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COURT OF APPEALS  
DIVISION II

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No. \_\_\_\_\_

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY 

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

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IN RE THE RESTRAINT OF:

JUSTIN M. HEGNEY,

Petitioner.

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OPENING BRIEF OF PETITIONER

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ORIGINAL

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

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

C. STATEMENT OF THE CASE ..... 3

    1. Procedural History ..... 3

    2. General Substantive Facts ..... 7

    3. Testimony About “Everybody” Being Involved ..... 9

    4. The Decline Hearing ..... 11

D. ARGUMENT ..... 15

    1. Inst. No. 5 Violated Due Process of Law and Violated  
    Mr. Hegney’s Right to Jury Unanimity and Notice of  
    the Charge ..... 15

        a. Inst. No. 5 Weakened the State’s Burden of  
        Proof ..... 16

        b. Inst. No. 5 Violated Mr. Hegney’s Right to  
        Jury Unanimity ..... 19

        c. Inst. No. 5 Allowed for Conviction  
        Based Upon an Uncharged Crime ..... 21

        d. The Failure of Mr. Hegney’s Prior Counsel to  
        Challenge Inst. No. 5 Constituted Ineffective  
        Assistance of Counsel ..... 22

        e. The Errors in Inst. No. 5 Were Not Harmless ... 23

2.	Washington’s Decline Procedure Violates Federal Constitutional Rights .....	24
a.	The Decline Hearing Violated <i>Blakely</i> .....	24
b.	Equal Protection and Substantive Due Process are Violated by the Use of a Reasonable Doubt Standard to Determine Manifest Injustices, but Not for the Decline Procedure ...	28
c.	The Decline Procedure Was Marred by the Use of Inadmissible Evidence .....	31
3.	Newly Discovered Evidence Requires Vacation of the Decline Decision .....	34
4.	Trying a 15 Year Old Child as an Adult and Imposing a 20 Year Mandatory Minimum Sentence Violates International Law and Constitutes Cruel and Unusual Punishment .....	38
5.	This Court Should Give Retroactive Application to EHB 1187 .....	41
6.	The State is Unconstitutionally Denying Mr. Hegney Earned Early Release Time .....	44
7.	The Admission of Jesse Hill’s Statements at a Joint Trial Violated the Confrontation Clause of the 6 <sup>th</sup> Amendment .....	46
E.	CONCLUSION .....	50

**TABLE OF CASES**

Page

*Washington Cases*

<u>City of Burien v. Kiga</u> , 144 Wn.2d 819, 31 P.3d 659 (2001) . . . . .	45
<u>Eggert v. Seattle</u> , 81 Wn.2d 840, 505 P.2d 801 (1973) . . . . .	40
<u>In re Boot</u> , 130 Wn. 2d 553, 925 P.2d 964 (1996) . . . . .	37
<u>In re Brown</u> , 143 Wn.2d 431, 21 P.3d 687 (2001) . . . . .	37
<u>In re Dalluge</u> , 152 Wn.2d 772, 100 P.3d 279 (2004) . . . . .	23
<u>In re Evans</u> , 154 Wn.2d 438, 114 P.3d 627 (2005) . . . . .	25
<u>In re Gentry</u> , 137 Wn.2d 378, 972 P.2d 1250 (1999) . . . . .	47
<u>In re Harbert</u> , 85 Wn.2d 719, 538 P.2d 1212 (1975) . . . . .	32
<u>In re Markel</u> , 154 Wn.2d 262, 111 P.3d 249 (2005) . . . . .	47
<u>In re Maxfield</u> , 133 Wn.2d 332, 945 P.2d 196 (1997) . . . . .	23
<u>State v. Beaver</u> , 148 Wn.2d 338, 60 P.3d 586 (2002) . . . . .	30
<u>State v. Brown</u> , 45 Wn. App. 571, 726 P.2d 60 (1986) . . . . .	21,22
<u>State v. Carr</u> , 97 Wn.2d 436, 645 P.2d 1098 (1982) . . . . .	21
<u>State v. Cloud</u> , 95 Wn. App. 606, 976 P.2d 649 (1999) . . . . .	44,45
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996) . . . . .	22,23
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953) . . . . .	17

<u>State v. Furman</u> , 122 Wn.2d 440, 858 P.2d 1092 (1993) . . . . .	27
<u>State v. Heath</u> , 85 Wn.2d 196, 532 P.2d 621 (1975) . . . . .	42
<u>State v. H.O.</u> , 119 Wn. App. 549, 81 P.3d 883 (2003) . . . . .	24,27,28
<u>State v. Jacobson</u> , 33 Wn. App. 529, 656 P.2d 1103 (1982) . . . . .	24,27
<u>State v. Kitchen</u> , 46 Wn. App. 232, 730 P.2d 103 (1986) . . . . .	20
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) . . . . .	20,23
<u>State v. Linares</u> , 75 Wn . App. 404, 880 P.2d 550 (1994) . . . . .	32
<u>State v. Massey</u> , 60 Wn. App. 131, 803 P.2d 340 (1990) . . . . .	41
<u>State v. Maurice</u> , 79 Wn. App. 544, 903 P.2d 514 (1995) . . . . .	36
<u>State v. Meade</u> , ___ Wn. App. ___, 120 P.3d 975 (2005) . . . . .	28
<u>State v. Mitchell</u> , 32 Wn. App. 499, 648 P.2d 456 (1982) . . . . .	31
<u>State v. Musgrave</u> , 124 Wn. App. 733, 103 P.3d 214 (2004) . . . . .	45
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994) . . . . .	20
<u>State v. Pang</u> , 132 Wn.2d 852, 940 P.2d 1293 (1997) . . . . .	40
<u>State v. Ramer</u> , 151 Wn.2d 106, 86 P.3d 132 (2004) . . . . .	32
<u>State v. Rhinehart</u> , 92 Wn.2d 923, 602 P.2d 1188 (1979) . . . . .	21
<u>State v. Rice</u> , 98 Wn.2d 384, 655 P.2d 1145 (1982). . . . .	28,30
<u>State v. Ross</u> , 152 Wn.2d 220, 95 P.3d 1225 (2004) . . . . .	42
<u>State v. Schaaf</u> , 109 Wn.2d 1, 743 P.2d 240 (1987) . . . . .	30

<u>State v. Sharon</u> , 100 Wn.2d 230, 668 P.2d 584 (1983) .....	31
<u>State v. Simmons</u> , 152 Wn.2d 450, 98 P.3d 789 (2004) .....	29
<u>State v. Smith</u> , ___ Wn.2d ___, 120 P.3d 559 (2005) .....	16,17
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980) .....	20
<u>State v. Tai N.</u> , 127 Wn. App. 733, 113 P.3d 19 (2005) .....	28
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	36
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996). .....	45
<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508 (1983) .....	21
<u>State v. Vincent</u> , ___ Wn. App. ___, 120 P.3d. 120 (2005) .....	49
<u>Tiffany Family Trust Corp. v. City of Kent</u> , 155 Wn.2d 225, 119 P.3d 325 (2005) .....	29

*Federal, International and State Cases*

<u>Apodoca v. Oregon</u> , 406 U.S. 404, 32 L.Ed.2d 184, 92 S. Ct. 1628 (1972) .....	20
<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) .....	25,27
<u>Blakely v. Washington</u> , 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004) .....	24,25,27
<u>Brady v. Maryland</u> , 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) .....	36
<u>Bruton v. United States</u> , 391 U.S. 123, 20 L. Ed.2d 476, 88 S. Ct. 1620 (1968) .....	46

<u>Burch v. Louisiana</u> , 441 U.S. 130, 60 L.Ed.2d 96, 99 S. Ct. 1623 (1979) .....	20
<u>City of Cleburne v. Cleburne Living Center</u> , 473 U.S. 432, 87 L. Ed.2d 313, 105 S. Ct. 3249 (1985) .....	43
<u>County of Sacramento v. Lewis</u> , 523 U.S. 833, 140 L.Ed.2d 1043, 118 S. Ct. 1708 (1998) .....	29
<u>Crawford v. Washington</u> , 541 U.S. 36, 158 L.Ed. 2d 177, 124 S. Ct. 1354 (2004) .....	46,47, 48
<u>Evitts v. Lucey</u> , 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985) .....	23
<u>Harris v. United States</u> , 536 U.S. 545, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) .....	25
<u>Harris v. Wright</u> , 93 F.3d 581 (9 <sup>th</sup> Cir. 1996) .....	41
<u>Hilao v. Estate of Marcos</u> , 103 F.3d 789 (9 <sup>th</sup> Cir. 1996) .....	41
<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) .....	16,17,30
<u>Jefferson v. State</u> , ___ S.W.3d ___ (Ark. 2004, CR 04-686) .....	49
<u>Kent v. United States</u> , 383 U.S. 541, 16 L.Ed.2d 84, 86 S. Ct. 1045 (1966) .....	26,27
<u>Kotteakos v. United States</u> , 328 U.S. 750, 90 L.Ed. 1557, 66 S. Ct. 1239 (1946) .....	17
<u>Kyles v. Whitley</u> , 514 U.S. 419, 131 L.Ed.2d 490, 115 S. Ct. 1555 (1995) .....	36
<u>Manley v. Georgia</u> , 279 U.S. 1, 73 L.Ed. 575, 49 S. Ct. 215 (1929) ....	18

<u>Miller v. Anderson</u> , 255 F.3d 455, <i>remand order modified by stipulation</i> , 268 F.3d 485 (7 <sup>th</sup> Cir. 2001) .....	36
<u>The Paquete Habana</u> , 175 U.S. 677, 44 L.Ed.320, 20 S. Ct. 290, (1900) .....	40,41
<u>Richardson v. Marsh</u> , 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987) .....	48,49
<u>Ring v. Arizona</u> , 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) .....	25,26
<u>Rompilla v. Beard</u> , ___ U.S. ___, 162 L.Ed.2d 360, 125 S. Ct. 2456 (2005) .....	36
<u>Roper v. Simmons</u> , ___ U.S. ___, 161 L.Ed.2d 1, 125 S. Ct. 1183 (2005) .....	30,39,40
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 61 L.Ed.2d 39, 99 S. Ct. 2450 (1979) .....	17
<u>Schad v. Arizona</u> , 501 U.S. 624, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) .....	17,18,20,21
<u>Siderman de Blake v. Republic of Argentina</u> , 965 F.2d 699 (9th Cir. 1992) .....	41
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984) .....	22,36
<u>Trop v. Dulles</u> , 356 U.S. 86, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) ....	40
<u>United States v. Molina</u> , 407 F.3d 511 (1 <sup>st</sup> Cir. 2005) .....	49
<u>V. v. United Kingdom</u> , European Court of Human Rights, Application No. 24888/94, 16 December 1999 ( <a href="http://hei.unige.ch/~clapham/hrdoc/docs/echrvcase.txt">http://hei.unige.ch/~clapham/hrdoc/docs/echrvcase.txt</a> ) .....	39

<u>Woodby v. I.N.S.</u> , 385 U.S. 276, 17 L.Ed.2d 362, 87 S. Ct. 483 (1966) .....	30
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*Statutes, Constitutional Provisions, Rules, Treatises  
and Other Authority*

Amnesty International and Human Rights Watch, <i>The Rest of Their Lives, Life Without Parole for Child Offenders in the United States</i> (October 2005) ( <a href="http://hrw.org/reports/2005/us1005/">http://hrw.org/reports/2005/us1005/</a> ) .....	41
Convention on the Rights of the Child .....	39
Init. 593 .....	44,45,46
Laws of 1997, ch. 340 (HB1924) .....	45,46
Laws of 2005, ch. 437 (EHB 1187) .....	2,3,41,42,43,44
RAP 16.4 .....	36
Former RCW 9.94A.120 .....	45
RCW 9.94A.540 .....	6,7,44
RCW 9.94A.728 .....	44
RCW 13.40.110 .....	26,31
RCW 13.40.300 .....	26
International Covenant on Civil and Political Rights .....	38,39,41,42
United Nations Standard Minimum Rules for the Administration of Juvenile Justice .....	39
Universal Declaration of Human Rights .....	40
U.S. Const. art. VI, cl.2 .....	40

U.S. Const. amend. 5 .....	1,32,33,34
U.S. Const. amend. 6 .....	1,2,20,21,22,24,25,27,28,32,36,46, 47,49,50
U.S. Const. amend. 8 .....	2,39,41
U.S. Const. amend. 14 .....	..... 1,2,19,20,21,22,24,25,27,28,29,31,34,36,43,46,47,49,50
Wash. Const. art. 1, § 3 .....	1,19,21,22,23,34,36,46
Wash. Const. art. 1, § 9 .....	1,34
Wash. Const. art. 1, § 12 .....	1,2,29,31,43
Wash. Const. art. 1, § 14 .....	2,40,41
Wash. Const. art. 1, § 21 .....	1,20
Wash. Const. art. 1, § 22 .....	1,2,20,21,22,23,31,36,46,47,50
Wash. Const. art. 2, § 19 .....	44,46

**A. ASSIGNMENTS OF ERROR**

1. Petitioner Justin M. Hegney assigns error to the entry of the judgment and sentence. Ex. 13.

2. Mr. Hegney assigns error to Inst. No. 5. Ex. 11; App. A.

3. Inst. No. 5 violated Mr. Hegney's right to due process of law, right to notice of the charges, and right to jury unanimity, protected by U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3, 21 & 22.

4. The failure of Mr. Hegney's prior counsel to except to the giving of Inst. No. 5 or challenge it on appeal constituted ineffective assistance of counsel, and violated his right to an appeal and due process of law in violation of U.S. Const. amends. 6 and 14, and Wash. Const. art. 1, §§ 3 & 22.

5. The decline procedure in Washington State generally, and as it was applied to Mr. Hegney's case, violated the right to a jury trial protected under U.S. Const. amends. 6 and 14, the right against self-incrimination, protected by U.S. Const. amends. 5 & 14 and Wash. Const. art. 1, § 9, the right to equal protection and due process of law, protected under U.S. Const. amend. 14 and Wash. Const. art. 1, §§ 3 & 12, and international law.

6. The decline decision should be vacated because of newly

discovered evidence.

7. Trying Mr. Hegney as an adult for acts committed when he was 15 years old and imposing a 20 year mandatory minimum prison sentence violates international law and constitutes cruel and unusual punishment, in violation of U.S. Const. amends. 8 & 14 and Wash. Const. art. 1, § 14.

8. EHB 1187 requires re-sentencing, and § 3 of that bill, making the bill prospective only, violates equal protection of law, under U.S. Const. amend. 14, the prohibition on special privileges and immunities, Wash. Const. art. 1, § 12, and international law.

9. The State is unconstitutionally denying Mr. Hegney earned early release time in violation of Wash. Const. art. 2, § 19.

10. The admission of Jesse Hills' confession at the joint trial violated Mr. Hegney's Confrontation Clause rights guaranteed under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did Inst. No. 5 weaken the State's burden of proof, allow the jury to come to a non-unanimous verdict, and allow the jury to convict Mr. Hegney of being an accomplice to individuals not listed in the information?

2. Was Mr. Hegney's prior lawyer ineffective for not excepting to Inst. No. 5 and for not challenging the instruction on direct appeal?

3. Does Washington's decline procedure on its face, and as it was applied to Mr. Hegney, violate substantive and procedural due process, the right against self-incrimination, equal protection of the law and the right to a jury trial?

4. Should the decline decision be revisited in light of newly discovered evidence?

5. Does trying a 15 year old child as an adult and punishing him with a 20-year mandatory minimum sentence violate international law and constitute cruel and unusual punishment?

6. Should this Court retroactively apply EHB 1187?

7. Is the State illegally denying Mr. Hegney earned early release credits?

8. Were Mr. Hegney's Confrontation Rights violated by the admission of Jesse Hill's statements to the police?

**C. STATEMENT OF THE CASE**

**1. Procedural History**

By information filed in juvenile court in Pierce County, the State

charged Justin Hegney (DOB: 6/5/85) with First Degree Felony Murder. The State alleged that Mr. Hegney or an accomplice killed Erik Toews during the course of or in furtherance of First Degree Robbery. The information listed as “co-respondents” Manuel Jose Hernandez, Charles Andrew Neely, Jamar Jay Spencer, Jesse Repheal Hill, and Jermaine Terron Beaver. Ex. 1.

A decline hearing was held Feb. 12-15, 2001, the Hon. Karen Strombom, presiding. The proceeding was held without a jury, with a preponderance of evidence standard. RP (2/20/01) 4-5.<sup>1</sup> On Feb. 20, 2001, Judge Strombom ruled that Mr. Hegney should be tried as an adult. Ex. 2. The defense filed a motion for reconsideration, Ex. 3, which the judge refused to hear. Ex. 4. Written findings of fact and conclusions of law were entered on March 2, 2001. Ex. 5. Mr. Hegney moved for discretionary review of this decision, and a commissioner of this Court denied review on Aug. 21, 2001. Ex. 6.

On March 2, 2001, the State filed an information against Mr. Hegney in adult court, charging him with First Degree Felony Murder. Ex. 7. The information alleged both principal and accomplice liability, and further named two co-defendants, Robert Anthony Hernandez and Terrance Lashawn

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<sup>1</sup> By separate motion, Mr. Hegney will move this Court for an order to transfer the Verbatim Report of Proceedings from the direct appeal to this case.

Hunt. Ex. 7.

A CrR 3.5 hearing was held on June 18, 2001. The court held that some statements made by Mr. Hegney to police officers on Aug. 23, 2000, were inadmissible, but that his statements to police on Aug. 28, 2000, were admissible at trial. Ex. 8.

Mr. Hernandez and Mr. Hunt pled guilty prior to trial. Mr. Hegney was then tried in a joint trial with Jesse Hill, another juvenile whose case had been declined from juvenile court. Mr. Hill was not named as a co-defendant in the adult information filed against Mr. Hegney. Ex. 7.

In a hearing outside the presence of the jury, the court heard extensive testimony regarding the State's allegations that Mr. Hill and Mr. Hegney committed various acts of misconduct prior to the homicide. Judge Strombom ruled that the State had not met its burden of proving by a preponderance of evidence that Mr. Hegney was even present at most of these incidents, and ruled that the incidents, while admissible against Mr. Hill, were not admissible against Mr. Hegney. RP (1/2/02) 1491-95, 1508. The court did admit evidence of only one prior incident (the "Duck Pond" incident"), which Mr. Hegney admitted to the police that he committed. RP (1/2/02) 1503-05.

The case was tried to a jury in January 2002. The trial took place in a “normal” adult courtroom at the Pierce County Courthouse. No special accommodations were made for the juvenile status of the defendants; the hours of court were the same as in any adult case; there were no special seating arrangements. The case attracted an enormous amount of publicity in the Tacoma/Pierce County area. Justin Hegney’s name, juvenile status and photograph were published repeatedly. When the trial began, the publicity continued Ex. 22.

Although not proposed by either the defense or the State, the Court gave the jury a joint “to convict” instruction, which applied to either Mr. Hegney or Mr. Hill. Inst. No. 5, Ex. 11. Defense counsel did not except to this instruction, RP (2/22/02) 2507-09, and did not raise any issues regarding the instruction on direct appeal. There was no tactical reason for this failure. Ex. 22. None of the other instructions named any of the alleged accomplices. Ex. 11. The verdict form set out only a general verdict of “guilty.” Ex. 12.

The jury returned a verdict of “guilty” on January 28, 2002. Ex. 12. Jesse Hill was also convicted of First Degree Murder. Sentencing took place on Feb. 22, 2002. Judge Strombom imposed a mandatory 20 year sentence on Mr. Hegney, the lowest possible sentence. Ex. 13. Under RCW

9.94A.540, Mr. Hegney is not eligible for any form of reduction of this 20 year sentence – there is no chance of parole, nor even good-time release. *See* Ex. 26.

Mr. Hegney appealed his conviction. This Court affirmed the conviction, in an unpublished opinion, on April 20, 2004. Ex. 14. Mr. Hegney petitioned for review, but review was denied on November 30, 2004. Ex. 15. The mandate issued on Dec. 17, 2004. Ex. 16.

## **2. General Substantive Facts**

Justin Hegney was just 15 years old when he was charged with First Degree Felony Murder. Justin was one of ten children and teenagers, ages 11 to 19,<sup>2</sup> present during the Aug. 19, 2000, street robbery of Erik Toews in Tacoma. After Mr. Toews was knocked to the ground, hit, and kicked, he got up and tried to run away. One of the teenagers, Terrance Hunt, caught him and repeatedly “knee-dropped” Mr. Toews on the head, thereby killing him. Ex. 14, Slip Op. at 2.

While Mr. Toews suffered non-fatal injuries on his lower body, the head injuries were the cause of death. RP (1/8/02) 1653-55. There was no dispute that Mr. Hegney was present during some portions of the incident, but

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<sup>2</sup> A chart containing the names, ages and dispositions of the other children can be found in Ex. 24.

there was differing evidence about the level of his involvement. Many of the witnesses gave conflicting statements to the police and in defense interviews, as well as testifying inconsistently in prior proceedings. Ultimately, there were three possible versions of Mr. Hegney's involvement:

1. Mr. Hegney was present in the background, but did not participate in the initial assault on Mr. Toews, and left before Mr. Hunt killed Mr. Toews.
2. Mr. Hegney was present during the initial phases of the assault and kicked Mr. Toews in the lower part of his body, but then left the area before Mr. Hunt killed Mr. Toews.
3. Mr. Hegney participated in the assault on Mr. Toews and never left the area until after Mr. Hunt killed Mr. Toews.

See, e.g., RP (1/9/02) 1757-78, 1786-1819; RP (1/10/02) 1920-25, 1956-65, 1984-88; RP (1/16/02) 2372-2378, 2382-86, 2390-2403, 2411, 2426-31, 2436-44.

When Mr. Hegney was arrested and interrogated, he initially admitted being present when Mr. Toews was attacked, but denied being involved in his beating. Mr. Hegney then admitted that he kicked Mr. Toews, first one time, and, then, a total of three times. He always was denied that he was involved in Mr. Hunt's fatal assault on Mr. Toews. RP (1/15/02) 2259, 2301, 2307-10.

### **3. Testimony About “Everybody” Being Involved**

The bystander witnesses could not easily distinguish between members of the group, and did not identify either Mr. Hill or Mr. Hegney personally. RP (1/9/02) 1757-78, 1786-1819. The juvenile witnesses (both those charged and uncharged) all mentioned, in the various versions of their stories, that Justin Hegney and Jesse Hill were part of the group. Although they differed about Mr. Hegney’s and Mr. Hill’s level of involvement, the witnesses were routinely included Mr. Hegney and Mr. Hill in the description of “everyone,” “everybody,” the “group,” and the “people.” RP (1/10/02) 1906, 1909-14, 1919-20, 1933; RP (1/16/02) 2368-74, 2382-86, 2389-2404, 2410-14, 2418-31, 2436-50. In closing argument, the prosecutor repeatedly referred to the children involved in this case as members of a “pack” or group with a “collective” nature, specifically referring to them as “everybody.” RP (1/22/02) 2513-16, 2530-36, 2544, 2551-53, 2555.

While Det. Graef carefully excluded Mr. Hegney’s name from the list of people that Mr. Hill claimed were involved, RP (1/14/02) 2216-36, she also relayed that Hill said that “everyone else had equally participated in the assault.” RP (1/14/02) 2223. Hill referred to “the “rest of the guys.” RP (1/14/02) 2227, and Graef testified that Hill stated, “we all walked across the

street with him, and Terry hit him and then everybody else started jumping on him, jumping on him. . . . I think Jermaine had kicked him. Then everybody else was hitting him . . . . and then everybody else ran . . . .” RP (1/14/02) 2228-29. When asked whether “everybody kind of equally participated in hitting him,” Hill responded “yes.” RP (1/14/02) 2232. The only one who did not hit Mr. Toews, according to Hill, was the girl, Elisha, who was “standing back like three feet away from us.” RP(1/14/02) 2231. When asked why “everybody stopped,” Hill said “everybody, everybody had just stopped, like most people stopped, and like that was, man, that was enough and they ran.” RP (1/14/02) 2232.

When Det. DeVault testified about Mr. Hegney’s statements, the testimony was similarly limited by exclusion of any mention of Mr. Hill, but the testimony was peppered by the same references to “the group” and “everybody” that ran through the case. *See e.g.* RP (1/15/02) 2258.

Despite attempts to redact the statements, there were a number of slip-ups that suggested to the jury that the witnesses had been instructed not to mention Mr. Hegney’s name. At one point on cross-examination, Mr. Hill’s lawyer, Ms. Sullivan, asked Det. Graef “Did he [Mr. Hill] name everyone that was in the group or not,” and Det. Graef responded, “He named, I think

I'm going to get stuck here," RP (1/14/02) 2238. Ms. Sullivan followed up by asking "From your investigation, do you think there were other individuals in the group that he met up with that were not, that he didn't mention?", to which Det. Graef said "Yes." RP (1/14/02) 2238.

This gaffe followed the testimony of William "Tyke" Terry, in which Mr. Terry was testifying about who had been at a BBQ earlier the day of the murder. After recounting a number of names, he blurted out "Could I say something? They told me not to say that name. I can't say that name, they said." RP (1/10/02) 2031. After the jury was excused, it was clarified that because of rulings regarding ER 404(b) evidence, Terry was confused and thought he could not mention Mr. Hegney's name. After the jury returned, Terry then testified that "Justin" was also present at the BBQ. RP (1/10/02) 2033.

#### **4. The Decline Hearing**

Both the defense and prosecution agreed that Justin Hegney abused illegal drugs (primarily marijuana) and that this was one of the main reasons for his poor choices for hanging out with the group that ultimately robbed and killed Mr. Toews. The juvenile probation counselor, Tara Varela, the State, and, ultimately, Judge Strombom believed that Justin made certain lifestyle

choices as a result of sophistication and maturity, and that, therefore, the juvenile system was not equipped to treat Mr. Hegney. Ex. 5 (FF VI) & 17.

There were references made throughout the decline hearing to family “problems” that caused Justin to move up and back between his divorced parents and to use drugs, but there was no explanation given about what those “problems” were. RP (2/14/01) 371, 381-82. Justin specifically denied to Ms. Varela that he had been the victim of any type of abuse, and Ms. Varela could not find any dependency history. Ex. 17. Ms. Varela did testify that Justin told her that he was once placed in foster care because his sister had made a “false report to CPS in regards to abuse by her mother.” RP (2/14/01) 367. In her oral decision, Judge Strombom noted this testimony about “family problems, but I do not have any information as to what those problems were. At best, I can only conclude that Justin just didn’t like the rules.” RP (2/20/01) 646.

Three days after the decline decision, on Feb. 23, 2001, DSHS sent a packet of CPS records to Ms. Varela. Ex. 19. At some point, Ms. Varela forwarded these records to Justin’s lawyer, Mr. Fricke, but Mr. Fricke does not know when he received them. Ex. 22 & 24. The CPS records show a pattern of abuse within Justin’s mother’s home, primarily directed towards

the two older children – Jeramy and Kristina.

As for being placed in foster care, Justin’s sister, Kristina, relates that the experience was so scary that she decided not to report any other incidents of abuse from the mother. Ex. 20. Kristina and Jeramy both now report that they (and Justin) grew up in two abuse filled households, where the mother would often abandon the children to go out drinking at night, where Justin watched an abusive babysitter torture Jeramy, and where both the mother and father physically assaulted the older children. Ex. 20 & 21. While Justin was not the direct target of this abuse, he witnessed much of it, and would have learned of the abuse he did not personally witness.

Karil Klingbeil, the defense expert at the decline hearing, interviewed Kristina. Unfortunately, at the time, Kristina was going through withdrawal from her own substance abuse addiction, was not thinking clearly, and did not tell Ms. Klingbeil about the abuse. Ex. 20 & 23. Jeramy was estranged from the family and no one ever interviewed him. Ex. 21

On top of this new evidence of abuse, recent neuropsychological testing of Justin reveals that he suffers from “mild impairment of general and moderate impairment of specific neuropsychological abilities . . . [and] bilateral sensorimotor deficits. These results would be consistent with

neurocognitive deficits resulting from recovering cranio-cerebral trauma.”

Ex. 25. Although at this point, evidence of exactly when this head injury occurred has not been located, the neuropsychologist, Dr. Briggs, believes that it would have occurred some time after Justin received his basic academic and intellectual skills. The injuries interfere with Justin’s abilities for processing information, attention, formulating appropriate action and integrating feedback. Ex. 25.

Had the CPS records, the evidence of abuse inside the home and the evidence of the head injury been provided to Ms. Klingbeil, she could have provided the source of Justin’s “problems” to the judge, and his substance abuse could have been seen as an attempt to self-medicate and numb himself to his dysfunctional home, rather than as a sign that he was mature and trying to act like an adult. Furthermore, Justin’s behavioral problems, lack of empathy, and poor judgment could have been explained as being the result of growing up in a violent environment. Ms. Klingbeil would have diagnosed Justin with Post-Traumatic Stress Disorder and would have urged his attorney to seek more comprehensive psychological testing. Finally, Ms. Klingbeil would have testified that Justin would have been a good candidate for a specialized mental health program at Echo Glen, where counselors are trained

to offer an individually designed program aimed at child survivors of abusive environments. Ex. 23.

Additionally, testimony was elicited at the decline hearing about statements Mr. Hegney gave to the police on Aug. 23, 2000, in which he was described as being “uncooperative.” RP (2/12/01) 96-97. There was also testimony about numerous other assaultive acts that Mr. Hegney allegedly was involved in, RP (2/12/01) 112-15, 141-45; Ex. 17, and Ms. Klingbeil was attacked on cross-examination for her lack of familiarity with these other incidents, RP (2/15/01) 546-48, an attack which led the judge to doubt her credibility. Ex. 5, FF VIII. Judge Strombom listed the “escalating” nature of these incidents as a reason for declining juvenile jurisdiction. Ex. 5 (FF VII). Yet, as noted, Judge Strombom specifically found at later hearings, that Mr. Hegney was not involved in most of these incidents, and that his lack of “cooperativeness” with the police should be suppressed for violation of his 5<sup>th</sup> Amendment rights.

**D. ARGUMENT**

**1. Inst. No. 5 Violated Due Process of Law and Violated Mr. Hegney’s Right to Jury Unanimity and Notice of the Charge**

Inst. No. 5 is the “to convict” instruction that led to Mr. Hegney’s

conviction for murder. Unlike normal “to convict” instructions which refer only to one defendant at time, Inst. No. 5 allowed for conviction if the jurors found that *either* Mr. Hegney *or* Mr. Hill committed the elements of the crime. App. A. While both Mr. Hegney and Mr. Hill are named in the preface to the instruction, the actual elements listed refer only to “the defendant or an accomplice,” without specifying which defendant was involved. Further complicating the instructions was the failure to list by name the other potential accomplices.

Given the State’s overarching “pack” theme of this case, and given the persistent references in the testimony about what “everybody else” was doing, Inst. No. 5 essentially set up a *res ipsa loquitur* theory of liability, by which both Mr. Hegney and Mr. Hill were held responsible for the murder, if the jury determined that one or either of them, or an unnamed accomplice, caused Mr. Toews’ death. This causes a series of constitutional violations.

a. **Inst. No. 5 Weakened the State’s Burden of Proof**

It is axiomatic that in a criminal prosecution, due process of law under both U.S. Const. amend. 14 and Wash. Const. art. 1, § 3 requires the State to prove every element of the charged crime beyond a reasonable doubt. State v. Smith, \_\_\_ Wn.2d \_\_\_, 120 P.3d 559 (2005); In re Winship, 397 U.S. 358,

361-64, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). “Implicit in this principle is the requirement that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element.” State v. Smith, *supra*, Slip Op. at 7.<sup>3</sup> A “to convict” instruction which weakens the State’s burden of proof, either through omission of material elements of the crime or by impermissible inferences, violates state and federal due process. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); Sandstrom v. Montana, 442 U.S. 510, 523-24, 61 L.Ed.2d 39, 99 S. Ct. 2450 (1979).

Due process requires a personal determination that the defendant committed the charged *actus reus* with the appropriate *mens rea*. See Kotteakos v. United States, 328 U.S. 750, 773, 90 L.Ed. 1557, 66 S. Ct. 1239 (1946) (while mass trials may be required, “the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass.”). Due process requires more than just a determination that a defendant committed a generic crime. See Schad v. Arizona, 501 U.S. 624, 633, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991) (“[N]othing in our history suggests that the Due Process Clause would permit

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<sup>3</sup> As the prosecutor argued, “Instruction No. 5 exclusively tells you what the State has to prove.” RP (1/22/02) 2526.

a State to convict anyone under a charge of ‘Crime.’”). Proof that someone else committed the crime is not sufficient – there is no doctrine of *res ipsa loquiter* in criminal law. See Manley v. Georgia, 279 U.S. 1, 73 L.Ed. 575, 49 S. Ct. 215 (1929) (reversing conviction for bank fraud based upon insolvency, where state law applied *res ipsa loquiter* standard). The fact that Mr. Hill or one of his accomplices caused Mr. Toews’ death had no bearing on whether Mr. Hegney was guilty.

Instruction No. 5, the “to convict” instruction (App. A), weakened the State’s burden of proof and allowed the jury to convict Mr. Hegney of murder based upon Mr. Hill’s actions or the actions of Mr. Hill’s accomplices. The instruction sets out both Mr. Hegney’s and Mr. Hill’s name in the first sentence and identifies them both as “the defendant.” However, in the numbered paragraphs, the instruction fails to distinguish between either Mr. Hegney or Mr. Hill, merely identifying “the defendant or an accomplice” as the person who committed the charged acts. Inst. No. 6, defining “accomplice,” further fails to differentiate between the two defendants, or any of the other alleged accomplices, merely using the generic term “a person.” App. B.

Thus, a reasonable juror reading through Inst. No. 5 could easily have

decided to convict Mr. Hegney if he or she concluded that one of the two defendants, or even one of their unnamed accomplices, committed the charged acts.<sup>4</sup> The instruction therefore weakened the burden of proof, and there is no assurance that the jurors separately determined that Mr. Hegney personally committed the charged acts or had the requisite mental state. The instruction therefore violated Due Process of Law under U.S. Const. amend. 14 and Wash. Const. amend. 1, § 3.

**b. Inst. No. 5 Violated Mr. Hegney's  
Right to Jury Unanimity**

Inst. No. 5 also allowed the twelve jurors to split amongst themselves as to which defendant (and which accomplices) committed the charged acts. Six of the jurors in this case could have determined that Mr. Hill was “the defendant” referred to in the numbered paragraphs of the instruction, while another six defendants concluded that Mr. Hegney was “the defendant.” Alternatively, some jurors may have concluded that any of the other eight children present at the scene was “an accomplice” to some unnamed

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<sup>4</sup> The instructions allowed for conviction of Mr. Hegney if the jurors concluded that “an accomplice” committed the charged acts, without specifying who the accomplice was or who the principal was. For example, if some jurors concluded that Mr. Spencer was an accomplice to Mr. Hunt, and that Mr. Hunt caused the death of Mr. Toews during the robbery, Inst. No. 5 allowed the jury to convict Mr. Hegney.

principal, while other jurors came to another conclusion as to who the accomplices or principals were.

Wash. Const. art. 1, §§ 21 & 22 guarantee unanimity of all twelve jurors. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). U.S. Const. amend. 6, as incorporated through the 14<sup>th</sup> Amendment, only requires unanimity of at least a substantial majority of twelve jurors in a state felony trial. See State v. Kitchen, 46 Wn. App. 232, 236-37 n.3, 730 P.2d 103 (1986), aff'd 110 Wn.2d 403, 756 P.2d 105 (1988) citing Burch v. Louisiana, 441 U.S. 130, 60 L.Ed.2d 96, 99 S. Ct. 1623 (1979) & Apodoca v. Oregon, 406 U.S. 404, 32 L.Ed.2d 184, 92 S. Ct. 1628 (1972). The right to jury unanimity requires unanimity as to who the “victim” of a crime is. See Stephens, supra (conviction reversed in assault case where defendant shot at two people and instructions allowed jury to convict if either person was determined to be assaulted). The right also encompasses unanimity as to which crime took place. See Schad v. Arizona, 501 U.S. at 651 (Scalia, J., concurring) (“We would not permit ... an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those

two acts.").

The same principles bar conviction unless there is unanimity by the jurors as to which of several defendants or accomplices committed the charged acts. Inst. No. 5 did not meet this standard.

**c. Inst. No. 5 Allowed for Conviction  
Based Upon an Uncharged Crime**

A criminal defendant has a right under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3 & 22 to be informed of the nature of the accusation against him or her, and may not be tried for an unstated offense or an offense with which he or she was not charged. State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983); State v. Carr, 97 Wn.2d 436, 441, 645 P.2d 1098 (1982)(Rosellini, J., concurring); State v. Rhinehart, 92 Wn.2d 923, 928, 602 P.2d 1188 (1979).

In State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986), the Court of Appeals applied these principles to reverse the conviction of Stanley Christiansen, one of a number of specifically named co-conspirators in a conspiracy case. The "To Convict" instruction failed to name the co-conspirators and allowed the jury to convict Mr. Christianson if he agreed with "one or more persons" to commit the crime. At trial, there was evidence of other co-conspirators, who were not named in the information. The Court

reversed the conviction on the grounds that Mr. Christiansen may have been convicted of a crime not charged in the information. 45 Wn. App. at 576.

Similarly, the information against Mr. Hegney specifically listed as his "co-defendants" Robert Hernandez and Terrance Hunt. Yet, at trial, evidence was introduced that any number of people at the scene were involved in the crime, including Mr. Hill who was tried with Mr. Hegney, and thus were potential accomplices to Mr. Hegney. The jury could well have concluded that any of these people not named in the information were Mr. Hegney's accomplices. Accordingly, he could well have been convicted of an uncharged crime, in violation of U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3 & 22.

d. **The Failure of Mr. Hegney's Prior Counsel to Challenge Inst. No. 5 Constituted Ineffective Assistance of Counsel**

Mr. Hegney's prior attorney failed to except to the giving of Inst. No. 5 or challenge it on direct appeal. There was no tactical reason for these failures. Ex. 22. Thus, Mr. Hegney's right to counsel at trial under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22 and Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984), was violated. See State v. Doogan, 82 Wn. App. 185, 917 P.2d 155

(1996)(ineffective for trial attorney to propose incorrect instruction). Similarly, because Mr. Hegney had a constitutional right to an appeal under Wash. Const. art. 1, § 22, ineffective assistance of counsel on appeal violated his rights to due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3. Evitts v. Lucey, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985). The remedy is to reinstate the direct appeal standard of review. In re Dalluge, 152 Wn.2d 772, 787-89, 100 P.3d 279 (2004); In re Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997).

e. **The Errors in Inst. No. 5 Were Not Harmless**

If Mr. Hegney's attorney had challenged Inst. No. 5 on direct appeal, the errors would have been presumed prejudicial subject to the prosecution demonstrating the errors were harmless beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d at 411-12. In contrast, on collateral attack, the burden shifts to the petitioner to demonstrate actual prejudice. Id. at 413-14. Under either of these standards, the errors pervasive in Inst. No. 5 cannot be considered harmless and were very prejudicial.

Mr. Hegney's strategy at trial was aimed at separating his mere presence at the scene from the criminal acts committed by some of the other children. Both in his initial statements to the police (in which he denied

kicking Mr. Toews), through some of the testimony of the other children, and in cross-examination, Mr. Hegney's entire defense was to make himself like Elisha Thompson and Kashif Oyenini, who were present on the periphery of the assault of Mr. Toews, and who were never charged with crimes as a result of their mere presence. In contrast, the State's whole theory of the case was to paint Mr. Hegney as being part of a "pack," thereby eliminating the distinctions between him and the others.

Under these circumstances, the serious constitutional errors in Inst. No. 5 cannot be minimized and were very prejudicial. The conviction should therefore be vacated.

**2. Washington's Decline Procedure Violates Federal Constitutional Rights**

**a. The Decline Hearing Violated *Blakely***

Washington requires that the decision to decline juvenile jurisdiction and try a child as an adult be made by a judge, sitting without a jury, using a preponderance of evidence standard. State v. H.O., 119 Wn. App. 549, 551-56, 81 P.3d 883 (2003); State v. Jacobson, 33 Wn. App. 529, 531, 656 P.2d 1103 (1982). The judge here in fact used the "preponderance of evidence" standard. RP (2/20/01) 4-5. Because the result of the declination decision effectively raised the maximum sentence for Mr. Hegney from just under 6

years (manifest injustice to age 21) to life, with a mandatory minimum sentence of 20 years, this standard no longer comports with the requirements U.S. Const. amends. 6 & 14 and Blakely v. Washington, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). In order to increase the maximum sentence from age 21 to life, Mr. Hegney was required to be provided with a jury trial and a reasonable doubt standard.<sup>5</sup>

The United States Supreme Court has held:

Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. See Ring [v. Arizona], 536 U.S. 584, 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002)] ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); Harris v. United States, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.

Blakely, 542 U.S. at 303-04 (emphasis in original).

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<sup>5</sup> Because Mr. Hegney's case was pending on direct and was not yet final when Blakely came out, there is no issue regarding this decision's application to Mr. Hegney. In re Evans, 154 Wn.2d 438, 443-44, 114 P.3d 627 (2005).

The requirement that such factors be proven to a jury beyond a reasonable doubt is substantive, and cannot be avoided by labeling the factor as a sentencing or a jurisdictional matter. “If a State makes an increase in a defendant’s authorized punishment contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.” Ring v. Arizona, 536 U.S. 584, 602, 153 L.Ed.2d 556, 122 S. Ct. 2428 (2002).

In the instant case, if Mr. Hegney remained in the juvenile system, he could not be incarcerated past his 21<sup>st</sup> birthday – or no later than June 5, 2006. RCW 13.40.300. The only way that the State is able to incarcerate Mr. Hegney in an adult prison (as opposed to a juvenile institution) well past his 21<sup>st</sup> birthday, for a minimum of 20 years, and a maximum of life, was pursuant to the decline procedure authorized by RCW 13.40.110. This procedure requires a court to determine eight factors (labeled Findings of Fact by the judge in this case, Ex. 5) before determining whether a juvenile should be declined to adult court.<sup>6</sup>

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<sup>6</sup> The factors are commonly referred to as the Kent factors, after Kent v. United States, 383 U.S. 541, 16 L.Ed.2d 84, 86 S. Ct. 1045 (1966). These factors include:

- (1) the seriousness of the alleged offense and whether the protection of the community requires declination;
  - (2) whether the offense was committed in an aggressive, violent, premeditated or willful manner;
  - (3)
- (continued...)

Thus, the scheme that Washington State has developed for raising the amount of punishment that Mr. Hegney would face from just shy of six years in a juvenile institution to a mandatory 20 year sentence in an adult prison requires determinations that Blakely requires be made by a jury with a reasonable doubt standard. Washington cannot avoid its obligations under the 6th and 14<sup>th</sup> Amendments simply by designating the factors as “jurisdictional” or “preliminary.”

Prior Washington decisions involving this issue, such as H.O. and Jacobsen, should not be followed because they rely on an analysis that was rejected by Blakely. Specifically, these cases wrongly believed that the relevant punishment maximum for Apprendi purposes was the absolute statutory maximum for the crime – as opposed to the standard range maximums. The cases also wrongly believed that Apprendi could be avoided by casting the decline determination as a mere “jurisdictional determination.”

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<sup>6</sup>(...continued)

whether the offense was against persons or only property; (4) the prosecutive merit of the complaint; (5) the desirability of trial and disposition of the entire case in one court, where the defendant's alleged accomplices are adults; (6) the sophistication and maturity of the juvenile; (7) the juvenile's criminal history; and (8) the prospects for adequate protection of the public and rehabilitation of the juvenile through services available in the juvenile system.

State v. Furman, 122 Wn.2d 440, 447, 858 P.2d 1092 (1993).

See, e.g. H.O., 119 Wn. App. at 554-55. As noted, it is not label that is determinative, but whether the factual determination increases the authorized punishment.

Accordingly, the current decline procedure in Washington State violated Mr. Hegney's right to a jury trial, protected by U.S. Const. amend. 6, and the right to a reasonable doubt standard, protected by the Due Process Clause of U.S. Const. amend. 14.

**b. Equal Protection and Substantive Due Process are Violated by the Use of a Reasonable Doubt Standard to Determine Manifest Injustices, but Not for the Decline Procedure**

Judge Strombom used a preponderance of evidence standard to subject fifteen year old Justin Hegney to a 20 year mandatory minimum adult sentence, with a maximum of life. Ironically, had Justin remained in the juvenile system, where rehabilitation is the paramount goal,<sup>7</sup> the court could only have incarcerated him until age 21, using a higher "reasonable doubt" standard. See State v. Meade, \_\_\_ Wn. App. \_\_\_, 120 P.3d 975 (2005); State v. Tai N., 127 Wn. App. 733, 740-43, 113 P.3d 19 (2005). Washington's statutory scheme therefore provides greater protections to

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<sup>7</sup> See State v. Rice, 98 Wn.2d 384, 391-94 & 399-401, 655 P.2d 1145 (1982).

defendants who remain in the juvenile system, to be rehabilitated, and who are only held until age 21, than those who are transferred to the adult system and who can be punitively incarcerated for the rest of their lives, without regard to rehabilitation. This system makes no sense and violates equal protection and substantive due process under U.S. Const. amend. 14.

The Washington Supreme Court has held:

Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 12. Equal protection is not intended to provide complete equality among individuals or classes but equal application of the laws. A party challenging the application of a law as violating equal protection principles has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification.

State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). A similar test applies to determine a violation of substantive due process. Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 231, 119 P.3d 325 (2005); County of Sacramento v. Lewis, 523 U.S. 833, 845, 140 L.Ed.2d 1043, 118 S. Ct. 1708 (1998).

Here, the classification involves 15 year old children charged with First Degree Murder. Some of these children remain in the juvenile system for rehabilitation, and can be held beyond the standard range, until their 21<sup>st</sup>

birthdays, but only through the use of the reasonable doubt standard.<sup>8</sup> Other children, like Mr. Hegney, are bound over to the punitive adult system, where they face life in an adult prison, with a mandatory minimum sentence of 20 years, but only with a standard of proof of preponderance of the evidence.

The standard of review should be “strict” or “intermediate” scrutiny because of the intersection of a particularly vulnerable class of individuals, Roper v. Simmons, \_\_\_ U.S. \_\_\_, 161 L.Ed.2d 1, 125 S. Ct. 1183, 1195-97 (2005), with deprivation of liberty. See State v. Schaaf, 109 Wn.2d 1, 21, 743 P.2d 240 (1987) & State v. Rice, 98 Wn.2d at 399 (appropriate to use strict scrutiny where issue was whether juveniles could be incarcerated longer than adults). But, even under a “rational relationship” test, there is no rational basis to apply a higher standard of proof in a proceeding where the consequences are less severe.

The severity of the consequences of the proceeding is the determinative factor that should drive the standard of proof. See In re Winship, 397 U.S. at 368 & n. 6, *citing* Woodby v. I.N.S., 385 U.S. 276, 285, 17 L.Ed.2d 362, 87 S. Ct. 483 (1966) (degree of deprivation in deportation case requires use of higher standard of proof). The consequences of a decline

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<sup>8</sup> See State v. Beaver, 148 Wn.2d 338, 60 P.3d 586 (2002) (addressing m.i. sentence imposed on one of children at scene of Mr. Toews’ death).

hearing (punitive incarceration up to life) are much more severe than the consequences of a manifest injustice finding, where rehabilitation is the result. Accordingly, it is completely arbitrary and irrational to utilize a preponderance of the evidence standard to decline a child, while using a reasonable doubt standard in the manifest injustice context. This difference violates equal protection and substantive due process under U.S. Const. amend. 14 and Wash. Const. art. 1, §§ 3 & 12.

c. **The Decline Procedure Was Marred by the Use of Inadmissible Evidence**

Under Washington's decline procedure, RCW 13.40.110, once a juvenile is declined to adult court on a particular charge, there is no procedure for bringing the child back to juvenile court since the child no longer meets the statutory definition of a juvenile. State v. Sharon, 100 Wn.2d 230, 668 P.2d 584 (1983). "When a juvenile court waives jurisdiction, the youth comes under the permanent jurisdiction of the adult criminal system." State v. Mitchell, 32 Wn. App. 499, 500, 648 P.2d 456 (1982).

This scheme has inherent problems. Key decisions about the future life of the child are determined early on in a case, before all the evidence is out and all the issues are litigated. A court can make the decline decision – really, the most important decision in the entire case for a fifteen year old

child – in a vacuum, and then be left remediless once full information comes out. Here, Judge Strombom refused even to entertain a defense motion for reconsideration of the decline decision. Ex. 4.

The problem is exacerbated by Washington's decision that juveniles do not have Confrontation Clause rights or even the privilege against self-incrimination at hearings such as decline hearings. State v. Ramer, 151 Wn.2d 106, 110 n.1, 86 P.3d 132 (2004); In re Harbert, 85 Wn.2d 719, 725-28, 538 P.2d 1212 (1975); State v. Linares, 75 Wn . App. 404, 407-09, 880 P.2d 550 (1994).

This procedure set up the situation in this case where evidence was admitted at the decline hearing, and used against Mr. Hegney, that later the same court determined to be inadmissible. For instance, there was testimony that Mr. Hegney was “uncooperative” with the police on Aug. 23, 2000, when the police attempted to interview him near an elementary school, prior to his formal arrest. RP (2/12/01) 96-97. His “uncooperativeness” was viewed as evidence of his maturity and cast him as a “hardened” individual. Yet, after the decline determination, in the CrR 3.5 hearing, Judge Strombom specifically ruled that any evidence of this contact was inadmissible, Ex. 8 (CL IV), because of Fifth Amendment violations.

Similarly, evidence was admitted at the decline hearing that Mr. Hegney allegedly participated in a series of other assaults, evidence that was considered significant to the decline decision. See RP (2/20/01) 4; Ex. 5, FF IV & VII; Ex. 6 at 3; Ex. 17. Later, after an extensive hearing, Judge Strombom ruled that the State had not presented sufficient evidence to prove that Mr. Hegney was even present during all but one of these incidents. RP (1/2/02) 1491-95, 1508.

Once Judge Strombom found that the State could not prove many of its allegations of prior misconduct, and once she held that Mr. Hegney's "uncooperativeness" was the result of a violation of his Fifth Amendment rights, there was no way of undoing the decline decision. Mr. Hegney was stuck in the adult system, facing a 20 year mandatory minimum, even though some of the factual underpinnings of the decline decision were swept away.

A procedure that allows for the most important decision in a juvenile case to be made based upon unreliable evidence (hearsay allegations that Mr. Hegney was involved in a series of other assaults) and evidence that was obtained in violation of Mr. Hegney's Fifth Amendment rights is unconstitutional. Basing the decision to subject Mr. Hegney to a mandatory minimum of 20 years in prison on such evidence violates U.S. Const. amend.

5 and Wash. Const. art. 1, § 9, as well as the Due Process under the 14th Amendment and Wash. Const. art. 1, § 3 and international law.<sup>9</sup> The decline determination should be vacated.

**3. Newly Discovered Evidence Requires Vacation of the Decline Decision**

Judge Strombom believed that Justin Hegney had “family problems,” but no one explained what this meant, and, therefore, she concluded that Justin simply did not want to follow the rules of the various households that he lived in. RP (2/20/01) 646. This tied in to Judge Strombom’s conclusion that Justin was sophisticated and mature, that he was responsible for the various choices he made, and that because of his maturity and criminal involvement, he could not be treated in the juvenile system. Ex. 5.

At the time of the decline hearing, the State of Washington was in possession of DSHS records which documented abuse in Justin’s mother’s home. Ex. 19. These records confirm recent statements from Kristina Myers and Jeramy Hegney that the homes in which Justin Hegney grew up were highly dysfunctional and abusive. Ex. 20 & 21. Both siblings describe a mother who abused alcohol and abandoned her children; who deprived them of food and love; and who used physical force against her children, mostly

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<sup>9</sup> See infra § D(4).

against Kristina. The children were also exposed to babysitters who tortured the Jeramy, sometimes in front of Justin. There was also violence in the father's home, mostly directed against Jeramy, but violence which Justin either observed or learned about later. Ex. 20 & 21. In addition to evidence of abuse, a recent neuro-psychological examination shows mild to moderate impairment of neuropsychological abilities, consistent with Justin having suffered a closed head injury in the past. Ex. 25.

Both the evidence about the abusive environment in which Justin was raised and the neurological impairment would have been important to provide the court with evidence of what his "problems" were. Moreover, this information could have been used to show that Justin's "problems," his impulse control, his acting out, his poor judgment, his lack of empathy, his demeanor, and his drug use were not the result of his maturity or desire to be an adult, but rather was the result of a combination of brain damage, possible Post-Traumatic Stress Disorder, and the effects of growing up in households filled with violence and dysfunction. Ex. 23.

There is no explanation for the failure of the State to disclose the DSHS records to the defense *prior* to Feb. 20, 2001 – the day of the decline order. This failure to disclose the evidence constituted a violation of the

State's obligations to disclose exculpatory evidence, in violation of due process. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; Kyles v. Whitley, 514 U.S. 419, 131 L.Ed.2d 490, 115 S. Ct. 1555 (1995); Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963).

Alternatively, counsel was ineffective in violation of U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3 & 22, for his failure to obtain the DSHS records on his own, for his failure to investigate the case sufficiently to find evidence of abuse inside Justin's homes, and for his failure to obtain a neuro-psychological evaluation. Strickland v. Washington, *supra*. Effective assistance includes the duty to investigate thoroughly and also to consult with qualified experts on key issues. Rompilla v. Beard, \_\_\_ U.S. \_\_\_, 162 L.Ed.2d 360, 125 S. Ct. 2456 (2005); State v. Thomas, 109 Wn.2d 222, 229-32, 743 P.2d 816 (1987); State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995); Miller v. Anderson, 255 F.3d 455, *remand order modified by stipulation*, 268 F.3d 485 (7<sup>th</sup> Cir. 2001).

The combination of the Brady violation and ineffective assistance of counsel are sufficient constitutional violations justifying relief under RAP 16.4(c)(2), (5) & (6). The discovery of new evidence is also an independent basis for relief under RAP 16.4(c)(3) since this evidence would have

probably changed the result of the decline hearing, has been discovered since the decline hearing, could not have been discovered before the decline hearing by the exercise of due diligence, is material, and is not merely cumulative or impeaching. In re Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001). With regard to due diligence, the withholding of the DSHS records by the State, Kristina Myers' drug addiction which interfered with her ability to tell Karil Klingbeil everything, and the estrangement of Jeramy Hegney from the rest of his family all make Justin Hegney blameless for the failure to discover this evidence.

Whether the issue is a withholding of exculpatory evidence, ineffective assistance of counsel or newly discovered evidence, the issue ultimately revolves around prejudice. Here, given the gap in the evidence at the decline hearing – that Justin had unknown “problems” – the prejudice is apparent. Had Judge Strombom known what “problems” Justin suffered, her analysis Kent factors would likely have been different. Not only was there evidence that Justin was not as mature as Judge Strombom believed, but there also would have been programs available in the juvenile system that were geared to children coming from abusive backgrounds. Ex. 23.

Accordingly, the decline decision should be vacated. Alternatively,

the case should be sent back for a reference hearing.

4. **Trying a 15 Year Old Child as an Adult and Imposing a 20 Year Mandatory Minimum Sentence Violates International Law and Constitutes Cruel and Unusual Punishment**

Justin Hegney was a fifteen year old child in Aug. 2000 when the murder took place. Like the other children accused of the crime, he was the subject of widespread publicity prior and during the trial. He was ultimately tried as an adult, and was the object of spectacle in the press as a result. The trial took place in a “normal” courtroom, with all the attendant formality of an adult criminal trial – judge in robes, silent adult jurors, guards, lawyers, regular court hours, trial open to the press and public. When he was ultimately convicted of murder, he was given a non-rehabilitative, punitive sentence of 20 years in prison, with no chance of early release or reduction due to good behavior or a finding that he was not a threat to society.

While it has been said that there is no right for a child to be tried or punished as a juvenile, In re Boot, 130 Wn. 2d 553, 571, 925 P.2d 964 (1996), this is no longer the case in light of widespread international law that children do, in fact, have a right to be treated by a country’s legal system as children. See International Covenant on Civil and Political Rights (ICCPR),

Art. 10 & 14;<sup>10</sup> Convention on the Rights of the Child, Articles 37 & 40;<sup>11</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, §§ 7, 8 & 17.<sup>12</sup>

The clear mandate of this international consensus is that a child such as Justin Hegney should not have been charged, tried, punished and stigmatized as if he were an adult. He should have been treated differently than adults, and have his case adjudicated in a different forum, with different rules and with different goals. An open and public trial, heavily publicized, in an adult court was not appropriate for a child. See V. v. United Kingdom, European Court of Human Rights, Application No. 24888/94, 16 December 1999 (<http://hei.unige.ch/~clapham/hrdoc/docs/echrvcase.txt>).

The United States Supreme Court has specifically recognized the importance international law in the area of protecting the rights of children, particularly when determining whether a particular punishment constitutes cruel and unusual punishment under the U.S. Const. amend. 8. Roper v.

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<sup>10</sup> The United States Senate ratified the ICCPR in 1992. 138 Cong. Rec. S4781-84 (1992), 58 Fed. Reg. 45934-45942 (8/31/93).

<sup>11</sup> U.N. Gen. Assembly Resolution 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, 28 I.L.M. 1448, Nov. 20, 1989. The U.S. signed, but has not ratified, this Convention.

<sup>12</sup> Adopted by General Assembly Resolution 40/33 of 29 November 1985 ("The Beijing Rules").

Simmons, 125 S. Ct. at 1198-99 (2005). The international consensus is important to consult as a reference for the "the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Id. at 1190 *quoting Trop v. Dulles*, 356 U.S. 86, 100-101, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958) (plurality opinion). While there are no decisions regarding the intersection between Wash. Const. art. 1, § 14 and international law, the Supreme Court of Washington has consistently looked at international law for guidance. "International law is incorporated into our domestic law. [footnote omitted] Treaties are the supreme law of the land. They are binding on the states as well as the federal government." State v. Pang, 132 Wn.2d 852, 908, 940 P.2d 1293 (1997). See also Eggert v. Seattle, 81 Wn.2d 840, 841, 505 P.2d 801 (1973) (citing to Universal Declaration of Human Rights).

International law is binding on the State of Washington either through the Supremacy Clause of the United States Constitution, article 6, clause 2, or as a matter of "customary international law" or its related concept of a *jus cogens* norm, both of which are determined by the "customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators." The Paquete Habana, 175 U.S. 677, 700, 44 L.Ed.320, 20

S. Ct. 290 (1900), (*quoted in Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992)). See Hilao v. Estate of Marcos, 103 F.3d 789, 794 (9th Cir. 1996) (citing ICCPR as "customs and usages of civilized nations").

While both this Court and the 9th Circuit have in the past upheld even the imposition of life without the possibility of parole on child offenders, State v. Massey, 60 Wn. App. 131, 803 P.2d 340 (1990) & Harris v. Wright, 93 F.3d 581 (9<sup>th</sup> Cir. 1996), such decisions need to be reconsidered in light an evolving international consensus that such punitive sanctions imposed on children are in fact cruel. See Amnesty International and Human Rights Watch, The Rest of Their Lives, Life Without Parole for Child Offenders in the United States (October 2005) (<http://hrw.org/reports/2005/us1005/>).

Thus, given Mr. Hegney's youth and minor role in the felony murder, it violates international law and U.S. Const. amend. 8 and Wash. Const. art. 1, § 14, to have tried him as an adult and punish him by imposing 20 years in an adult prison. The judgment and sentence should be vacated.

**5. This Court Should Give Retroactive Application to EHB 1187**

The disproportionality of a 20 year sentence, imposed on a fifteen year old child, is highlighted by the adoption by the Legislature in 2005 of

EHB 1187.<sup>13</sup> In this bill, the Legislature eliminated the 20 year mandatory minimum sentence for juveniles convicted of First Degree Murder who were declined from juvenile court. This new legislation was based upon a legislative recognition that new research on brain development which shows that “adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults.” EHB 1187 § 1. Accordingly, the Legislature found, courts should be able to take these differences into account when sentencing juveniles for crimes such as First Degree Murder and that the mandatory minimums would not apply.

Normally, new statutes which reduce the penalties for crimes are to be applied retroactively. State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). This is in accord with international law. See ICCPR, Article 15(1) (“If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”). But see State v. Ross, 152 Wn.2d 220, 95 P.3d 1225 (2004).

§ 3(b) of the EHB 1187 limits application of the new statute prospectively, only to crimes that occurred after the effective date of the statute. This provision violates equal protection of the laws, guaranteed

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<sup>13</sup> Laws of 2005, ch. 437. The full text of this bill is set out in Appendix D.

under U.S. Const. amend. 14, and the privilege and immunities clause of Wash. Const. art. 1, § 12.

EHB 1187 effects the amount of time children spend in prison, and gives preference to those who commit First Degree Murder after July 2005. Yet, children who were accomplices to felony murder before July 2005 still have the same immature brains that led the Legislature to eliminate application of mandatory minimums and which would allow them to seek lesser, exceptional sentences. The result is that children like Mr. Hegney must spend 20 years in prison even though the Legislature has now determined that it is unfair for them to be treated just as adults are treated.

As noted above, because of the intersection of a particularly vulnerable class of individuals and incarceration, at least “intermediate” scrutiny, if not “strict” scrutiny, should be utilized. But, even under a “rational relationship” test, there is no rational basis to distinguish between juveniles convicted of First Degree Murder before the effective date of the statute and those convicted after the effective date. Brains of both categories of offenders are the same, and it is irrational to deny the benefits of EHB 1187 to children in Mr. Hegney’s category. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 87 L. Ed.2d 313, 105 S. Ct. 3249 (1985).

Accordingly, this Court should strike § 3(b) from EHB 1187, and order that EHB 1187 be applied retroactively to Mr. Hegney's case. The judgment should be vacated and a new sentencing hearing be held, at which Mr. Hegney should not be barred from seeking an exceptionally low sentence.

**6. The State is Unconstitutionally Denying Mr. Hegney Earned Early Release Time**

Normal prisoners, even adults with multiple prior convictions and even sex offenders, generally earn early release time based upon good behavior. RCW 9.94A.728. The State, however, is denying Mr. Hegney, a first-time offender, any "good time" credits and he must serve out the entire 20 year sentence. Ex. 26. This denial resulted from the passage of Init. 593 which contained a provision barring earned early release credits to certain offenders with mandatory minimum sentences. RCW 9.94A.540.

In State v. Cloud, 95 Wn. App. 606, 976 P.2d 649 (1999), the court held that Init. 593 violated the single subject rule of Wash. Const. art. 2, § 19, which provides that "no bill shall embrace more than one subject, and that shall be expressed in the title." Because the purposes of this constitutional provision are to prevent "logrolling" and to assure the members of the public and legislature are aware of what is contained in proposed new laws, Init. 593 violated this provision by limiting its ballot title to the subject of persistent

offenders. 95 Wn. App. at 616-18.<sup>14</sup>

Arguably, the constitutional infirmity identified by the court in Cloud was fixed when the Legislature reenacted former RCW 9.94A.120(4) on July 1, 1997. See Laws of 1997, chapter 340, §2 (HB 1924), Ex. 27 & Cloud, 95 Wn. App. at 618 n.26 (“We express no opinion about the reenacted statute.”). However, the statute enacted by the Legislature in 1997 suffers from the same constitutional infirmity as Init. 593.

First, the constitutional provision applies to both initiatives and bills. City of Burien v. Kiga, 144 Wn.2d 819, 824, 31 P.3d 659 (2001). Next, HB 1924 was titled “AN ACT Relating to sex offenses; amending RCW 9A.44.130; reenacting and amending RCW 9.94A.320, 9.94A.120, and 9.94A.030; and prescribing penalties.” This title clearly applies to sex offenders only and gives no clue that buried within the bill was a provision denying earned early release credits to first offenders. See State v. Musgrave, 124 Wn. App. 733, 738, 103 P.3d 214 (2004) (“the 1997 reenactments and amendments related only to sex offenses”).

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<sup>14</sup> Initiative 593's ballot title stated: "Shall criminals who are convicted of 'most serious offenses' on three occasions be sentenced to life in prison without parole?" State v. Thorne, 129 Wn.2d 736, 757, 921 P.2d 514 (1996).

The title of HB 1924 suffers from the same infirmities under Wash. Const. art. 2, § 19 as did Init. 593. Accordingly, this Court should order that the State allow Mr. Hegney to earn early release credits.

7. **The Admission of Jesse Hill's Statements at a Joint Trial Violated the Confrontation Clause of the 6<sup>th</sup> Amendment**

Justin Hegney and Jesse Hill were tried together and the trial court admitted each co-defendant's confession into evidence. While the trial court attempted to diminish the Bruton<sup>15</sup> problems, by eliminating direct references to each co-defendant in the other's confession, and by a curative instruction, these attempts were feeble charades that fooled no one. The statements clearly referred to the other co-defendant, and violated Mr. Hegney's right to confront witnesses protected under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, §§ 3 & 22.

The propriety of the admission of Jesse Hill's confession was raised by Mr. Hegney on direct appeal in the context of the severance issue. This Court rejected Mr. Hegney's arguments. Ex. 14 at 11-12. This Court's opinion, however, came out just a few weeks after the United States Supreme Court's landmark decision in Crawford v. Washington, 541 U.S. 36, 158

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<sup>15</sup> Bruton v. United States, 391 U.S. 123, 20 L. Ed.2d 476, 88 S. Ct. 1620 (1968).

L.Ed. 2d 177, 124 S. Ct. 1354 (2004), and never mentions this decision in its analysis.<sup>16</sup> Normally, issues raised on direct appeal are not reviewed in collateral petitions unless the ends of justice would be served by reexamining the issue. In re Gentry, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Here, given Crawford, the ends of justice would be served by re-analyzing the 6th Amendment issue, and concluding that the admission of Mr. Hill's statement at the joint trial violated Mr. Hegney's constitutional right to confront witnesses protected under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22.

In Crawford, the United States Supreme Court held an out-of-court "testimonial" statement offered against an accused is inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. While not giving a comprehensive listing of what "testimonial" meant, the Court held that statements made to the police squarely fell within this category. 541 U.S. at 68.

Prior to Crawford, the Supreme Court had held that an out-of court statement of a co-defendant might be admissible at a joint trial if steps were taken to redact the statement to eliminate references to the defendant and with

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<sup>16</sup> Because Mr. Hegney's case was on direct appeal when Crawford came out, there is no issue of retroactivity. In re Markel, 154 Wn.2d 262, 268-69, 111 P.3d 249 (2005).

proper cautionary instructions. Richardson v. Marsh, 481 U.S. 200, 211, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987). While Crawford never purported to overrule Marsh, Crawford should be seen as standing for a basic distrust by our system of justice for admission of a non-testifying witness' statements to the police. As the Court concluded: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 68-69.

Here, Mr. Hill's custodial statements clearly were testimonial, within the context of the 6th Amendment. While there were redactions, testimony about who was present and who participated in the assault and robbery made it clear that "everybody" except Elisha Thompson participated. Testimony from other witnesses included Mr. Hegney in the category of "everybody." Moreover, the jury was clearly informed, through a series of gaffes (from William Terry and Det. Graef) that there was information that was being withheld from them and that witnesses were instructed not to mention Mr. Hegney's name. Given the testimony, and given the State's theory of a "pack" mentality, the inference was clear – Mr. Hill told the police that "everybody" attacked Mr. Toews and Mr. Hegney was within that group.

Under Richardson v. Marsh, *supra*, “a defendant's out-of-court confession generally will be admitted if it is redacted to delete the codefendant's name and any reference, direct *or indirect*, to his or her existence.” United States v. Molina, 407 F.3d 511, 519 (1<sup>st</sup> Cir. 2005) (emphasis added). Here, Mr. Hill’s confession, if not directly, indirectly referred to Mr. Hegney, and thus violated the 6th Amendment. State v. Vincent, \_\_ Wn. App. \_\_\_, 120 P.3d. 120 (2005); Jefferson v. State, \_\_\_ S.W.3d \_\_\_ (Ark. 2004, CR 04-686).

Moreover, given the evidence (disputed by the State) that Mr. Hegney was not involved even in kicking Mr. Toews, and was merely present, the error in the admission of Mr. Hill’s confession cannot be considered harmless. “A confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict.” State v. Vincent, 120 P.3d at \_\_\_. Here, given the conflicting evidence, it cannot be said that the error was harmless.

In this analysis, one must carefully examine the cautionary instruction that actually was given at the conclusion of the case stating that the jury “may not consider an admission or incriminating statement made out of court by

one defendant as evidence against a codefendant.” Inst. No. 35, Ex. 11, App. C. Yet, the issue was not the use of Mr. Hill’s *admissions* against Mr. Hegney – as this Court noted, “Hill told the police that everyone participated equally – except him.” Ex. 14 at 3. Rather, the issue was the use of Mr. Hill’s blame that “everybody else” was involved against Mr. Hegney. A proper curative instruction should have stated that one co-defendant’s out-of-court statements, whether they were admissions or not, should not be used against another co-defendant. The cautionary instruction actually given really did nothing to ameliorate the damage of Mr. Hill’s statement that “everybody else” participated in the robbery and assault of Mr. Toews.

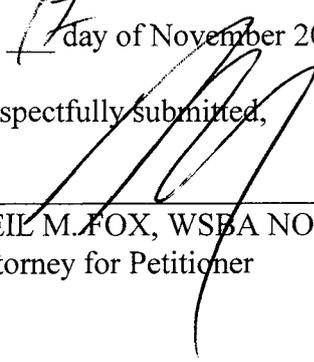
Accordingly, Mr. Hegney’s 6th (and 14th Amendment) rights were violated, as were Mr. Hegney’s rights under Wash. Const. art. 1, § 22. The conviction should be vacated.

**E. CONCLUSION**

For the foregoing reasons, this Court should grant the PRP.

Dated this 17 day of November 2005.

Respectfully submitted,

  
\_\_\_\_\_  
NEIL M. FOX, WSEA NO. 15277  
Attorney for Petitioner

## APPENDIX A

INSTRUCTION NO. 5

To convict either the defendant JUSTIN HEGNEY or the defendant JESSE HILL of the crime of Murder in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about the 19th day of August, 2000, ERIK TOEWS suffered injuries that resulted in his death on or about the 25th day of August, 2000;

(2) That the defendant or an accomplice was committing or attempting to commit the crime of Robbery in the First Degree;

(3) That the defendant or an accomplice caused the death of ERIK TOEWS in the course of or in the furtherance of such crime or in immediate flight from such crime;

(4) That ERIK TOEWS was not a participant in the crime; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

## APPENDIX B

INSTRUCTION NO. 6

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

## APPENDIX C

INSTRUCTION NO. 35

You may not consider an admission or incriminating statement made out of court by one defendant as evidence against a codefendant.

## APPENDIX D

## Relevant Statutory Provisions and Rules

**RAP 16.4** provides:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section ( c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

©) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons: (1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or (2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or (5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding

or civil proceeding instituted by the state or local government; or (6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or (7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

**RCW 9.94A.728** (Effective until July 1, 2005) provides in part:

No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

(1) Except as otherwise provided for in subsection (2) of this section, the term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and promulgated by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits. Any program established pursuant to this section shall allow an offender to earn early release credits for presentence incarceration. If an offender is transferred from a county jail to the department, the

administrator of a county jail facility shall certify to the department the amount of time spent in custody at the facility and the amount of earned release time. An offender who has been convicted of a felony committed after July 23, 1995, that involves any applicable deadly weapon enhancements under RCW 9.94A.533 (3) or (4), or both, shall not receive any good time credits or earned release time for that portion of his or her sentence that results from any deadly weapon enhancements. . . .

. . . .

Notwithstanding any other provisions of this section, an offender sentenced for a felony crime listed in RCW 9.94A.540 as subject to a mandatory minimum sentence of total confinement shall not be released from total confinement before the completion of the listed mandatory minimum sentence for that felony crime of conviction unless allowed under RCW 9.94A.540, however persistent offenders are not eligible for extraordinary medical placement.

**RCW 13.40.110** provides in part:

(1) The prosecutor, respondent, or the court on its own motion may, before a hearing on the information on its merits, file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter shall be set for a hearing on the question of declining jurisdiction. Unless waived by the court, the parties, and their counsel, a decline hearing shall be held when:

(a) The respondent is fifteen, sixteen, or seventeen years of age and the information alleges a class A felony or an attempt, solicitation, or conspiracy to commit a class A felony;. . .

(2) The court after a decline hearing may order the

case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public. The court shall consider the relevant reports, facts, opinions, and arguments presented by the parties and their counsel.

(3) When the respondent is transferred for criminal prosecution or retained for prosecution in juvenile court, the court shall set forth in writing its finding which shall be supported by relevant facts and opinions produced at the hearing.

**RCW 13.40.300** provides in part:

(1) In no case may a juvenile offender be committed by the juvenile court to the department of social and health services for placement in a juvenile correctional institution beyond the juvenile offender's twenty-first birthday. . . .

**EHB 1187, Laws of 2005, Ch. 437** provides:

AN ACT Relating to elimination of mandatory minimum sentences for youthful offenders tried as adults; amending RCW 9.94A.540; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF  
THE STATE OF WASHINGTON:

NEW SECTION. Sec. 1 (1) The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances.

(2) The legislature intends to eliminate the application of mandatory minimum sentences under RCW 9.94A.540 to juveniles tried as adults, and to continue to apply all other adult sentencing provisions to juveniles tried as adults.

Sec. 2 RCW 9.94A.540 and 2001 2nd sp.s. c 12 s 315 are each amended to read as follows:

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release

time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or ©) for an extraordinary medical placement when authorized under RCW 9.94A.728(4).

(3)(a) Subsection (1) of this section shall not be applied in sentencing of juveniles tried as adults pursuant to RCW 13.04.030(1)(e)(i).

(b) This subsection (3) applies only to crimes committed on or after the effective date of this act.

**U.S. Const. art. VI, cl. 2** provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**U.S. Const. amend. 5** provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in

jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const. amend. 6** provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**U.S. Const. amend. 8** provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**U.S. Const. amend. 14, § 1** provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Wash. Const. art. 1, § 3** provides:

No person shall be deprived of life, liberty, or property, without due process of law.

**Wash. Const. art. 1, § 9** provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

**Wash. Const. art. 1, § 12** provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**Wash. Const. art. 1, § 14** provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

**Wash. Const. art. 1, § 21** provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

**Wash. Const. art. 1, § 22 (amend. 10)** provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

**Wash. Const. art. 2, § 19** provides:

No bill shall embrace more than one subject, and that shall be expressed in the title.

**Convention on the Rights of the Child, Article 37**, provides in part:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances . . . .

**Convention on the Rights of the Child, Article 40**, provides in part:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and

fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(I) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination

of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

**International Covenant on Civil and Political Rights** provides in part:

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

...

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or where the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would

prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

(e) To examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter

if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such a conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### Article 15

1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of a lighter penalty, the

offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

**United Nations Standard Minimum Rules for the Administration of Juvenile Justice** provides in part:

7. Rights of juveniles

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

8. Protection of privacy

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

.....

17. Guiding principles in adjudication and disposition

17.1 The disposition of the competent authority shall be guided by the following principles:

(a) The reaction taken shall always be in proportion

not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;

(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.