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IN THE SUPREME COURT THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

MIGUEL A. VILLANUEVA-GONZALEZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 11-1-00544-5

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<sup>PETITIONER</sup>  
SUPPLEMENTAL BRIEF OF ~~RESPONDENT~~

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 ORIGINAL

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A. STATEMENT OF FACTS

Maria Gobeia and the defendant, Miguel Villanueva-Gonzales, were in a romantic relationship and have three children together. RP 151-52. On March 27, 2011, Maria went to a dance. RP 174, 176. The defendant didn't accompany Maria to the dance. RP 176. When she returned home she went into her children's bedroom to watch television with them and the babysitter, Itsel. RP 176-77. Only her five year-old child was awake. RP 177. At some point later the defendant came into the bedroom and angrily confronted her. RP 177-78. He told her "get out of there," upset because she had attended the dance without him. RP 178. He pulled her out of the room, causing her to hit her leg against some furniture. RP 179. He then head-butted her in the nose, causing it to fracture in two places. RP 179, 242. After head-butting her he grabbed her throat and strangled her. RP 193-94. She had trouble breathing, caused not only by the strangulation but the blood running down through her nose. RP 194. As is common in domestic violence cases, Ms. Gobeia was a reluctant witness. RP 178. The record is silent on how much time passed between the head butt and the strangulation. RP 193-96.

The State charged Villanueva-Gonzalez with two counts of assault in the second degree. CP 22-23. Count I alleged the defendant committed

assault in the second degree by strangling Ms. Gobeia, contrary to RCW 9A.36.021 (g), and Count II alleged the defendant committed assault in the second degree by assaulting Ms. Gobeia and thereby recklessly inflicting substantial bodily harm. CP 22-23. The jury returned a verdict of guilty to the lesser included offense of assault in the fourth degree as to count I, and convicted the defendant as charged as to Count II. CP 59, 61. The defendant filed a timely appeal. CP 90. Division I of the Court of Appeals reversed the defendant's conviction for assault in the fourth degree in a decision that was originally unpublished. The Court ordered publication of the opinion on June 12, 2013. The Court held that the defendant's conviction for assault in the second degree, based upon his conduct in head-butting the victim and fracturing her nose, was the same offense as his assault in the fourth degree based upon grabbing the victim's throat because they "were actions taken against the same victim within the same short time span." See Opinion at p. 5. The State asserts that the Court of Appeals misapplied the same evidence test and asks this Court to reverse the Court of Appeals' decision.

B. ISSUES PRESENTED FOR REVIEW

- I. THE COURT OF APPEALS INCORRECTLY APPLIED THE SAME EVIDENCE TEST AND ERRONEOUSLY CONCLUDED THAT THE ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE FOURTH DEGREE WERE THE SAME IN FACT.
- II. THE COURT OF APPEALS SHOULD HAVE APPLIED UNIT OF PROSECUTION ANALYSIS, AND THE COURT'S ANALYSIS ON THIS POINT IS CONFUSING AND SHOULD BE CLARIFIED.

C. ARGUMENT

- I. THE COURT OF APPEALS INCORRECTLY APPLIED THE SAME EVIDENCE TEST AND ERRONEOUSLY CONCLUDED THAT THE ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE FOURTH DEGREE WERE THE SAME IN FACT.

The double jeopardy clauses of the Washington State Constitution and United States Constitution provide identical protection against multiple punishments for the same offense. *State v. Graham*, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005).

Washington follows the same evidence rule adopted by the Supreme Court in 1896. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007); *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). This rule provides that a defendant is subjected to double jeopardy if he is

convicted of offenses that are identical both in fact and in law. *Calle* at 777. “Washington’s ‘same evidence’ test is very similar to the rule set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180 (1932).” *Womac* at 652, *Calle* at 777. Unless the legislature has expressed a clear intent that multiple punishments not be imposed, the same evidence rule applies. *State v. Gohl*, 109 Wn.App. 817, 821, 37 P.3d 293 (2001).

“[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other.” *State v. Trujillo*, 112 Wn.App. 390, 410, 49 P.3d 935 (2002) (citing *Calle* at 777-78). Washington courts, however, have occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements. *State v. Schwab*, 98 Wn.App. 179, 184-85, 988 P.2d 1045 (1999).

*Womac* at 652. “If each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes.” *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); citing *Calle* at 777. The *Freeman* Court went on to say “[w]hen applying the *Blockburger* test, we do not consider the elements of the crime on an abstract level. ‘[W]here the *same act or transaction* constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision *requires proof of a fact* which the other does not.’” *Freeman* at 772,

(quoting *In re Personal Restraint of Orange*, 152 Wn.2d 795, 817, 100 P.3d 291 (2004) (italics in original) (quoting *Blockburger*, supra, at 304)).<sup>1</sup>

It is not necessarily appropriate to apply the same evidence test where the defendant is accused of violating one statute that is broken into degrees. The State sought review in this case because the published opinion of the Court of Appeals appears to stand for the proposition that convictions for assault in the second degree and assault in the fourth degree can never lie where they occur as part of the same overall incident. But the analysis of the Court of Appeals is flawed in that its holding is far too broad. In this case the defendant has never argued or claimed that the jury was not clearly informed that the assaultive conduct which formed the basis of count I was separate and distinct from the assaultive conduct which formed the basis of count II. He has not claimed the jury could have been confused or misled into returning two separate verdicts for the singular head butt which broke the victim's nose. Indeed, the State made it abundantly clear through its charging document, its jury instructions and

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<sup>1</sup> The *Blockburger* doctrine for whether two crimes are the "same offense" is a distinct doctrine from merger (or merger-by-elevation). "Several distinct doctrines stem from the prohibition on double jeopardy and the *Blockburger* test is merely one of them." *State v. S.S.Y.*, 150 Wn.App. 325, 207 P.3d 1273 (2009); *affirmed* 170 Wn.2d 322, 241 P.3d 781 (2010). Crimes merge when proof of one is *necessary* to prove an element or degree of another crime. *S.S.Y.* at 330. A conviction for an offense which elevates another can stand, however, where that conviction is based on "some injury to the person or property of the victim of others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *S.S.Y.* at 330, quoting *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

its closing argument that it was relying upon two distinct acts for the crimes charged: the defendant's act of placing his hands around the victim's neck in an assaultive manner for count I<sup>2</sup> and the defendant's act of head butting the victim and breaking her nose in count II.

In reaching the conclusion that the defendant's convictions for both assault in the fourth degree as to count I and assault in the second degree as to count II violated double jeopardy, the Court of Appeals misapplied the same evidence test and improperly concluded that assault in the fourth degree and assault in the second degree are always the same in both law and fact and that they are always the same offense. Here, the defendant committed two distinct acts: a battery upon the victim's neck which resulted in no injury (a fourth degree assault) and a battery which resulted in the reckless infliction of substantial bodily harm. The acts, contrary to the Court's conclusion, were not the same offense. The Court of Appeals asserted, with citation to inapposite authority, that "[a]s a lesser included offense of second degree assault, fourth degree assault is the same in law as second degree assault." See Opinion at page 4. But in

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<sup>2</sup> The State asserted that the defendant strangled the victim as defined by RCW 9A.04.110 (26), which states: "'Strangulation' means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." The jury, in returning a verdict of assault in the fourth degree, clearly rejected the notion that the defendant had obstructed the victim's blood flow or ability to breathe, or had intended to obstruct her blood flow or ability to breathe, but that the defendant nevertheless committed an assault on the victim, in placing his hands on her neck, that did not amount to assault in the second degree.

reviewing the primary authority cited for this proposition, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 28-29 (1995), it is clear that the authors of this article were referring to successive prosecutions for a lesser included offense following conviction or acquittal on the greater offense, or for a greater offense following conviction or acquittal on the lesser offense, where the prosecutions are based on the *same act*, not different acts. Further, the case cited by the Court of Appeals which originally cited to this law review article in a footnote merely reiterates that while the State may bring, and the jury may consider, multiple charges arising from *the same criminal conduct*<sup>3</sup> in a single proceeding, courts may not then enter multiple convictions for the *same offense* without offending double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005), citing *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137 (1981)).

The convictions in this case were clearly based on two distinct acts: the defendant grabbing the victim's throat (in a manner that didn't rise to the level of definitional strangulation, according to the jury) and the defendant head-butting the victim and fracturing her nose. There is no danger, nor has there been any suggestion, that the jury actually returned

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<sup>3</sup> "Same criminal conduct," as used in this sentence, refers to the same act or transaction, not a determination of same criminal conduct under the SRA.

verdicts of assault in the second degree and assault in the fourth degree based on the singular act of head-butting which broke the victim's nose. Indeed, both the defendant's and the Court's singular focus on the time that elapsed between the two assaults demonstrates that there is no concern that the jury returned two verdicts, and the defendant was punished twice, for the same physical act (the head-butt).

If the Court of Appeals is correct that assault in the second degree (by any of the seven means it can be committed—see RCW 9A.36.021) will always be the same in law as fourth degree assault, the acts here were nevertheless not the same in fact. Several cases from other jurisdictions are instructive here. In *State v. Scanlon*, 982 A.2d 1268, 1277-78 (R.I. 2009), the Supreme Court of Rhode Island addressed the question of whether multiple assault convictions violate the prohibition on double jeopardy. The Court first noted that Rhode Island, (like Washington), follows the same evidence test outlined in *Blockburger*, supra. In *Scanlon*, the victim was sexually and physically assaulted during a single criminal episode, and during the course of the attack the defendant stabbed the victim with a screwdriver and pulled her arm and dislocated her shoulder. *Scanlon* at 1271. Although the opinion is silent on how much time transpired between the stabbing with the screwdriver and the dislocation

of the shoulder, the Court nevertheless held that the convictions did not violate double jeopardy:

On their face, the facts alleged in each count do not constitute the “same act or transaction,” because each assault arises from a different act. Nothing in the record indicates that the use of the screwdriver caused the complainant's right arm to dislocate.

*State v. Scanlon*, 982 A.2d at 1278.

In reaching its decision, the Rhode Island Supreme Court distinguished its earlier case of *State v. Bolarinho*, 850 A.2d 907 (R.I. 2004), in which the defendant was convicted of two separate felony assaults for one singular act of kicking the victim. Because the kick was done with a dangerous weapon (to wit: a “shod foot”), and because the kick inflicted serious bodily injury, the State sought dual punishments because those are alternative means of committing assault. But the Court held that because the convictions were based on the same kick, convictions for both violated double jeopardy. *Bolarinho* at 911. Whereas in *Scanlon* the assaults were supported by different evidence, in *Bolarinho* they were not. Similarly, here, the assault in the second degree is supported by different evidence than the assault in the fourth degree.

In *People v. Berner*, 42 Colo.App. 520, 600 P.2d 112 (1979), the Colorado Court of Appeals found that two convictions for assault violated double jeopardy. In that case, the defendant, over the course of a ten

minute period, verbally harassed his victim in an effort to extract information and struck her twice as part of that effort. The Court, in finding that the two blows were the same act, held:

The two blows were delivered to the same person within a short period of time as part of a continuous harangue to extract information. Under these circumstances, we agree with defendant that these two blows were not separate transactions but were part of a single criminal transaction arising from a single impulse.

*People v. Berner*, 42 Colo. App. at 521-22. Here, the assaults were not the same act as they did not arise from the same impulse. The impulse to strangle and suppress one's ability to breathe over a period of time is not the same as the impulse to deliver a single, bone-fracturing blow. The impulse behind strangulation is to cause terror, whereas the impulse behind a blow so severe it can crack a bone is to cause substantial bodily injury. The jury was entitled to find that these acts were motivated by a separate impulses and constituted distinct acts.

Here, the Court's conclusion that Villanueva-Gonzalez's acts were the same in fact appears to rest on the idea that when the jury returned a verdict of assault in the fourth degree as a lesser included offense of the assault second degree charged in count I (the strangulation count), it was necessarily resting its verdict on the same act which broke Ms. Gobeau's nose. But as noted above, Villanueva-Gonzalez has never claimed that the

jury was confused and actually convicted him of two counts of assault arising from the head-butt that broke Ms. Gobeau's nose. The jury was instructed on, and clearly relied on, two different acts to support the two different convictions.

It is axiomatic that assault in the second degree and assault in the fourth degree can be different in fact, just as two assaults in the fourth degree can be different in fact. If a defendant commits an assault in the fourth degree upon a victim at 10:00 a.m., and then commits an assault in the second (or fourth) degree upon the same victim, in the same place, at noon, those actions would not be the same in fact. They are different units of prosecution. Similarly, a defendant who assaults a victim by slapping her several times, and then moments later pulls out a gun and points it in her face, can be convicted of two assaults: assault in the fourth degree for the slaps and assault in the second degree for the assault with the deadly weapon. The State submits these would be separate units of prosecution and not the same in fact under the *Blockburger* test.

The Court of Appeals' analysis on this point is muddled. Although the Court claimed that the unit of prosecution test is the incorrect test to apply in this situation (a proposition with which the State does not agree), it nevertheless relied on dictum from a unit of prosecution case (*State v.*

*Till*)<sup>4</sup> to hold that Villanueva-Gonzalez cannot be convicted of both assault in the second degree for breaking Ms. Gobe's nose and assault in the fourth degree by strangling her. The Court said:

Villanueva-Gonzalez's convictions were also the same in fact. The State alleged that Villanueva-Gonzalez committed two separate assaults, grabbing of M.G.'s throat and head butting her. But these events were actions taken against the same victim within the same short time span. *Because assault is not defined in terms of each physical act against a victim, Villanueva-Gonzalez's actions constituted one single assault in fact.*

*State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 6, 304 P.3d 906, 908 (2013) *review granted*, 316 P.3d 494 (2014) (emphasis added). Is the Court saying that multiple blows, of whatever variety and with whatever instrument, can *never* be different in fact because assault can never be charged for "each physical act against a victim"? If so, there is no authority cited to support this broad claim. Indeed, the emphasized sentence above suggests that the Court instructs us never to look at the individual facts of the case because the legislature has already determined that multiple convictions of assault cannot lie for each physical act against a victim.<sup>5</sup> The Court of Appeals' analysis is confusing and erroneous.

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<sup>4</sup> *State v. Till*, 148 Wn.2d 350, 60 P.3d 1192 (2003)

<sup>5</sup> As an additional matter, the Court's holding in this case would seem to support a claim that a trial court is precluded from denying a defendant's request for a lesser included offense instruction as to assault in the fourth degree whenever the charged offense is assault in the second degree, because the offenses are always the same in law and fact. But in *State v. Winings*, 126 Wn.App. 75, 88, 107 P.3d 414 (2005), the Court of Appeals

II. THE COURT OF APPEALS SHOULD HAVE APPLIED UNIT OF PROSECUTION ANALYSIS, AND THE COURT'S ANALYSIS ON THIS POINT IS CONFUSING AND SHOULD BE CLARIFIED.

The Court of Appeals' discussion of the unit of prosecution for assault is unsupported by on-point authority and misleading. Relying on *State v. Tili*, 148 Wn.2d 350, 60 P.3d 1192 (2003) the Court of Appeals stated that assault is not defined by each physical act against a victim. *Villanueva-Gonzalez* at 6. But the language from *Tili* relied upon by the Court of Appeals is dictum.<sup>6</sup> As discussed above, the Court of Appeals contends in its opinion that all assaultive acts, no matter the means of commission or degree, will always be the same in fact so long as they were committed against the same victim in a short period of time. Yet on the unit of prosecution question, the Court's opinion implies that had the jury returned verdicts of guilty for two counts of assault in the second degree rather than one each of assault in the second degree and assault in the fourth degree, the unit of prosecution test would have applied and the result may have been different. The Court of Appeals' unit of prosecution analysis rests on its assertion that the defendant was convicted of violating

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affirmed the trial court's denial of a request for a lesser included instruction as to assault in the fourth degree because where the defendant stabbed his victim with a sword, the evidence did not support any rational inference that the assault was committed only with a non-deadly weapon.

<sup>6</sup> The discussion of the assault statute was not essential to the outcome of the case. *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580 (7th Cir. 2005) (Posner, J)

several distinct statutory provisions rather than one statute separated into four degrees. Assault, however, is a statute that proscribes one offense that is divided into different degrees. See *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). See also *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

In addition to the Court of Appeals' mischaracterization of the assault statute, the opinion confuses the reader as to whether, even if the defendant had been convicted of assault in the second degree as to both counts, the Court would nevertheless hold that there was but one assault because a strangulation which is followed close in time by an intentional battery which fractures a bone is akin to punishing "every punch thrown in a fistfight." See Opinion at 7-8. If the Court's opinion stands for that proposition, it is inconsistent with the intent of the legislature. This Court has said:

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. See *State v. Arndt*, 87 Wn.2d 374, 384, 553 P.2d 1328 (1976). Criminal assault is just such a crime.

*State v. Smith*, 159 Wn. 2d 778, 784, 154 P.3d 873, 876 (2007) (assaulting another with a deadly weapon comprises the criminal activity measured by the unit of prosecution under second degree assault statute). This Court went on to say that "[b]etween the crimes of first, second, and third degree

assault, the legislature has delineated a total of 17 alternative means of commission.”<sup>7</sup> *Smith* at 784. With respect to assault in the second degree, the legislature has prescribed seven distinct means of committing that offense. Any one of the ways constitutes a single unit of prosecution. *Smith* at 784. The legislature, by setting out seven specific alternative ways of committing the offense, defined the unit of prosecution. An assault by strangulation and an intentional battery accompanied by the reckless infliction of substantial bodily harm each constitute one unit of prosecution.

Perhaps most troubling, the Court’s opinion provides no guidance as to how much time must pass between assaults committed by separate means before they will no longer be deemed the same in fact. If a defendant strangles the victim one hour after breaking her nose, are they the same act? How many free assaults will a defendant be entitled to under the Court’s analysis? The State submits that an assault in the fourth degree committed by strangulation is an assault committed by different means than an assault that recklessly inflicts substantial bodily harm, and that they are therefore separate units of prosecution. Admittedly, *Smith*, supra, does not explicitly say this, nor could the State find published authority for this proposition. But nothing in *Smith* that suggests it is so limited, either,

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<sup>7</sup> At the time of the opinion in *Smith*, there were only six alternative ways of committing assault in the second degree and seventeen overall ways of committing assault between the degrees of first, second, and third degree. There is now an additional way of committing assault in the second degree, as the legislature has since amended RCW 9A.36.021.

as to not include the one mean<sup>8</sup> of committing assault in the fourth degree as an alternative to the seventeen other means of committing criminal assault comprised within the three other degrees of the offense. Indeed, the one mean of committing assault in the fourth degree is unquestionably different in both law and fact, and a different unit of prosecution, from at least two of the means of committing assault in the third degree, to wit: (1) with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or (2) with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. An intentional fourth degree assault is distinct from assault in the third degree, such that so long as the conviction for each did not rest on the same, singular physical act of the defendant (i.e.—intentionally pushing a victim such that his head strikes a concrete floor as he falls down), they would comprise separate units of prosecution.

The State asks this Court to clarify the correct unit of prosecution for the crime of assault, particularly where the convictions are based on different degrees of the crime.

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<sup>8</sup> The common law definition of assault recognized in Washington are: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. These definitions do not constitute additional alternative means of committing the crime of assault. *State v. Elmi*, 166 Wn. 2d 209, 215, 207 P.3d 439, 442 (2009).

D. CONCLUSION

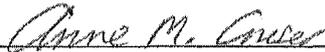
The Court of Appeals should be reversed, and Villanueva-Gonzalez's conviction for assault in the fourth degree reinstated.

DATED this 20th day of February, 2014.

Respectfully submitted:

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# APPENDIX A

## 9A.36.021. Assault in the second degree

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
  - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
  - (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
  - (c) Assaults another with a deadly weapon; or
  - (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
  - (e) With intent to commit a felony, assaults another; or
  - (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
  - (g) Assaults another by strangulation or suffocation.
- (2)
  - (a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
  - (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

### **9A.36.031. Assault in the third degree**

- (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
- (a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or
  - (b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or
  - (c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or
  - (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or
  - (e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or
  - (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or
  - (g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

- (h) Assaults a peace officer with a projectile stun gun; or
  
- (i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW; or
  
- (j) Assaults a judicial officer, court-related employee, county clerk, or county clerk's employee, while that person is performing his or her official duties at the time of the assault or as a result of that person's employment within the judicial system. For purposes of this subsection, "court-related employee" includes bailiffs, court reporters, judicial assistants, court managers, court managers' employees, and any other employee, regardless of title, who is engaged in equivalent functions; or
  
- (k) Assaults a person located in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This section shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the assault.

(2) Assault in the third degree is a class C felony.

### **9A.36.041. Assault in the fourth degree**

- (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
  
- (2) Assault in the fourth degree is a gross misdemeanor.

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Rec'd 2/20/14

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Attached you will find the Respondent's Supplemental Brief on the Villanueva-Gonzalez Appeal.

*Connie Utterback*  
Legal Secretary – Appeals  
Clark County Prosecutor's Office

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Email: [Connie.Utterback@clark.wa.gov](mailto:Connie.Utterback@clark.wa.gov)

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