NO. 93692-7

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent
v.

R. C.
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. INTRODUCTION.

This matter was tried to the bench in Juvenile court. Prior to that trial the court held a hearing to determine whether RC had the capacity to commit any crime. Because RC was 10 years and 7 months old that the time he committed these assaults. "The presumption that a 10-year-old child is incapable of committing a crime may be removed by "proof that they have sufficient capacity to understand the act [charged] ... and to know that it was wrong." RCW 9A.04.050." (Slip at 2)

"From Mr. Driscoll's testimony, his report, and the police reports admitted into evidence, the court found that R.C. had the capacity to understand the acts charged and that they were wrong. The court relied both on aspects of the assaults revealed in the police reports and on R.C.'s history with law enforcement in Yakima and Montana. The court noted that because R.C. "understands what he is doing is wrong" he "might be a kid that could really benefit from some services" available in the juvenile justice system. RP at 40-41." (Slip at 3)

RC, comes before this court and tries to portray himself as a This was not a young person who was no longer connected to or engaged in everyday society. RC claims in his petition that there is no indication that "he continued to engage in school upon his return to Washington", clearly

that is not accurate, the record contains numerous indications that RC was attending school, for example;

> MS. COLLINS: I'd like to give him a chance to come home.
> THE COURT: All right.
> MS. COLLINS: And just have him on probation. If anything else happens, I can bring him back up.
> THE COURT: Does he go to school somewhere?
> MS. COLLINS: He does. He goes to school at McKinley.
> THE COURT: At McKinley?
> MS. COLLINS: Uh-huh.
> THE COURT: Okay. RP 7-8.
> …
> THE COURT: Next Thursday morning. I realize that that
> 9 will take Robert out of school, but if he needs us to
> 10 sign anything, we can accomplish that. RP 11

His Mother testified on cross examination to the following:

> A. I want to say at least a month because they were there --yeah, it had been at least a month because school had already started, and he was in school when all of this happened. RP 139

The was discussion throughout this trial, to include the court's ruling were it we specifically discussed that one of the reasons that RC was striking out was that he was being told to do his normal activities such as his chores and homework. RP 102-3, 122-3, 157, 161.

RC claims "(his) home life continued to be abusive when he acted to defend himself." (Petition at 3). However, there is nothing in the cited testimony that is "abuse" nor is the testimony an indication that RC was "defending himself." What the testimony does show is a family attempting to coping with a child who had significant emotional issues and that RC

was still acting out. The cited testimony also demonstrates the fact that RC knew his actions were not acceptable because after the initial assault on his grandmother he took time to cool off and then apologized for his actions.

ISSUES PRESENTED BY PETITION

1. Did the State overcome the presumption of incapacity by clear and convincing evidence.
2. Was RC's trial counsel ineffective for not arguing self-defense?

ANSWER TO ISSUES PRESENTED BY PETITION

1. As is set out in detail by the Court of Appeals ruling the State proved by clear and convincing evidence that RC had the capacity to commit the crimes charged. Dismissal is proper.
2. Trial counsel was not ineffective.

RC has petitioned this court requesting review of the ruling by the Court of Appeals Division III denying both issues he raised on appeal.

RC states that this court has "analyzed what special protections must be provided to youthful offenders who are adults, recognizing youth diminishes culpability." This statement alone sets this case apart from the cases cited by RC. The issue here is not whether RC was "culpable" but whether he had the "capacity" to commit a criminal act. RC states that the new view of juveniles incorporates "what "any parent know" with recent developments in brain science that support lesser culpability in youth." If that is the standard than as every parent knows the indoctrination by any

and all **agencies** that have contact with youth, school, church specifically, is to enforce the rules, the acceptable actions that one must comport with to be allowed to function in those settings and one that was continuously presented/taught to RC was that his actions had consequences and that his actions could lead to criminal sanctions, not just familial sanctions.

It was after literally years of these warning, to include actual sanctions being imposed for similar acts in Montana, that these three criminal assaults occurred. There is no claim nor could there be a claim that RC has intelligence issues. He was in school in Montana making A's and B's and he was in school at the time of these assaults. The reason his attendance is of great import is that is without any doubt demonstrates that this offender, although of tender years, was functioning in society. There is no indication that he was suspended from school in Yakima a clear indication that RC knew and understood how to act and react in society. While having clearly suffered abuse from his father there is not one single word of testimony presented that would indicate that abuse was present in the home he was living in at the time of these assaults.

The indication is that this person knew and understood his actions and even after being warned about his actions and reactions on this day RC took premeditated intentional actions to prepare to assault the next person who upset him. This was not "self-defense" which is a lawful act

in the eyes of the law. The standard that must be met was not here. A child does not get to claim self-defense against a parent because of the past actions of some third party, here RC's father. The act of self-defense could be argued in a factual setting where the testimony justified it based on the past actions of the actor whom the offender assaulted in "self-defense" but these three women over an extended period of time did nothing that would justify RC's actions, they clearly were not and are not his father.

As stated by the Court of Appeals in this decision;

> Where, as here, the trial court finds a child has capacity to commit a crime, we review the record to determine whether substantial clear and convincing evidence was presented from which the trial court could reasonably find that the statutory presumption was overcome. Ramer, 151 Wn.2d at 112-13. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding" at issue. State v. Hill, 123 Wn.2d 641,644,870 P.2d 313 (1994). (Slip at 7-8)

RC requested the Court of Appeals reconsider its original ruling, it did so denying that review however the court did amend the opinion to state;

> The problem with this circular argument is that we review the seven factors to determine whether, because a child has sufficient capacity understand the act and know that it was wrong, the presumption has overcome.

RC now finds fault that the court in the amendment used the correct statement of the law, stating that the court did not explain how it's analysis under the correct standard in this one section was supported by the facts previously stated.

This clearly was just a misstatement in the original test not an attempt by the Court of Appeals to use some different standard to analyze RC's case. The very first paragraph of the analysis section of the opinion sets forth that;

> RCW 9A.04.050 provides that children under the age of eight years are incapable of committing a crime and, relevant here, that [c]hildren of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act [charged] ... and to know that it was wrong.
>
> "The purpose of the presumption is to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior." State v. Q.D., 102 Wn.2d 19, 23, 685 P.2d 557 (1984). (Slip at 6)

The court then stated the correct law again and the cases that are the foundation of that rule of law. Slip at 7:

> The State must overcome the presumption of an 8 to 12 year old' s lack of capacity with clear and convincing evidence. State v. J.P.S., 135 Wn.2d 34, 37, 954 P.2d 894 (1998). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. In re Dependency of

> K.S.C., 137 Wn.2d 918,925,976 P.2d 113 (1999).
>
> "A capacity determination must be made in reference to the specific act charged." J.P.S., 135 Wn.2d at 37. To have capacity, the child must know the act charged was wrong at the time he committed it. Id. at 37-38. "A 'sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient,' although actual knowledge of the legal consequences is not necessary." State v. Ramer, 151 Wn.2d 106, 115, 86 P.3d 132 (2004) (quoting 43 C.J.S. Infants§ 197 (1978)). Courts consider seven factors to determine whether a child knew the act charged was wrong:
>
> (1) the nature of the crime; (2) the child's age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences that attached to the conduct; and (7) acknowledgment that the behavior was wrong and could lead to detention. J.P.S., 135 Wn.2d at 38-39.

In this petition Gomez has set forth no basis for review which comport with RAP 13.4(b) and 13.5A. Because Gomez has not met any of the conditions set forth in those rules this court need not and should not grant review of the ruling of Division III of the Court of Appeals.

As this court is well aware RAP 13.4(b) sets forth the basis for review;

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the

> petition involves an issue of substantial public interest that should be determined by the Supreme Court.

State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993);

> …we do not address this issue because it was not raised on appeal. An issue not raised or briefed in the Court of Appeals will not be considered by this court. State v. Laviollette, 118 Wn.2d 670, 679, 826 P.2d 684 (1992).

B. STATEMENT OF THE CASE

The following facts section is taken verbatim from decision of the Court of Appeals:

R.C. was charged with one count of second degree assault and two counts of fourth degree assaults committed in September 2014. At the time of the assaults, R.C. was 10 years and 7 months old. The victim of the second degree assault was R.C.'s aunt. The victims of the fourth degree assaults were his mother and his great-aunt.

Since children R.C.'s age are presumed to lack the capacity to commit a crime, the first order of business in R.C.'s case was a capacity hearing. The presumption that a 10-year-old child is incapable of committing a crime may be removed by "proof that they have sufficient capacity to understand the act [charged] ... and to know that it was wrong." RCW 9A.04.050.

The only witness called at R.C.'s capacity hearing was Steven Driscoll, a juvenile probation officer whose job duties include

investigating and opining on the capacity of children under the age of 12 who are charged with crimes in Yakima County. Mr. Driscoll learned from R.C.'s mother that he had engaged in physical fights with her from age 5 or 6, which she and Mr. Driscoll attributed to R.C.'s history with his very abusive father. Before 2014, R.C.'s mother had called Yakima police "two or three times" when R.C. assaulted her. Report of Proceedings (RP) at 28. No formal action was taken in those instances, although the officers talked to R.C. about how his behavior could lead to legal issues and jail.

In 2014, R.C.'s mother moved with him to Montana, hoping that getting him away from his father might give R.C. a fresh start. But R.C. assaulted her twice during the several months they lived in Montana before returning to Yakima. Mr. Driscoll spoke with the probation officer assigned to oversee R.C. in Montana. She told Mr. Driscoll that given R.C.'s age, he had been granted diversion in both cases but had faced a definite prospect of being sent to a juvenile detention facility on the second occasion, and "he was definitely afraid of it." RP at 25.

Mr. Driscoll learned from R.C.'s mother that he had been diagnosed with posttraumatic stress disorder and oppositional defiant disorder,[1] and was being treated for the disorders with Prozac and

[1] Oppositional Defiant Disorder is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures that persists for at least 6 months ... and is

counseling. R.C. was also taking melatonin to help him sleep.

From Mr. Driscoll's testimony, his report, and the police reports admitted into evidence, the court found that R.C. had the capacity to understand the acts charged and that they were wrong. The court relied both on aspects of the assaults revealed in the police reports and on R.C.'s history with law enforcement in Yakima and Montana. The court noted that because R.C. "understands what he is doing is wrong" he "might be a kid that could really benefit from some services" available in the juvenile justice system. RP at 40-41.

At the adjudication hearing that took place thereafter, the State called the two police officers who responded to the September assaults and the three victims. The evidence established that the initial event precipitating R.C. 's assaults was his great-aunt telling him to give her a television remote that he had taken in order to change the channel from the cartoons his three-year-old sister was watching. When his great-aunt reached for the remote, R.C. punched her in her right arm, which was in a sling following surgery. He then raised his legs and kicked her in the

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characterized by the frequent occurrence of at least four of the following behaviors: losing temper ... , arguing with adults ... , actively defying or refusing to comply with the requests or rules of adults ... , deliberately doing things that will annoy other people ... , blaming others for his or her own mistakes or misbehavior ... , being touchy or easily annoyed by others ... , being angry and resentful ... , or being spiteful or vindictive .... AM. PSYCHIATRIC Ass'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS § 313.81, at 100 (4th rev. ed. 2000).

stomach as if to push her away.

After suffering the assault, R.C. 's great-aunt told his mother, "[H]e's all yours," and went outside, crying. RP at 86. R.C.'s mother told him it was wrong to hit others, that he needed to respect his elders, and that he was grounded from watching television and could not have the remote. R.C. then punched his mother in the stomach. She ordered R.C. to take a time-out and went outside where she sat down with her sister, who was commiserating with R.C.'s great-aunt. R.C. went to a comer of the yard where he goes to calm down.

After 5 or 10 minutes, R.C. approached his mother, great-aunt and aunt, apologized for being "mouthy," and hugged his mother and great-aunt. RP at 121. But in the conversation that ensued, R.C.'s mother told him he needed to do his homework and his chores, and he again became angry. When his aunt weighed in, telling him he needed to do as he was told, R.C. told her and his mother that he "wasn't going to f---king do anything," at which point his aunt pulled the bucket on which he was sitting out from under him, causing him to fall on the ground, and told him, "[Y]ou get off your ass, you get in the house, and you do your chores." RP at 123.

R.C. went into the house, but instead of undertaking chores or homework, he went into his mother's room, where his mother feared he

was going to destroy things. His aunt was also afraid that R.C. "was going to do something stupid," so she went inside and told R.C., who was sitting on his mother's bed, that he needed to go outside. Ex. B at 1. When he refused, persistently, the two argued, and his aunt went outside to tell his mother he would not listen.

A few minutes later, R.C.'s aunt tried again to get him to obey. She stood in the doorway of her sister's room and told R.C. to go outside as he was told. She and R.C. yelled and swore at one another, with R.C. saying, at one point, "the next person that touches me or says anything to me is ... going to get their ass beat or get killed." RP at 127. When R.C.'s aunt finally entered the room and reached for his arm to pull him off the bed, R.C. reached behind his back, where he had a small paring knife, grabbed it, and raised it over his head-according to his aunt, "like he was coming at [her]." RP at 131. She fled the room and called police. She testified that she feared he was going to stab her; that "If I had not moved, I probably would have gotten it right in the side." RP at 133.

At the conclusion of the evidence, the trial court announced it found the evidence "very credible on all three counts." RP at 168. While observing that it is "a very sad case," it found R.C. guilty as charged. Id. On the two counts of fourth degree assault, it committed him to a total of 36 days of detention-the time he had already served. It committed him to

the custody of the Juvenile Rehabilitation Administration for institutional placement for 15 to 36 weeks on the second degree assault, stating "that's appropriate to give him the longest shot he could get there to get the kind of help that he needs." RP at 179.

Regarding the alleged “self-defense” it is worth noting that RC states as part of the reasons RC was went into his mother’s room was to defend himself from the failure of the family to “appreciate his fragile mental state” and by “ordering him to clean the toilet with his toothbrush”, here again RC slants the testimony to bolster the claim that there was ongoing “abuse” the testimony actually was that this statement was a joke by one of the victims; And Auntie had made a joke that after his fit, that he needed to go scrub the toilet with a toothbrush, and that just set him off even more. RP 122

It should also be noted that RC was seated in his mother bedroom when the attack on the one aunt with the knife occurred. Clearly the knife, a kitchen knife, is not a common item found in a bedroom and therefore RC had to have taken the premeditated step to find the knife in the kitchen RP 134 and carry this knife into the bedroom as well as hide it presence from the person who was assaulted who did not see the knife until it was literally coming at her. RP 125-37

C. ARGUMENT

As with a direct appeal, acceptance of review of the Court of Appeals opinion is governed by RAP 13.4(b). This rule sets forth the manner and mechanism for review of a decision by the Court of Appeals terminating review.

This case does not meet any of the criterion set forth in RAP 13.4(b) RAP 13.4(b) Considerations Governing Acceptance of Review; This case does not **1**) Conflict with any decision by this court; **2**) This ruling does not conflict with any ruling by any other division of the Court of Appeals or for that matter any court; **3**) The ruling does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years **4**) The issues raise in this petition for review do not involve an issue of substantial public interest that this court should determine.

The State would note that pursuant to GR 14.1 an unpublished opinion "may be accorded such persuasive value as the court deems appropriate." The State would note that the exact same panel of jurists from Division III of the Court of Appeals contemporaneously with the decision in this case rendered an opinion in State v. Ellison, 33215-2-III (WACA) unpublished slip opinion addressed implications of Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) in a matter where "the infancy defense" set forth in RCW 9A.04.050.

RC askes this court to void decades of controlling law, law that the court in Ellison cited to and used; State v. J.P.S., 135 Wn.2d 34, 37, 954 P.2d 894 (1998) and more recently State v. Ramer, 151 Wn.2d 106, 115, 86 P.3d 132 (2004) (quoting 43 C.J.S. Infants§ 197 (1978)). Division II recently cited as J.P.S in its opinion in State v. Plueard, 42167-4-II (WACA)(2013) unpublished slip opinion.

The Court of Appeals reviewed the juvenile court's determination that RC had capacity to commit the crime here by examining the record to determine whether the State produced substantial evidence to rebut the presumption of incapacity. Ramer, 151 Wn.2d at 112-13. Significantly, the inquiry is whether the State *produced* sufficient evidence to meet its burden of proof and, necessarily then, a court of review does not pass on whether the State's showing was *persuasive*. State v. Huff, 64 Wn.App. 641, 655, 826 P.2d 698 (1992). The burden of persuasion is a matter for the trier of fact (here the juvenile court judge) to resolve. *Id.*

The State will not regurgitate the lengthy opinion of the court of appeals in this answer to do so would be redundant and unneeded. The ruling was well reasoned and took point by point the existing and valid law set forth in the case law pertinent to this issue which addressed a statute that is valid and is a statement of the intent of the legislature.

The Court ruled:

1) Nature of the crime. … The crimes charged in this case are assaults, the wrongfulness of which is intuitively obvious. Children are almost always taught from a very young age that hitting someone is wrong. The same is true of threatening to injure someone with a weapon. This factor weighs in favor of finding capacity.

2) Age and maturity…. The fact that R.C. was in the upper end of the 8 to 12 age range, had good grades, the fact that he was self-aware enough to attempt to calm himself down, and the absence of any evidence that he lacked the cognitive ability to understand what an average 10-year-and-7-month-old child understands, all bear on this factor. While not strong support for a finding of capacity, this factor weighs in favor of finding capacity.

3) Desire for secrecy…. R.C. 's history of asking his mother not to call police, together with evidence that when police were called in September 2014, he lied, demonstrate a desire for secrecy and a corresponding knowledge that his acts were wrong. The factor weighs in favor of finding capacity.

4) Asking the victim not to tell…. We find no evidence that R.C. asked family members not to call police on that occasion, but given the precipitous events, he might not have had the opportunity. We have already mentioned prior occasions on which R.C. asked his mother not to call police and will not double count that evidence under this factor. This factor does not weigh in favor, or against, finding capacity.

5) Prior conduct & consequences (factors 5 and 6 combined)….In addressing these factors, R.C. cites his mother's opinion that when he hits family members, it is self-protective because he cannot distinguish between abuse and discipline. Br. of Appellant at 20-21. But this evidence (which was in the context of hitting in response to physical

punishment) was only presented at the trial, not at the capacity hearing.

He and amici also contend the evidence of his prior similar conduct and consequences was not specific enough to be clear and convincing evidence. We disagree. The court was presented with evidence that by the time of the capacity hearing, R.C. had dealt with law enforcement for assaulting his mother on at least five occasions; that while living in Montana, he suffered the consequence of diversion with county probation services; and that multiple police officers had told him his behavior was wrong and could lead to legal issues or jail. The court was presented with evidence that R.C. was receiving regular counseling for oppositional defiant disorder at Behavioral Health Services of Yakima. This is an extraordinary history of opportunities from which a 10-year-old child with average or better than average cognitive ability could learn what constitutes assault and that it is wrong. This factor weighs strongly in favor of finding capacity.

7) Acknowledgment that behavior is wrong…. In announcing its finding of capacity, the trial court identified as relevant to this factor only actions and statements from which one might infer that R.C. knew his assaults were wrong: his being "scared shitless" of going to jail, his trying to calm himself down after the first two assaults, and his lying to police officers about what had happened. RP at 4 7.

Having considered that evidence in connection with other factors, we do not count it again here. This factor does not weigh for or against a finding of capacity.

Slip 8-14

Having completed the above analysis, the court then ruled, using

the proper legal standard; "Considering all seven factors, the State presented substantial clear and convincing evidence from which the trial court could reasonably find that it overcame the presumption that R.C. lacked the capacity to commit assault." Slip at 14

The Court's decision is well reasoned and the edicts of RAP 13.4(b) have not been met. The acceptance of review by this court is and should be limited. The opinion rendered below need not be reviewed.

The Court of Appeals then addressed the series of federal and out of state cases that RC argues should be the standard in this State.

This court need only look at the Court of Appeals analysis it correctly sums up that reason that the cases cited by RC are not applicable and why that court and this court need not and should not change the well-reasoned standard that is presently in place. As the court ruled:

> R.C. and amici nonetheless argue that a child's impulsivity, susceptibility to outside pressures, and capacity for growth and change-qualities that distinguish children from adults-should cause us to modify the seven-factor inquiry or should inform the inquiry in a way they contend it did not in R.C.'s case.
> …
> None of the cases cited has any direct application to the issue of capacity to commit a crime.
> …
> All discuss current or then-current knowledge about the juvenile brain. We see no reason why the science they discuss could not have been presented in R.C.'s capacity hearing to the extent it was relevant. We have no reason to believe that a superior court judge

> assigned to juvenile court would not have some knowledge of the science. But its relevance would have been limited to the issue in the capacity hearing: whether R.C. had the capacity to understand the acts charged and know that they were wrong. Where a juvenile has that capacity, our legislature intends that the crimes charged be adjudicated in the juvenile justice system.
>
> And the juvenile justice system itself reflects the legislature's recognition that a child's criminal act must be addressed differently than the criminal act of an adult. "[T]he fundamental difference between juvenile courts and adult courts" is that, "unlike wholly punitive adult courts, juvenile courts remain[] rehabilitative." *State v. Saenz*, 175 Wn.2d 167, 172-73, 283 P.3d 1094, aff'd, 175 Wn.2d 167,283 P.3d 1094 (2012). *Saenz* summarizes a number of respects in which Washington law responds to the fact that juvenile brains, and therefore the juvenile justice response, must be different.
>
> The longstanding seven-factor analysis of capacity remains viable and supports R.C.'s capacity.
> (Slip at 15-16)

It is the State's position that the present methodology does in fact already incorporate standards that take into account many, if not most, of the factors that are addressed in the recent cases addressing the qualities that distinguish a child's brain from that of an adult. The seven separate factors that are addressed in a capacity hearing are set out so that there is a very specific, person by person, analysis of the alleged offender to determine if that person will be deemed by this state to have the capacity to commit a criminal act. A process that by its very process looks to the qualities of the juvenile offender and determines if that juveniles, that

child's, brain had the capacity to act in a manner that this society has labeled as criminal.

If the court after its analysis, the capacity hearing, determines that the youth did not meet the criterion then the court in effect has stated, has ruled, that this youthful brain should be distinguished from that of an adult and therefore not be held to have the capacity to "commit a crime." This is so even if the person did in fact act, do something, that if the offender was not of a tender age would in fact be a criminal act.

2) Alleged ineffective assistance by trial counsel for not alleging these assaults were done in self-defense.

The actions of trial counsel here were not ineffective. The record is clear that his considered self-defense and found that the facts did not fit the law. Furthermore, if trial counsel's conduct "can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim that a defendant received ineffective assistance of counsel." State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). Personal Restraint of Stenson, 142 Wn.2d 710, 734-5, 16 P.3d 1 (2001).

> For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every "colorable" claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders. Nothing in the Constitution or our interpretation of that document requires such a standard. Jones v. Barnes, 463 U.S. 745, 751, 754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).
>
> The Court later expressed similar views about representation at the trial court level:
>
> Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial. . . . Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial.
>
> . . . For many reasons, therefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment. State v. Piche, 71 Wn.2d at 590.

This is a classic case of hind sight on appeal, where RC would have the Court of Appeals and now this court, second guess the actions of trial counsel where clearly that counsels trial tactic did not included alleging the three assaults committed by RC were done so out of self-defense. "When R.C.'s trial lawyer told the court, "I'm not trying to justify his actions[,] because he was out of control that day. I don't think his actions really properly fit into a self-defense mode," we can see from the record that he was reasonably anticipating how the trial court was

likely to view the evidence. RP at 174. So he relied instead on an argument that merely raising a knife, without making a forward thrust, does not amount to assault." Slip at 20

Harrington v. Richter, 562 U.S. 86, 109-110, 131 S.Ct. 770, 178 L.Ed.2d 624, 79 U.S.L.W. 4030 (2011)

> Although courts may not indulge "*post hoc* rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, *Wiggins*, 539 U.S., at 526–527, 123 S.Ct. 2527, 156 L.Ed.2d 471, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) *(per curiam)*. After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S., at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

There was no claim of self-defense attempted because trial counsel knew and acknowledged that the facts did not support this defense. No attorney is mandated to argue something that is not supported by the facts and to not argue something which was not supported by the facts is the ethical duty of any and all attorney. RPC 3.3

There were three assaults in this case. An examination of the the first two, on RC's mother and his great aunt, demonstrate that the record is devoid of any facts that would allow such a defense to be presented even given RC's past and perhaps because of his past. His history must and did factor into the method this case was presented. These assaults are not the first, therefore RC already had knowledge of the consequence of his actions and had, according to the record, assaulted his mother on a weekly and sometimes daily basis. The acts by these two victims could never be presented in any manner to a finder of fact which would justify or allow the use of the defense of self-defense. The third assault against his aunt was the only confrontation that there was a possibility of the use of this defense based on the hostile interaction. However, the fact that the initial act by the Aunt, when she knocked RC off of his seat in the yard was separated by time and space and the premediated act of RC to find a knife, conceal the knife and only attempt to stab his aunt after she came into the room also does not meet the legal standard. State v. McCullum. 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (self-defense negates the intent element of a crime). Proof of self-defense requires evidence (1) that the defendant had a subjective fear of imminent danger of bodily harm, (2) that this belief was objectively reasonable, and (3) that the defendant exercised no more force than was reasonably necessary. State v. Werner, 170 Wn.2d 333,

337, 241 P.3d 410 (2010); see RCW 9A. 16.020(3).

The standard for self-defense incorporates both subjective and objective elements. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The trier of fact considers all the facts and circumstances subjectively known to the actor and then determines what a similarly situated reasonably prudent person would have done. Walden, 131 Wn.2d at 474.

It was for RC to provide some evidence of this defense. That evidence need not come from the defendant himself however there must be some evidence presented. Once that evidence is presented by the defendant, the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Acosta. 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); Walden, 131 Wn.2d at 473.

Here there is nothing which could have been presented from the State's witnesses or from RC himself which would satisfy this requirement.

There are cases such as State v. Graves, 97 Wn.App. 55, 982 P.2d 627 (1999) which have been cited by Appellant where the court has allowed the use of this defense by a child when one of party is a parent. This case is distinguishable from Graves. In Graves the father and his son had an argument about household chores that turned into an actual

physical confrontation initiated by the father. The father had grabbed Graves face and later placed his son head lock. The defendant, Graves, was the son who was charged with assaulting his father. Graves like RC was competent and involved in an altercation with his parent. As the court in Graves states **"[t]o raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense**. State v. Dyson, 90 Wn.App. 433, 438, 952 P.2d 1097 (1997). The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Miller, 89 Wn. App. 364, 367-68, 949 P.2d 821 (1997). Id 61-2

As the Court of Appeals ruled:

> R.C. does not identify any evidence to which his trial lawyer could have pointed in support of argument that R.C. subjectively believed, or a reasonable child would have objectively believed, that he was about to be injured by his great-aunt, mother, and aunt, and responded with necessary force. Slip at 19.
> ….
> When R.C.'s trial lawyer told the court, "I'm not trying to justify his actions[,] because he was out of control that day. I don't think his actions really properly fit into a self-defense mode," we can see from the record that he was reasonably anticipating how the trial court was likely to view the evidence. RP at 174. So he relied instead on an argument that merely raising a knife, without making a forward thrust, does not amount to assault. Slip at 20

The Court of Appeals completed its analysis of the allegation that

RC's trail counsel had been ineffective as follows:

> In the end, the trial court found conduct sufficient to be "violence begun." That a defense strategy "ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." Grier, 171 Wn.2d at 43. Since R.C.'s trial lawyer's defense theory was a legitimate trial strategy, his performance was not deficient.

Here again the actions of the trial court were supported by the record and Court of Appeals ruling based on the evidence presented and the applicable law need not be further reviewed. RC has not demonstrated that the ruling of the Court of Appeals satisfies any portion of RAP 13.4.

D. CONCLUSION

The Court of Appeals properly analyzed the facts that were presented to that court by the Petitioner. Based on the information before it that court, a three judge panel, determined, twice, that the State had met its burden and that the trial court judge had properly applied the appropriate law to those facts.

Trial counsel for RC acknowledged that self-defense was not applicable to this case. The Court of Appeals properly ruled that there was no error on the part of counsel regarding this allegation and this an order issued literally giving this Petitioner what he wanted and yet now the State is being asked to explain why the highest court of this petition has not

demonstrated that that decision meets RAP 13.4, this court should deny review of any of the rulings of the Court of Appeals.

Respectfully submitted this 5th day of December 2016,

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DECLARATION OF SERVICE

I, David B. Trefry state that on December 5, 2016, I emailed a copy of the State's Answer, by agreement of the parties to Mr. Stearns at wapofficemail@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of December, 2016 Spokane, Washington.

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