct. at 1230. Historically, however, Washington required jury determination of prior convictions prior to sentencing as a habitual offender. State v. Manussier, 129 Wn.2d 652, 690-91, 921 P.2d 473 (1996) (Madsen, J., dissenting); State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) (deadly weapon enhancement): Furth, 5 Wn.2d at 18. Likewise, many other states' recidivist statutes provide for proof beyond a reasonable doubt.

Ind. Code Ann. § 35-50-2-8; Mass. Gen. Laws Ann. ch. 278 § 11A; N.C. Gen. Stat. § 14-7.5; S.D. Laws § 22-7-12; W.Va. Code An.. § 61-11-19.

For several reasons, Almendarez-Torres does not answer the question whether Mr. McKague was entitled to have a jury decide beyond a reasonable doubt whether he had two prior convictions for most serious offenses before he could be sentenced as a persistent offender. The cases cited by Almendarez-Torres support not pleading the prior convictions until after conviction on the underlying offense; they do not address the burden of proof or jury trial right. 523 U.S. at 243-45.

Second, Almendarez-Torres noted the fact of prior convictions triggered an increase in the maximum permissive sentence. “[T]he statute’s broad permissive sentencing range does not itself create significantly greater unfairness” because judges traditionally exercise discretion within broad statutory ranges. 118 S.Ct. at 1231-32. Here, in contrast, Mr. McKague’s prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.570. Life without the possibility of parole in Washington is

reserved for aggravated murder and persistent offenders. This fact is certainly important in the constitutional analysis.

The SRA eliminated a sentencing court's discretion in imposing the mandatory sentence under the POAA, requiring the life sentence be based on a judge's finding regarding sentencing factors. Mr. McKague was entitled to a jury determination beyond a reasonable doubt of the aggravating facts used to increase his sentence.

4. THE CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATED MR. MCKAGUE'S RIGHT TO EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT AND ARTICLE ONE, SECTION TWELVE OF THE WASHINGTON CONSTITUTION.

As noted, even though under the Sixth and Fourteenth Amendments, all facts necessary to increase the maximum punishment must be proven to a jury beyond a reasonable doubt, Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury. Smith, 150 Wn.2d at 143; Wheeler, 145 Wn.2d 123-24.

However, the Washington Supreme Court has recently held that where a prior conviction “alters the crime that may be charged,” the prior conviction “is an essential element that must be proved beyond a reasonable doubt.” State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). While conceding that the distinction between a prior-conviction-as-aggravator and a prior-conviction-as-element is the source of “much confusion,” the Court concluded that because the recidivist fact in that case elevated the offense from a misdemeanor to a felony it “actually alters the crime that may be charged,” and therefore the prior conviction is an element and must be proven to the jury beyond a reasonable doubt. Id. While Roswell correctly concludes the recidivist fact in that case was an element, its effort to distinguish recidivist facts in other settings, which Roswell termed “sentencing factors,” is neither persuasive nor correct.

First, in addressing arguments that one act is an element and another merely a sentencing fact the Supreme Court has said “merely using the label ‘sentence enhancement’ to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently.” Apprendi, 530 U.S. at 476. More recently the Court noted:

Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. at 478 (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). Beyond its failure to abide the logic of Apprendi, the distinction Roswell draws does not accurately reflect the impact of the recidivist fact in either Roswell or the cases the Court attempts to distinguish.

In Roswell the Court considered the crime of communication with a minor for immoral purposes. Id. at 191. The Court found that in the context of this and related offenses,² proof of a prior conviction functions as an "elevating element," i.e., elevates the offense from a misdemeanor to a felony, thereby altering the substantive crime from a misdemeanor to a felony. Id. at 191-92. Thus, Roswell found it significant that the fact altered the maximum possible penalty from one year to five. See, RCW 9.68.090 (providing communicating with a minor for an immoral purpose is a gross misdemeanor unless the person has a prior conviction in

² Another example of this type of offense is violation of a no-contact order, which is a misdemeanor unless the defendant has two or more prior convictions for the same crime. Roswell, 165 Wn.2d at 196 (discussing State v. Oster, 147 Wn.2d 141, 142-43, 52 P.3d 26 (2002)).

which case it is a Class C felony); and RCW 9A.20.021 (establishing maximum penalties for crimes). Of course, pursuant to Blakely, the “maximum punishment” is five years only if the person has an offender score of 9, or an exceptional sentence is imposed consistent with the dictates of the Sixth Amendment. In all other circumstance “maximum penalty” is the top of the standard range. Indeed, a person sentenced for felony CMIP with an offender score of 3³ would actually have a maximum punishment (9-12 months) equal to that of a person convicted of a gross misdemeanor. See, Washington Sentencing Guidelines Comm’n, Adult Sentencing Manual 2008, III-76. The “elevation” in punishment on which Roswell pins its analysis is not in all circumstances real. And in any event, in each of these circumstances, the “elements” of the substantive crime remain the same, save for the prior conviction “element.” A recidivist fact which potentially alters the maximum permissible punishment from one year to five, is not fundamentally different from a recidivist element which actually alters the maximum punishment from 10 years to life without the possibility of parole.

³ Because the offense is elevated to a felony based upon a conviction of prior sex offense, and because prior sex offenses score as 3 points in the offender score, a person convicted of felony CMIP could not have score lower than 3.

In fact, the Legislature has expressly provided that the purpose of the additional conviction “element” is to elevate the penalty for the substantive crime: see RCW 9.68.090 (“Communication with a minor for immoral purposes – Penalties”). But there is no rational basis for classifying the punishment for recidivist criminals as an ‘element’ in certain circumstances and an ‘aggravator’ in others. The difference in classification, therefore, violates the equal protection clauses of the Fourteenth Amendment and Washington Constitution.

Under the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless the classification also affects a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that “recidivist criminals are not a semi-suspect class,” and therefore

where an equal protection challenge is raised, the court will apply a “rational basis” test. Id.

Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be “purely arbitrary” to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 117, 263, 279, 814 P.2d 652 (1991).

The Washington Supreme Court has described the purpose of the POAA as follows:

to improve public safety by placing the most dangerous criminals in prison; reduce the number of serious, repeat offenders by tougher sentencing; set proper and simplified sentencing practices that both the victims and persistent offenders can understand; and restore public trust in our criminal justice system by directly involving the people in the process.

Thorne, 129 Wn.2d at 772.

The use of a prior conviction to elevate a substantive crime from a misdemeanor to a felony and the use of the same conviction to elevate Class B felony to an offense requiring a sentence of life without the possibility of parole share the purpose of punishing the recidivist criminal more harshly. But in the former instance, the prior conviction is called an “element” and must be proven to a jury

beyond a reasonable doubt. In the latter circumstance, the prior conviction is called an “aggravator” and need only be found by a judge by a preponderance of the evidence.

So, for example, where a person previously convicted of rape in the first degree communicates with a minor for immoral purposes, in order to punish that person more harshly based on his recidivism, the State must prove the prior conviction to the jury beyond a reasonable doubt, even if the prior rape conviction is the person’s only felony and thus results in a “maximum sentence of only 12 months. But if the same individual commits the crime of rape of a child in the first degree, both the quantum of proof and to whom this proof must be submitted are altered – even though the purpose of imposing harsher punishment remains the same.

The legislative classification that permits this result is wholly arbitrary. Roswell concluded the recidivist fact in that case was an element because it defined the very illegality reasoning “if Roswell had had no prior felony sex offense convictions, he could not have been charged or convicted of *felony* communication with a minor for immoral purposes.” (Italics in original.) 165 Wn.2d at 192. But as the Court recognized in the very next sentence, communicating with a minor for immoral purposes is a crime regardless of whether

one has prior sex conviction or not, the prior offense merely alters the maximum punishment to which the person is subject to. Id. So too, second degree assault is a crime whether one has two prior convictions for most serious offenses or not.

The recidivist fact here operates in the precise fashion as in Roswell, this Court should hold there is no basis for treating the prior conviction as an “element” in one instance – with the attendant due process safeguards afforded “elements” of a crime – and as an aggravator in another. The Court should strike Mr. McKague’s persistent offender sentence and remand for entry of a standard range sentence.

F. CONCLUSION

For the reasons above, the Court must reverse Mr. McKague’s conviction of second degree assault. Alternatively, the court must reverse Mr. McKague’s sentence and remand for imposition of a standard range sentence.

Respectfully submitted this day of September, 2009.



GREGORY C. LINK -25228
Washington Appellate Project – 91052
Attorney for Appellant

APPENDIX

EXHIBIT 34

(Supplemental designation filed September 25, 2009)



OLYMPIA POLICE DEPARTMENT
 900 Plum Street SE Olympia Washington 98507
 Phone: (360)753-8300, Fax: (360)753-8143

2008-7817



34

Authorization to Use or Disclose My Health Information

Patient Name: Kee Ho Chang

Date of Birth: 5 / 4 / 54

Previous Name(s): _____

Patient's Address/Phone: 2020 Black Lake Boulevard SW Olympia, WA 98501

If known and available, please list the associated police report case number:
2008-7817

The Medical Providers listed below may disclose information to:

Olympia Police Department and Olympia Prosecuting Attorney's Office located at 900 Plum Street, Olympia, Washington 98507 (phone/fax information listed above).

- Providence St. Peter Hospital, 413 Lilly Road NE, Olympia, WA 98506-5166; Fax (360) 493-7181
- Capital Medical Center, 3900 Capital Mall Drive SW, Olympia, WA 98502; Fax (360) 956-3537
- Centralia Providence Hospital, 914 S. Scheuber Rd, Centralia, WA 98531; Fax (360) 330-8997
- Other: _____

My Authorization—You may use or disclose the following health care information (check all that apply):

- All of my health information and records, all correspondence, documents, reports, files and billings
- My health information relating to the following treatment or conditions: Injuries sustained 10-17-08 during a robbery incident
- My health information for the date(s): _____
- Other: _____

You may use or disclose health information regarding testing, diagnosis and treatment for (check all that apply):

- HIV (AIDS virus)
- Sexually transmitted diseases
- Drug/alcohol use
- Psychiatric disorders/mental health

Note: Only the patient may authorize disclosures relating to sexually transmitted diseases, including HIV/AIDS, if the patient was 14 years of age or older at the time of treatment. Only the patient may authorize disclosures relating to drug or alcohol abuse treatment or mental health treatment if the patient was 13 years of age or older at the time of treatment.

Reasons for this authorization (check all that apply):

- Criminal investigation and prosecution
- At my request
- Other: _____

This authorization ends in 90 days from date signed or:

- On date (within the 90 days) _____
- When following event occurs (within 90 days): _____

My Rights: I understand I do not have to sign this authorization in order to get health care benefits (treatment, payment or enrollment). I may revoke this authorization in writing. However, the revocation will not affect any actions already taken based upon this authorization. Two ways to revoke this authorization are: (1) fill out a revocation form that should be available from the medical provider's Records Department; or, (2) write a letter to the medical provider listed above. Once the medical provider discloses health information, the person or organization that receives it may re-disclose it. Privacy laws may no longer protect it.

Signature of patient (or personal representative/guardian) [Signature]

Date authorization signed 10-20-08

If signature by a personal representative of the patient, please complete the following information:
 Personal representative's name: _____ Phone number: _____

Relationship (circle one): parent, legal guardian* or power of attorney*

*If legal guardian or power of attorney, attach legal documentation.

CAPITAL MEDICAL CENTER
3900 Capital Mall Drive - Olympia, Wa. 98502
(360) 704-4749
Department of Imaging

COMPUTERIZED TOMOGRAPHY REPORT

PATIENT: CHANG, KEE HO LOC: D.ERD
DOB: 05/04/1954
UNIT #: D286970796
DATE: 10/17/2008
PHYSICIAN: Taylor, Robert A D.O.

EXAMS:

000602140 CT HEAD/BRAIN W/O CONTRAST,
000602147 CT MAXILLOFACIAL W/O CONTRAST

CLINICAL HISTORY: Pain.

HEAD CT WITHOUT CONTRAST: Multiple images of the head were performed without contrast. The brain parenchyma is normal. The ventricles are midline and are of normal size and configuration. There is no indication of an intracranial bleed. There is no suggestion of intracranial edema or intracranial mass effect. The paranasal sinuses are clear.

CONCLUSION: Negative CT head.

CT FACIAL BONES: Facial bone CT shows opacification, air-fluid levels, maxillary and ethmoid sinuses. Findings may indicate an underlying occult fracture. The inferior orbits appear intact. The pterygoid plates are unremarkable. No definite orbital or maxillary fracture is identified. The visualized nasal bone looks to be intact without a definite nasal bone fracture identified. The are normal appearances to the mandible and mandibular condyles.

CONCLUSION: Air-fluid levels maxillary sinuses and opacification ethmoid sinuses, potentially indicating occult fracture. No definite fracture is identified, however.

DVI/137606

** Electronically Signed by M.D. THOMAS F. PLUMLEY **
** on 10/17/2008 at 1633 **
Reported and signed by: THOMAS F. PLUMLEY, M.D.

CC: Jin, Jonathan Y., M.D.

TECHNOLOGIST: ANN F. BENOIT, RT(R) (CT)
TRANSCRIBED DATE/TIME: 10/17/2008 (1442)
TRANSCRIPTIONIST: DSPH.DM
ELECTRONIC SIGNATURE DATE/TIME: 10/17/2008 (1633)

PAGE 1 Signed Report Printed From PCI

RESP / CVS

chest non-tender
breath sounds nml
heart sounds nml

see diagram
tenderness / ecchymosis
splinting / paradoxical movements
decreased breath sounds
wheezes / rales / rhonchi
tachycardia / bradycardia

ABDOMEN

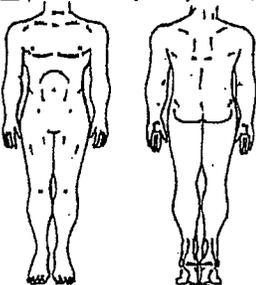
non-tender
no organomegaly
pulses nml

see diagram
tenderness / ecchymosis
mass / organomegaly
pulses unequal / poor

BACK

non-tender
painless ROM
pulses nml

see diagram
vertebral point-tenderness
CVA tenderness
muscle spasm
pulses unequal / poor



SKIN

intact, nml palp.

see diagram
crepitus

EXTREMITIES

no evidence of trauma
nml ROM
no pedal edema

see diagram
bony point-tenderness
painful / unable to bear weight
pulse deficit
ROM limited by pain

Handwritten notes: 'general crepitus', 'shoulder', 'and supra scapular area' with arrows pointing to the diagrams.

PROCEDURES

Wound Description / Repair

length cm location

superficial clean
*subcut. contaminated
muscle moderately / *heavily
linear stellate irregular

distal NVT: neuro & vascular status intact no tendon injury

anesthesia: local digital block ml

lidoc 1% 2% epi / bicarb marcaine 0.25% 0.5% LET

conscious sedation required; see attached documentation

prep: Betadine

irrigated / washed w/ saline minimal / mod. / *extensive

wound explored undermined

foreign material removed minimal / mod. / *extensive

partially completely wound margins revised

incision with scalpel multiple flaps aligned

removed with forceps no foreign body identified

repair: Wound closed with: wound adhesive / Dermabond / stork-strips

SKIN- # -0 nylon / prolene / staplos

interrupted running simple mattress (h/v)

*SUBCUT- # -0 vicryl / chromic

interrupted running simple mattress (h/v)

*may indicate intermediate repair *may indicate complex repair

EKG MONITOR STRIP NSR Rate

EKG NML Reviewed at (time) Rate

NSR nml intervals nml axis nml QRS nml ST/T

not / changed from

Repeat EKG Unchanged /

CT SCAN

head facial bones neck

normal



*00287-P-1-2

XRAYS Interpret by me Review of rad. report Discsd with radiologist

C-Spine
nml / NAD reversal / straightening of cerv. lordosis
no fracture DJD / spondylosis / spurring
nml alignment fracture non-displaced displaced
soft tissues nml

Facial Series CT
nml / NAD soft tissue swelling
no fracture max. sinus opacification / air-fluid level
soft tissues nml fracture non-displaced displaced
sinuses nml

Other See separate report

PROGRESS
re-examined same changed
pain reassessment same worse better
response to treatment same worse better

Notes:

Rx given
Discussed Hx, exam, results, dx and plan with Dr.
at (time) response
will see patient in: ED / hospital / office
Counseled patient / family regarding
lab / rad. results diagnosis need for follow-up family caretaker paramedics

CLINICAL IMPRESSION

Table with 3 columns: Concussion, Hematoma, Laceration, Fracture, stabilized, restorative; head, nose, ear R/L, chin, mandible, maxilla, lip, eyebrow, Cervical Strain; Intracranial Bleed, subdural, epidural, subarachnoid, intracerebral, Cerebral Contusion, Concussion with LOC, w/o LOC, Post-Concussive Syndrome.

Handwritten notes: 'Strain @ shoulder', 'No Facial Fracture' with circled numbers 1 and 2.

CONDITION- stable improved unchanged
DISPOSITION- home admitted AMA transferred
Time 1415 admission recommended-patient refuses

NP / PA ID#

PHYSICIAN ATTESTATION - (to be used when care is provided by the physician in conjunction with the NP or PA)
For this patient encounter, I reviewed the NP or PA documentation, treatment plan, and medical decision making and I had face-to-face time with this patient. All procedures were done by me except:
Signature ID#

crit care 30-74 min rendered crit care over 74 min rendered no crit care (excluding separately billable procedures)

PATIENT SAFETY ATTESTATION

Concerning the care of this patient, I have afforded the staff an opportunity to discuss findings or concerns and I either addressed them or no issues were voiced.

Physician Signature ID# turned care over at

Physician Signature ID# assumed care at

Additional Template Used Dictated Addendum

CHANG, KEE HO
A#: D00910077008# D286970796M
Loc: D. ERD
Dr: Taylor, Robert A D. 10/17/08

Capital Medical Center
 Service/Location: EMERGENCY ROOM DEPARTMENT
 Status: REG ER Date: 10/17/08
 Acct #: D00910077002
 OLYRAD#: 289141
 Unit #: D286970796

Patient's Legal Name: CHANG, KEE HO
 Sex: M Race: W DOB: 05/04/54 Age: 54 MS: M Religion: NONE
 Prior Stay: — Patient's Legal Address: 2020 BLACK LAKE BLVD SW OLYMPIA, WA 98501 Home Phone: (360)943-9498
 SELF SELF EMPLOYED Occupation: SELF County: THURSTON
 Social Security #: 534-82-8027

Client: -
 PR Guarantor's Name: SA CHANG, KEE HO Address: 2020 BLACK LAKE BLVD SW OLYMPIA, WA 98501 Home Phone: (360)943-9498
 Guarantor's Employer: SELF EMPLOYED Employer Address: 2020 BLACK LAKE BLVD SW, OLYMPIA, WA 98501 Work Phone: (360)943-9498
 Social Security #: 534-82-8027 Occupation: SELF County: THURSTON

PR Other Guarantor's Name: _____ Address: _____ Home Phone: _____
 Employer: _____ Employer Address: _____ Work Phone: _____
 Social Security #: _____ Occupation: _____

Insurance #1	Address	O C C U R R E N C E S		
REGSEL REGENGE SELECTIONS POS	PO BOX 30271, SALT LAKE CITY, UT 84130-0271	06	10/17/08	0830
Insured Name: CHANG, KEE	Rel Asg Policy #: Y Y ZLAS3482802700	Group Name: INDIVIDUAL PLAN	Group Number: 099980	Authorization: NOT REQUIRED
DOB: 05/04/54	Coverage Effective Date: _____			
Call: (800)322-1737				

Insurance #2	Address	C O N D I T I O N S		
Insured Name	Rel Asg Policy #	Group Name	Group Number	Code Type
DOB:	Coverage Effective Date:	Authorization		

Insurance #3	Address	S p e c i a l P r o g r a m		
Insured Name	Rel Asg Policy #	Group Name	Group Number	
DOB:	Coverage Effective Date:	Authorization		

PR Notify in Emergency: DA SONG, LINDA Home Phone: (206)818-3435 CELL Work Phone: _____ Family/Other Physician: JINJO /
 DA CHANG, MICHELLE Home Phone: (206)919-2699 CELL
 Attending Physician: Taylor, Robert A D.O. Admitting Physician: _____ Primary Care Physician: Jin, Jonathan Y., M.D. ER Physician: Taylor, Robert A D.O.

Reason for Visit: HEAD PAIN S/P ASSAULT
 Date: 10/17/08 Time: 1227 Type: ER Source: ER Rm/Bed: _____ Service: _____ Arrival: CAR
 Admit Priority: EM
 Type: CRIME VICTIM Date: 10/17/08 Accom: _____
 NOTES: _____ CD: 06 From: 10/17/08 Thru: _____ By: SLH



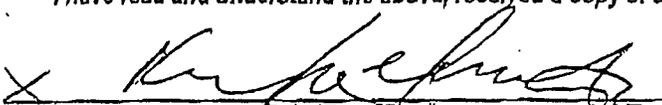
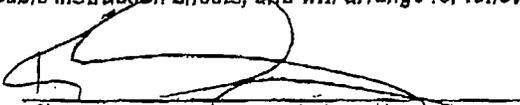
 CAPITAL MEDICAL CENTER Capital Medical Center 3900 Capital Mall Rd. Olympia, WA98502	Patient Information CHANG, KEE Acct: D00910077002 Reg: D286970796	Treating Provider Robert Taylor MD 3900 Capital Mall Rd. Olympia, WA98502 Phone: 360.754.5858	Discharge Summary Date: 10/17/08 Time: 2:10:00 PM <h1>Chart Copy</h1>
--	---	--	--

1) Your Discharge Instructions: CONCUSSION # (English) SCALP CONTUSION - NO WAKE UP #Document: 697 (English) NARCOTIC MEDICATION #Document: 548 (English)	2) Your Prescriptions: Vicodin Oral Tablet 5-500 Milligram 1 TABLET EVERY 6 HOURS AS NEEDED FOR SEVERE PAIN # 15 TABLETS (0 Refills)
---	--

3) You should Follow Up with:	
Follow Up Physician: YOUR REGULAR PHYSICIAN, Phone: Fax:	Follow Up Information On 10/17/2008 this patient was treated in the Emergency Department at Capital Medical Center located at 3900 Capital Mall Rd. Olympia, WA98502 for Refer to Discharge list above. The patient was asked to follow up in 5 to 7 Days.

I understand that the emergency care which I received is not intended to be complete and definitive medical care and treatment. I acknowledge that I have been instructed to contact the above physician immediately for continued and complete medical diagnosis, care and treatment. EKG's, X-rays, and lab studies will be reviewed by appropriate specialists and I will be notified of significant discrepancies. I also understand that my signature authorizes this Medical Center to release all or any part of my medical record (including, if applicable, information pertaining to AIDS and/or HIV testing, mental health records, and drug and/or alcohol treatment) to the referred physician listed above.

I have read and understand the above, received a copy of applicable instruction sheets, and will arrange for follow up care.

Signature Patient/Parent/Guardian Date/Time Signature Instructed by Date/Time

CONFIDENTIAL INFORMATION: The information contained in this fax is confidential. If you have received this fax in error, please notify the sender at once and destroy this document.

 CAPITAL MEDICAL CENTER Capital Medical Center 3900 Capital Mall Rd. Olympia, WA 98502	Patient Information CHANG, KEE Phone:	Treating Provider Robert Taylor MD 3900 Capital Mall Rd. Olympia, WA 98502 Phone: 360.754.5858	Discharge Instructions Date: 10/17/08 Time: 2:09:57 PM <h1>Chart Copy</h1> Page: 1 of 3
	Document: 697		

Patient Discharge Instructions

SCALP CONTUSION - NO WAKE UP

A scalp contusion is a bruise with swelling and sometimes bleeding under the skin. The swelling should start to go down within two days. Although there is no sign of a serious injury at this time, symptoms may appear later. These could be a sign of a more serious problem such as bruising or bleeding in the brain. Therefore, watch for the warning signs below.

Follow These Instructions Carefully

1. If you have swelling of the face or scalp, apply an ice pack (ice cubes in a plastic bag, wrapped in a towel) for 20 minutes every 1 to 2 hours until the swelling starts to go down.
2. You may take Tylenol (acetaminophen) or ibuprofen (Advil, Motrin) for pain, unless another pain medicine was prescribed.

Follow up with your doctor or this facility as advised by our staff if you do not start to improve within the next 24 hours.

Return to this facility immediately or contact your doctor if you begin to have any of the following:

- Repeated vomiting.
- Severe or worsening headache or dizziness.
- Unusual drowsiness or unable to awaken as usual.
- Unequal pupils.
- Confusion or change in behavior, speech or vision.
- Convulsion (seizure).
- Increasing scalp or face swelling.
- Redness, warmth or pus coming from the injured area.
- Fever over 100 (oral).

Patient Discharge Instructions

CONCUSSION

Concussion is a head injury that causes a transient loss of consciousness, without any serious brain lesion, injury, or complications. Most head injuries do not cause any serious problems and get better within several days. A Concussion may cause a moderate headache and loss of memory surrounding the head injury event. You may experience weakness, dizziness, nausea, concentration difficulties, and depression for up to a week or more after the injury. This post-injury state is called a **post-concussion syndrome** and usually gets better with bed rest and mild pain medicine. If any of these symptoms last for more than a week, you will need further medical attention. See your doctor or return to emergency if symptoms last longer than one week.

Please follow these instructions carefully:

During the first 24 hours:

- Have an adult relative or friend stay with you. You should not be left alone.
- If you were "knocked out," someone should wake you every 2 hours and check for confusion.
- Eat and drink very little. Clear liquids are best if your stomach is upset. A clear liquid is one you can see through (water, weak tea, broth or bouillon, ginger ale, jello, Kool-Aid, Gatorade, apple juice, popsicles or ice chips).
- Do not drink alcoholic beverages, including beer and wine.
- Get plenty of rest over the next 2-3 days.
- Do not take sedatives, tranquilizers or other medicine that makes you sleepy unless told to by your doctor.
- Avoid medicine containing aspirin, ibuprofen (Motrin, Advil), naprosyn (Alleve) and Ketopfen (Orudis). Use

 CAPITAL MEDICAL CENTER Capital Medical Center 3900 Capital Mall Rd. Olympia, WA 98502	Patient Information CHANG, KEE Phone:	Treating Provider Robert Taylor MD 3900 Capital Mall Rd. Olympia, WA 98502 Phone: 360.754.5858	Discharge Instructions Date: 10/17/08 Time: 2:09:58 PM <h1>Chart Copy</h1> Page: 2 of 3

- acetaminophen (Tylenol) or the medicine your doctor has recommended instead
- Do not drive or operate machinery.
- No heavy lifting or straining.
- No contact sports for two weeks and only then if you have no symptoms and approved by your doctor.
- **For Children:** Expect some increased sleepiness after a head injury. This is normal. Your child may fall asleep as soon as you leave the emergency department. If your child was unconscious or knocked out, wake and check your child at least every 2 hours or often as directed to by the doctor.

Return to the Emergency Department or see your own doctor right away if any problems develop, including the following:

- Throwing up
- Confusion, drowsiness or any change in alertness.
- Loss of memory.
- Dizziness or fainting.
- Trouble walking or staggering. Trouble speaking or slurred speech.
- Your headache gets worse or feels different.
- Convulsions or seizures. These are twitching or jerking movements of the eyes, arms, legs or body.
- A change in the size of one pupil (black part of your eye) as compared to the other eye.
- Weakness or numbness of an arm or leg.
- Stiff neck or fever.
- Blurry vision, double vision or other problems with your eyesight.
- Bleeding or clear liquid drainage from your ears or nose.
- Very sleepy (more than expected) or hard to wake up.
- Anything else that worries you.

Patient Discharge Instructions

Document: 548

NARCOTIC MEDICATIONS

You have been prescribed narcotic. Narcotic medicines are used to relieve pain. Some examples of narcotic medicines include the following:

- Codeine (Tylenol #2, #3 - cough syrup)
- Propoxyphene (Darvocet, Darvon)
- Hydrocodone (Vicodin)
- Oxycodone (Percocet, Percodan)

This drug may cause drowsiness. Therefore, be sure to take it only as directed.

How To Take This Medication:

1. If this medicine makes your stomach upset, take it with food.
2. Pain medicine should be taken only if needed at the times prescribed. If you are not having pain, do not take the medicine, unless you are advised to do so by your doctor.
3. Narcotic medicines can be habit forming; therefore, take this medicine only as directed. **Do not take more of it, do not take it more often, and do not take it for a longer period of time than directed.**

What You Should Watch Out For:

Possible Side Effects:

- If you have dizziness, or drowsiness, take a smaller dose, breaking a pill in half or take it less often.

 CAPITAL MEDICAL CENTER Capital Medical Center 3900 Capital Mall Rd. Olympia, WA 98502	Patient Information CHANG, KEE Phone:	Treating Provider Robert Taylor MD 3900 Capital Mall Rd. Olympia, WA 98502 Phone: 360.754.5858	Discharge Instructions Date: 10/17/08 Time: 2:09:58 PM <h1>Chart Copy</h1> Page: 3 of 3

- If you develop constipation, drink lots of liquids, use small doses of a mild laxative like Milk of Magnesia as needed and add fiber to your diet.
- If you have difficulty passing urine, stop taking the medicine and contact your doctor.

Possible Allergic Reactions: Rash, itching, swelling, trouble breathing or swallowing. You should contact your doctor or return to this facility immediately.

Medical Conditions: Before you begin to take this medicine, be sure your doctor knows if you have any of the following conditions:

- Prostate enlargement.
- Pregnancy or breast-feeding.

Possible Drug Interactions: This drug may cause increased side effects when taken with alcohol, muscle relaxant, sedative, tricyclic antidepressants, MAO-inhibitor or another pain medicine. Make sure your doctor knows what other medicines you are taking.

Note These Warnings:

- Do not drive, ride a bicycle, operate dangerous equipment, climb a ladder or do any other activity where you must concentrate and might be injured for at least 12 hours after taking this medicine until you know how it will affect you.
- Prolonged use of this medicine can be habit forming and may lead to addiction.
- Tell your doctor what other medicines you are taking.
- Do not drink any alcohol while taking this medicine.

Stop taking this medication and call your doctor or return to this facility right away if you notice any of these problems:

- Hives or itching.
- Confusion, dizziness, or lightheadedness.
- Hallucinations.
- Blurry vision.
- Slow breathing, slow heartbeat, or severe weakness.
- Nausea or vomiting.
- Stomach pain or chest pain.
- Anything else that worries you.

Discharge Instructions Special Notes

Discharge Instructions Special Notes

Discharge Instructions Special Notes

I understand that the emergency care which I received is not intended to be complete and definitive medical care and treatment. EKG's, X-rays, and lab studies will be reviewed by appropriate specialists and I will be notified of significant discrepancies.

01 Head Injury (S)

TIME SEEN: 1300 on arrival ROOM: EMS Arrival
SEEN (ALSO) BY NP / PA
HISTORIAN: patient spouse paramedics
HX / EXAM LIMITED BY:

HPI

chief complaint: injury to: head face mouth / lip / chin / nose / ear neck
time course: all present better pain intermittent / lasting
occurred: just prior to arrival where: home school
today about 0830 neighbor's city park
yesterday work street
context: direct blow fall MVA alleged assault
53% of was struck by fist (2) orbit
also struck back of head - NO LOC -
R shoulder was also twisted
severity: mild moderate severe
pain level: current 6/10 max /10
LOC? no dazed yes duration:
EYES remembers: injury coming to hospital

ROS

loss feeling / power arms / legs trouble breathing / chest pain
memory loss loss of bladder function
headache / neck pain skin laceration
double vision / hearing loss recent fever / illness
nausea / vomiting all systems neg except as mtd

SOCIAL HX

*smoker tobacco
recent ETOH drug use / abuse
advised patient about smoking cessation
advised patient to quit using tobacco / drugs / alcohol
lives alone

PAST HX

negative diabetes Type 1 Type 2 diet / oral / insulin
HTN / cholesterol
Meds: none see nurses note Anti hypertensive / Statins
Allergies: NKDA see nurses note

Nursing Assessment Reviewed Vitals Reviewed Tetanus immun. UTD

PHYSICAL EXAM

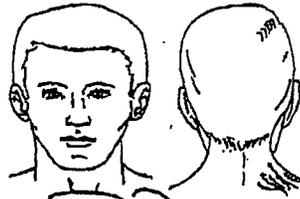
General Appearance c-collar (PTA / in ED) / backboard
no acute distress mild / moderate / severe distress
alert anxious / lethargic / unconscious / unresponsive
apneic / dyspneic

HEAD

non-tender Ratcoon Eyes / Battle's sign
no swelling Has small abrasion / small
no obvious injury Herpetiform occipital scalp



008287-P-1-1



NECK

non-tender vertebral point tenderness
painless ROM muscle spasm / decreased ROM
trachea midline pain on neck movement
pain on axial compression

Nexus criteria neg midline tenderness / distracting injury
altered mental status
recent ETOH

EYES

PERRL EOM palsy / entrapment
EOMI subconjunctival hemorrhage
foreign body / hyphema
corneal abrasion
periorbital edema / ecchymosis
visual field deficit / decreased vision
unequal pupils R pupil mm L pupil mm

ENT

nmI external hemotympanum
inspection nasal septal hematoma
pharynx nmI TM obscured by wax
clotted nasal blood
dental injury / malocclusion
rhinorrhea / otorrhea

NEURO / PSYCH

Alert slow / confused / no response to commands
oriented x3 repeatedly asks about recent events
mood / affect seizing / aphasic expressive / receptive
disoriented
to: time (day-of-week day-of-month
month year) place / person
cooperative Irritable / restless
interactive

Glasgow Coma Score SCORE = 15
Eyes Open spontaneously (4) to voice (3) to pain (2) none (1)
Speech (4) (3) disoriented (4) inapprop. (3) incoherent (2) none (1)
Motor: nmI (5) localizes (5) withdraws (4) flexor (3) extem (2) none (1)

cranial nerves-

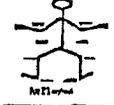
normal facial palsy
as tested sensory deficit
tongue deviation (to R / L)
hearing deficit (gross challenge)
deficit of palate elevation

cerebellar-

nmI as tested abnormal Romberg test
normal gait abnormal finger-nose-finger
abnormal gait

sensorimotor-

no sensory deficit weakness
no motor deficit hemiparesis / hemiplegia (R / L)
DTR's nmI pronator drift
sensory loss Babinski reflex (R / L)
clonus



T=Tenderness PIT=Point Tenderness S=Swelling E=Ecchymosis B=Burn
C=Contusion L=Laceration A=Abrasion M=Muscle spasm PW=Puncture Wound
(0=without m=mild mod=moderate s=severe)
Example: Trv = Tenderness on palpation (severe)

TIME PLACED IN ROOM 1242 ROOM NUMBER 6 DATE _____

PRIMARY NURSING PHYSICAL ASSESSMENT		REASSESSMENT TIME	REASSESSMENT TIME	REASSESSMENT TIME
SAFETY	FALL RISK? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO SIDE RAILS UP <input type="checkbox"/> BRAKE ON <input type="checkbox"/> CALL BELL ACCESSIBLE <input type="checkbox"/> AMBULATORY TO ROOM	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
BEHAVIOR	<input type="checkbox"/> APPROPRIATE <input type="checkbox"/> ANXIOUS <input type="checkbox"/> COMBATIVE <input type="checkbox"/> VERBALLY ABUSIVE <input type="checkbox"/> UNCOOPERATIVE <input type="checkbox"/> FLAT <input type="checkbox"/> DANGER TO SELF <input type="checkbox"/> DANGER TO OTHERS	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
COGNITIVE	AGE APPROPRIATE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
PHYSICAL	<input type="checkbox"/> WELL DEVELOPED <input type="checkbox"/> SLENDER <input type="checkbox"/> FRAIL <input type="checkbox"/> ROBUST <input type="checkbox"/> OBESE <input type="checkbox"/> ELDERLY <input type="checkbox"/> KEMPT <input type="checkbox"/> UNKEMPT <input type="checkbox"/> MALODOROUS <input type="checkbox"/> DEVELOPMENTAL AGE APPROPRIATE	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
NEURO	<input type="checkbox"/> ALERT <input checked="" type="checkbox"/> ORIENTED x <u>3</u> <input type="checkbox"/> CONFUSED <input type="checkbox"/> LETHARGIC <input type="checkbox"/> UNRESPONSIVE <input type="checkbox"/> SEIZURE ACTIVITY GCS _____ <input type="checkbox"/> GRIPS: L _____ R (>=<=)	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
SKULL	<input type="checkbox"/> TENDER <input type="checkbox"/> NONTENDER <input type="checkbox"/> DEFORMITIES: FONTANELLES <input type="checkbox"/> FLAT <input type="checkbox"/> BULGING <input type="checkbox"/> DEPRESSED (PEDIATRIC < 1 YR)	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
HEADACHE	ONSET: <u>see triage</u> HISTORY OF HEADACHES? <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> DULL <input type="checkbox"/> SHARP <input type="checkbox"/> THROBBING <input type="checkbox"/> STABBING <input type="checkbox"/> PRESSURE <input type="checkbox"/> RADIATING _____	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
EENT	<input type="checkbox"/> PUPIL REACTION L _____ R _____ B = BRISK N = NORMAL <input type="checkbox"/> BARACHE <input type="checkbox"/> SORE THROAT <input type="checkbox"/> CORRECTIVE LENSES WORN <input type="checkbox"/> TOOTHACHE S = SLUGGISH F = FIXED PUPIL SIZE: 	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
NECK	<input type="checkbox"/> SUPPLE <input type="checkbox"/> NUCHAL RIGIDITY <input type="checkbox"/> C-COLLAR 	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
RESP	<input type="checkbox"/> NORMAL/SPONTANEOUS <input type="checkbox"/> EFFORTLESS <input type="checkbox"/> CLEAR <input type="checkbox"/> LABORED <input type="checkbox"/> SHALLOW <input type="checkbox"/> SYMMETRICAL <input type="checkbox"/> ASYMMETRICAL <input type="checkbox"/> WHEEZES <input type="checkbox"/> CRACKLES <input type="checkbox"/> DIMINISHED <input type="checkbox"/> COUGH <input type="checkbox"/> PRODUCTIVE COLOR <input type="checkbox"/> NON-PRODUCTIVE <input type="checkbox"/> CHEST WALL STABLE	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
CARDIO	<input type="checkbox"/> CHEST PAIN LOCATION _____ INTENSITY _____ <input type="checkbox"/> TYPE OF PAIN: <input type="checkbox"/> SHARP <input type="checkbox"/> CRUSHING <input type="checkbox"/> STABBING <input type="checkbox"/> DULL <input type="checkbox"/> PRESSURE <input type="checkbox"/> PULSE QUALITY: <input type="checkbox"/> REGULAR <input type="checkbox"/> IRREGULAR <input type="checkbox"/> ABSENT <input type="checkbox"/> RHYTHM _____ HEART TONES: _____	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
GI	<input type="checkbox"/> NAUSEA <input type="checkbox"/> VOMITING <input type="checkbox"/> DIARRHEA <input type="checkbox"/> CONSTIPATION <input type="checkbox"/> BRBPR <input type="checkbox"/> MELENA ABDOMEN: <input type="checkbox"/> SOFT <input type="checkbox"/> FLAT <input type="checkbox"/> REBOUND <input type="checkbox"/> DISTENDED <input type="checkbox"/> NON-TENDER <input type="checkbox"/> TENDER BOWEL SOUNDS: <input type="checkbox"/> NORMOACTIVE <input type="checkbox"/> HYPERACTIVE <input type="checkbox"/> ABSENT	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
GU	<input type="checkbox"/> DYSURIA <input type="checkbox"/> FREQUENCY <input type="checkbox"/> HEMATURIA <input type="checkbox"/> INCONTINENT <input type="checkbox"/> POLYURIA URINE: <input type="checkbox"/> CLEAR <input type="checkbox"/> CLOUDY <input type="checkbox"/> OUTPUT _____	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
GYN	<input type="checkbox"/> DISCHARGE _____ <input type="checkbox"/> PAIN _____ <input type="checkbox"/> BLEEDING _____ # OF PADS _____ GRAVIDA _____ PARA _____ AB _____	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
ORTHO/ EXTREMITIES	PULSES: <input type="checkbox"/> YES <input type="checkbox"/> NO SPLINTS: <input type="checkbox"/> LUE <input type="checkbox"/> RUE <input type="checkbox"/> LLE <input type="checkbox"/> RLE DEFORMITIES: <input type="checkbox"/> YES <input type="checkbox"/> NO EDEMA: <input type="checkbox"/> PRESENT <input type="checkbox"/> ABSENT <input type="checkbox"/> PITTING APPEARANCE: <input type="checkbox"/> WARM <input type="checkbox"/> COOL <input type="checkbox"/> PINK <input type="checkbox"/> PALE <input type="checkbox"/> CYANOTIC <input type="checkbox"/> MOTTLED CAP REFILL: <input type="checkbox"/> < 2 SECS <input type="checkbox"/> > 2 SECS <input type="checkbox"/> ABSENT STRONG WEAK NONE LAC _____ Abrasions _____ Ecchymosis _____	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
SPINE	<input type="checkbox"/> TENDER <input type="checkbox"/> NONTENDER <input type="checkbox"/> DEFORMITIES/PROTRUSIONS <input type="checkbox"/> IMMOBILIZED ON LBB	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*
SKIN	<input type="checkbox"/> PINK <input type="checkbox"/> WARM <input type="checkbox"/> DRY <input type="checkbox"/> MOTTLED <input type="checkbox"/> DIAPHORETIC <input type="checkbox"/> HOT <input type="checkbox"/> NIGHT SWEATS <input type="checkbox"/> LACERATIONS <input type="checkbox"/> PALE <input type="checkbox"/> COOL <input type="checkbox"/> MOIST <input type="checkbox"/> CYANOTIC <input type="checkbox"/> CLAMMY <input type="checkbox"/> FLUSHED <input type="checkbox"/> ABSCESS <input type="checkbox"/> BURNS MUCOUS MEMBRANES: <input type="checkbox"/> MOIST <input type="checkbox"/> DRY <input type="checkbox"/> PINK <input type="checkbox"/> PALE TURGOR: <input type="checkbox"/> GOOD <input type="checkbox"/> POOR	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*	<input type="checkbox"/> NO CHANGE <input type="checkbox"/> CHANGES NOTED*

SAFETY	PROCEDURES	TIME
<input type="checkbox"/> ID ALLERGY BAND ON	<input type="checkbox"/> LABS SENT	
<input type="checkbox"/> CARDIAC MONITOR	<input type="checkbox"/> URINE SAMPLE SENT	
<input type="checkbox"/> SpO2 MONITOR	<input type="checkbox"/> EKG DONE	
<input type="checkbox"/> SIDE RAILS UP/BRAKES ON	<input type="checkbox"/> X-RAYS	
<input type="checkbox"/> O2 _____ LPM VIA _____	<input type="checkbox"/> CT SCAN/US	
<input type="checkbox"/> IV SITE CHECKED	<input type="checkbox"/> FOLEY PLACED	

Sedation: See separate form

Diagnosis Codes: _____

Med Codes: _____

Follow Up with: _____ When: _____

Discharge Instructions: _____

PREHINT NAME	TITLE	SIGNATURE	INIT.
J. Stank	RN	[Signature]	JS

CHANG, KEE HO
 ACCT#: D00910077002 MR#: D286970796
 Loc: D. ERD DOB: 05/04/54 54/M
 Dr: Taylor, Robert A D. 10/17/08

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 39087-6-II
v.)	
)	
JAY MCKAGUE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> CAROL LA VERNE, DPA
THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DR SW BLDG 2
OLYMPIA WA 98502-6045 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> JAY MCKAGUE
967048
WASHINGTON CORRECTIONS CENTER
PO BOX 900
SHELTON, WA 98584-0974 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF SEPTEMBER, 2009.

X _____ *gril*

CO SEP 23 11 09 12
STATE OF WASHINGTON
BY _____
DEPUTY

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711