

FILED  
COURT OF APPEALS

05 OCT 88 PM 2:05

STATE OF WASHINGTON  
BY: *[Signature]*

No. 34800-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Benjamin C.,**

Appellant.

---

Clallam County Juvenile Court

Cause No. 05-8-00303-5

The Honorable Commissioner William G. Knebes

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 352-5316  
FAX: 740-1650

pm 10-19-06

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iv

ASSIGNMENTS OF ERROR ..... ix

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... xiii

1. Did the trial court incorrectly apply the *Ryan* factors for admission of child hearsay under RCW 9A.44.120? Assignments of Error Nos. 1-20..... xiii

2. Did the trial court err by admitting hearsay where the *Ryan* factors weighed in favor of exclusion? Assignments of Error Nos. 1-20..... xiii

3. Did the trial court err by admitting the child’s drawings allegedly depicting the offense, where the *Ryan* factors weighed in favor of excluding the drawings? Assignments of Error Nos. 1-20. .... xiii

4. Did the trial court violate the appearance of fairness doctrine? Assignment of Error No. 21. .... xiii

5. Do juveniles charged with sex offenses have the right to a jury trial under the Washington State Constitution? Assignment of Error Nos. 22-24. .... xiv

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 9

I. The trial court erred by admitting L.V.’s hearsay statements under RCW 9A.44.120. .... 9

|      |   |           |
|------|---|-----------|
| A.   | <i>Ryan</i> factor No. 1: Declarant’s apparent motive to lie.<br>.....  | 11        |
| B.   | <i>Ryan</i> factor No. 2: Declarant’s general character. ....   | 12        |
| C.   | <i>Ryan</i> factor No. 3: Whether more than one person<br>heard each statement. ....  | 13        |
| D.   | <i>Ryan</i> factor No. 4: Whether the statements were<br>spontaneous. ....  | 14        |
| E.   | <i>Ryan</i> factor No. 5: Timing of the declaration and the<br>relationship between the declarant and the witness. ....   | 15        |
| F.   | <i>Ryan</i> factors Nos. 6, 8 and 9. ....   | 19        |
| II.  | <b>The trial judge violated the appearance of fairness by<br/>expressing his opinion about L.V.’s credibility prior to<br/>the commencement of trial. ....</b>                            | <b>20</b> |
| III. | <b>RCW 13.40.021(2), which prohibits jury trials for<br/>juveniles, is unconstitutional when applied to juveniles<br/>charged with sex offenses. ....</b>                                 | <b>23</b> |
| A.   | Analysis under <i>State v. Gunwall</i> establishes that the<br>Washington Constitution provides broader protection than<br>the U.S. Constitution. ....                                    | 23        |
| 1.   | The language of the state constitution requires jury<br>trials for juveniles charged with sex offenses. ....  | 24        |
| 2.   | Significant differences in the texts of parallel<br>provisions of the federal and state constitutions favor an<br>independent application of the state constitution in this<br>case. .... | 25        |
| 3.   | State constitutional history, state common law<br>history, and pre-existing state law require jury trials for<br>juveniles charged with sex offenses. ....                                | 26        |

4. Differences in structure between the federal and state constitutions favor an independent application of the state constitution..... 35

5. The right to a jury trial is a matter of particular state interest or local concern. .... 35

B. Benjamin C. was denied his constitutional right to a jury trial because the court found him guilty of a sex offense without obtaining a valid waiver the right. .... 36

**CONCLUSION ..... 37**

## TABLE OF AUTHORITIES

### FEDERAL CASES

|  |    |
|--|----|
| <i>Bracy v. Gramley</i> , 520 U.S. 899, 117 S.Ct. 1793 (1997) .....                    | 20 |
| <i>In re Murchison</i> , 349 U.S. 133 (1955).....                                      | 20 |
| <i>Offutt v. United States</i> , 348 U.S. 11 (1954) .....                              | 20 |
| <i>Taylor v. Illinois</i> 484 U.S. 400, 108 S.Ct. 646 (1988).....                      | 36 |
| <i>United States v. Alvarez</i> , 584 F.2d 694, 702 (5 <sup>th</sup> Cir., 1978) ..... | 13 |
| <i>United States v. Thomas</i> , 571 F.2d 285 at 290 (5 <sup>th</sup> Cir., 1978)..... | 13 |

### WASHINGTON CASES

|   |                |
|---|----------------|
| <i>Brister v. Tacoma City Council</i> , 27 Wn. App. 474, 619 P.2d 982 (1980),<br><i>review denied</i> , 95 Wn.2d 1006 (1981)..... | 21             |
| <i>Buell v. City of Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972).....   | 21             |
| <i>City of Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982)....   | 23, 25, 26, 33 |
| <i>Dimmel v. Campbell</i> , 68 Wn.2d 697, 414 P.2d 1022 (1966).....   | 21             |
| <i>Estes v. Hopp</i> , 73 Wn.2d 263, 438 P.2d 205 (1968).....   | 26, 27         |
| <i>Monroe v. Soliz</i> , 132 Wn.2d 414, 939 P.2d 205 (1997).....  | 27, 28         |
| <i>OPAL v. Adams County</i> , 128 Wn.2d 869, 913 P.2d. 793 (1996).....  | 21             |
| <i>Rogers Potato v. Countrywide Potato</i> , 152 Wn.2d 387, 97 P.3d 745 (2004)<br>.....   | 10             |
| <i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260<br>(1989).....                                       | 24, 25         |
| <i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997) .....   | 10, 13, 19     |

|  |                    |
|--|--------------------|
| <i>State v. Byrd</i> , 110 Wn.App. 259, 39 P.3d 1010 (2002) .....  | 10, 13, 19         |
| <i>State v. Chavez</i> , 2006 Wash. App. LEXIS 1849 (2006).....  | 27                 |
| <i>State v. Dugan</i> , 96 Wn.App. 346, 979 P.2d 85 (1999) .....   | 21, 22             |
| <i>State v. Gregory</i> , 80 Wn. App. 516, 910 P.2d 505 (1996).....  | 21                 |
| <i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986). 23, 24, 25, 26, 35, 36                                |                    |
| <i>State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85 (1995) .....   | 23, 26             |
| <i>State v. J.H.</i> , 96 Wn.App. 167, 978 P.2d 1121 (1999).....   | 27                 |
| <i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999) .....  | 24                 |
| <i>State v. Lawley</i> , 91 Wn.2d 654, 591 P.2d 772 (1977).....  | 27, 28             |
| <i>State v. Madry</i> , 8 Wn. App. 61, 504 P.2d 1156 (1972).....   | 20                 |
| <i>State v. McKinney</i> , 50 Wn. App. 56, 747 P.2d 1113 (1987).....   | 16                 |
| <i>State v. Meade</i> , 129 Wn. App. 918, 120 P.3d 975 (2005) .....  | 27                 |
| <i>State v. Parris</i> , 98 Wn.2d 140, 654 P.2d 77 (1982).....   | 13                 |
| <i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984).. xiii, 9, 10, 11, 12, 13,<br>14, 15, 16, 17, 18, 19, 20 |                    |
| <i>State v. Schaaf</i> , 109 Wn.2d 1, 743 P.2d 240 (1987) .....  | 26, 27, 28, 33, 35 |
| <i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003).....   | 26                 |
| <i>State v. Treat</i> , 109 Wn.App. 419, 35 P.3d 1192 (2001).....  | 36, 37             |
| <i>State v. Woods</i> , 154 Wn.2d 613, 114 P.3d 1174 (2005) .....  | 9, 19              |
| <i>State v. Young</i> , 123 Wn.2d 173, 867 P.2d 593 (1994).....  | 35                 |

**CONSTITUTIONAL PROVISIONS**

|  |                        |
|--|------------------------|
| Wash. Const. Article I, Section 21 ..... | 23, 24, 25, 26, 35, 36 |
|--|------------------------|

|  |                    |
|--|--------------------|
| Wash. Const. Article I, Section 22 ..... | 23, 24, 25, 35, 36 |
| Wash. Const. Article I, Section 9.....   | 20                 |

**STATUTES**

|  |        |
|--|--------|
| Code of 1881, ch. 87, Section 1078.....  | 26     |
| Laws of 1905, Ch. 18, Section 2.....     | 26     |
| Laws of 1937, Chapter 65, Section 1..... | 26     |
| RCW 10.05 .....                          | 29     |
| RCW 10.97.050.....                       | 30     |
| RCW 13.04.011 .....                      | 28     |
| RCW 13.40.021(2).....                    | xiii   |
| RCW 13.40.0357 .....                     | 29, 33 |
| RCW 13.40.070 .....                      | 29, 33 |
| RCW 13.40.127 .....                      | 29, 33 |
| RCW 13.40.140.....                       | 30     |
| RCW 13.40.160 .....                      | 29, 34 |
| RCW 13.40.165 .....                      | 29, 34 |
| RCW 13.40.167 .....                      | 34     |
| RCW 13.40.215.....                       | 31     |
| RCW 13.40.280 .....                      | 29     |
| RCW 13.40.320 .....                      | 34     |
| RCW 13.40.580 .....                      | 33     |
| RCW 13.50.050 .....                      | 30     |

|                     |                 |
|---------------------|-----------------|
| RCW 2.28.170 .....  | 29              |
| RCW 3.50.330 .....  | 29              |
| RCW 3.66.068 .....  | 29              |
| RCW 35.50.255 ..... | 29              |
| RCW 43.43.754 ..... | 31              |
| RCW 43.43.830.....  | 30              |
| RCW 46.20.265.....  | 32              |
| RCW 70.24.340 ..... | 31              |
| RCW 74.08.025 ..... | 32              |
| RCW 9.41.040 .....  | 32              |
| RCW 9.41.042 .....  | 32              |
| RCW 9.94A.030.....  | 28, 31          |
| RCW 9.94A.411.....  | 29              |
| RCW 9.94A.525.....  | 31, 32          |
| RCW 9.94A.640.....  | 30              |
| RCW 9.94A.650.....  | 32              |
| RCW 9.94A.660.....  | 29, 32          |
| RCW 9.94A.670.....  | 29              |
| RCW 9.94A.690.....  | 32              |
| RCW 9A.44.120.....  | xiii, 9, 10, 21 |
| RCW 9A.44.130.....  | 30              |
| RCW 9A.44.140.....  | 30, 31          |

**OTHER AUTHORITIES**

Massachussetts General Laws Chapter 119 Section 55A ..... 36

*RLR v. State*, 487 P.2d 27, 35 (Alaska 1971)..... 36

*State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779 (Tenn. 1980)..... 36

*State v. Eric M.*, 122 N.M. 436, 925 P.2d 1198 (N.M. 1996)..... 35

### ASSIGNMENTS OF ERROR

1. The trial court erred by admitting L.V.'s hearsay statements.
2. The trial court erred by admitting L.V.'s July 3 statement to her mother.
3. The trial court erred by admitting L.V.'s July 3 statement to her father.
4. The trial court erred by admitting L.V.'s July 13 statement to her therapist.
5. The trial court erred by admitting L.V.'s July 13 drawing depicting the alleged offense.
6. The trial court erred by admitting L.V.'s second drawing depicting the alleged offense.
7. The trial court erred by admitting L.V.'s January 5, 2006 statement to her mother.
8. The trial court erred by adopting Finding of Fact No. 4, which reads as follows:
  - 4) LV was six years old at the time of this alleged incident on July 3, 2005. She is presently in first grade at Queen of Angels school. She appears to be an intelligent young girl and, through her answers to question, demonstrated that she had the mental capacity at the time of the incident to receive an accurate impression of the incident.
9. The trial court erred by adopting Finding of Fact No. 5, which reads as follows:
  - 5) LV possesses a good memory of the incident and has been continually processing the incident through sessions with her counselor. She also demonstrated a reasonable memory regarding other past events.
10. The trial court erred by adopting Finding of Fact No. 6, which reads as follows:

- 6) LV is a very verbal six year old and possesses the capacity to express in words those thoughts that she has regarding this incident.

11. The trial court erred by adopting Finding of Fact No. 7, which reads as follows:

- 7) LV demonstrated a capacity to answer simple questions and responded appropriately to all of the questions that were asked of her.

12. The trial court erred by adopting Finding of Fact No. 8, which reads as follows:

- 8) The Court notes that LV has not been accused of being prone to fantasy, fabrication or any other personal traits that would undermine her competency as a witness.

13. The trial court erred by adopting Finding of Fact No. 9, which reads as follows:

- 9) Since the alleged incident, LV has made statements to her mother, father and counselor that the prosecutor intends to present at trial. LV's statement to her mother occurred the evening of the alleged incident when her mother was helping her with a bath. LV initiated the conversation and was concerned that her mother would be mad if she disclosed what was on her mind. Subsequently she gave details concerning the incident in the church nursery. Her statements were not the product of questions, but were made voluntarily by LV without coaching. Her mother asked her father to come in and LV, while sitting on her mother's lap in the bathroom, repeated the statements to her father. Again this statement was not the product of questions from the father or the mother, but instead the parents offered the child an opportunity to recount an incident that was of concern to the child.

14. The trial court erred by adopting Finding of Fact No. 10, which reads as follows:

10) LV's mother recounted another statement when LV was taking a bath at a later time. That statement also was a voluntary statement by LV and not the product of any questions. Finally, LV has made numerous statements to her counselor Cathy Shea. Ms. Shea described the statements as voluntary on the part of LV who was allowed to direct her play and activities while in the counseling setting. Ms. Shea's role is to assist LV in processing her thoughts and feelings regarding the alleged molestation and, in that regard, LV has made numerous statements regarding the Respondent. Some of her statements while performing the drawings.

15. The trial court erred by adopting Finding of Fact No. 12, which reads as follows:

12) There is no showing that LV had any motive to lie. She viewed the respondent as her friend and there are no indications that she had any other motive except to tell the truth.

16. The trial court erred by adopting Finding of Fact No. 13, which reads as follows:

13) As noted above, LV appears to have good character. She did not present any exaggeration, fantasy or dishonesty and she testified with sincere, direct testimony in the presence of over thirty people in the courtroom including her alleged perpetrator.

17. The trial court erred by adopting Finding of Fact No. 14, which reads as follows:

14) LV has been consistent in her statements from the first time she disclosed them to her mother on the eve of the alleged incident. The statements have been made to her mother, father, and counselor who are the persons we would expect a small child to make disclosures to.

18. The trial court erred by adopting Finding of Fact No. 15, which reads as follows:

15) LV's statements have been spontaneous. Although she apparently brought up the alleged molestation almost daily in her mother's presence, her mother testified that she has never asked LV about the incident. There's no showing that her father or counselor asked LV about the incident other than when LV has brought up the incident her counselor may have directed her to process her thoughts or feelings through verbal play therapy.

19. The trial court erred by adopting Finding of Fact No. 16, which reads as follows:

16) LV's statements to her parents were made the day of the alleged incident. The first statement made to her counselor was made ten days after the incident immediately upon entering the counselor's office. The timing of her statements, the persons the statements were made to and the circumstances surrounding the statements all lend reliability to them.

20. The trial court erred by adopting Finding of Fact No. 17, which reads as follows:

17) At the Child Hearsay hearing, Respondent's attorney pointed out inconsistencies between the written statements of the parents and the statements made at the hearing. Certainly there was more detail provided in the statements at the hearing as opposed to the written statements. The general tenor of the written and oral statements is consistent, but Respondent's attorney has pointed out specific differences that might affect the interpretation of those statements. Those differences affect the weight the Court may give to such testimony at trial, but does not affect admissibility or make the statements unreliable.

21. The trial court violated the appearance of fairness doctrine.

22. RCW 13.40.021(2) is unconstitutional as applied to juveniles charged with sex offenses.

23. Benjamin C. was denied his constitutional right to a jury trial.

24. Benjamin C.'s conviction was invalid because he did not knowingly, intelligently, and voluntarily waive his constitutional right to a jury trial.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Fourteen-year-old Benjamin C. was charged with Child Molestation in the First Degree. Over objection, the trial court admitted four hearsay statements describing the alleged offense. The court also admitted two drawings depicting the alleged offense. In its ruling, the court analyzed only five of the nine *Ryan* factors.

1. Did the trial court incorrectly apply the *Ryan* factors for admission of child hearsay under RCW 9A.44.120? Assignments of Error Nos. 1-20.
2. Did the trial court err by admitting hearsay where the *Ryan* factors weighed in favor of exclusion? Assignments of Error Nos. 1-20.
3. Did the trial court err by admitting the child's drawings allegedly depicting the offense, where the *Ryan* factors weighed in favor of excluding the drawings? Assignments of Error Nos. 1-20.

Prior to trial, Commissioner Knebes issued a ruling allowing the admission of child hearsay. Commissioner Knebes personally drafted written findings in support of his decision, and included language indicating potential bias. The written findings went beyond finding the statements reliable, and instead suggested that Commissioner Knebes found the child credible. Despite this Commissioner Knebes presided over the trial as the factfinder.

4. Did the trial court violate the appearance of fairness doctrine? Assignment of Error No. 21.

Because of the seriousness of the charge, Benjamin C. was ineligible for nearly all of the special rehabilitative programs ordinarily available through the juvenile system. Under RCW 13.40.021(2), he was prohibited from demanding a jury trial. At no point did he waive his constitutional right to a jury trial.

5. Do juveniles charged with sex offenses have the right to a jury trial under the Washington State Constitution? Assignment of Error Nos. 22-24.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Fourteen-year-old Benjamin C. was charged with Child Molestation in the First Degree in Clallam County Juvenile Court. CP 19. Ben was alleged to have inappropriately touched L.V., age 6, on July 3, 2005 while he was babysitting her at church. CP 19.

Juvenile Court Commissioner Knebes held a child hearsay hearing on February 8, 2006. RP (2/8/06). The state identified three statements made by L.V. to her mother (one of which was also heard by her father), one statement made to her therapist, and two drawings depicting the alleged offense, made at the behest of her therapist. RP (2/8/06) 14-70.

L.V. testified at that hearing, but was not asked about the incident. RP (2/8/06) 14-29.

L.V.'s mother, Julie Valentine, testified about the three statements she had heard. RP (2/8/06) 30-49. First, she said that she bathed her daughter on July 3, 2005, and that L.V. said she had something to tell but was afraid her mother would be mad. RP (2/8/06) 33. Ms. Valentine said L.V. told her that Ben had "begged" her to play the "snake game," in which a toy snake was hidden by one player for the other player(s) to find. RP (2/8/06) 33, 50; RP (2/23/06) 135. Ms. Valentine said L.V. told her

that Ben showed her his “bottom,” although she covered her eyes.<sup>1</sup> RP (2/8/06) 34. According to Ms. Valentine, L.V. said that Ben had pulled down his pants, sat on the toy snake, grabbed her wrist, had her kneel in front of him, and smiled while he put her hand on his “mushroom.” RP (2/8/06) 34-35. Ms. Valentine said that L.V. also told her Ben had instructed L.V. not to tell her family. RP (2/8/06) 35. No one else was present during this initial conversation between L.V. and her mother. RP (2/8/06) 30-49.

Second, Ms. Valentine testified that L.V. repeated her account to Mr. Valentine shortly after the initial disclosure. RP (2/8/06) 36. She testified that L.V. was afraid that her father would be mad at her about the incident. RP (2/8/06) 36.

Third, Ms. Valentine described another conversation, which took place on January 5, 2006, again during bath time.<sup>2</sup> She testified that L.V. said the conditioner reminded her of something. When asked what the conditioner reminded her of, L.V. said it was a secret. RP (2/8/06) 35.

---

<sup>1</sup> According to the testimony of Ms. Valentine, L.V. used the word “bottom” to mean “penis” and “bottom”. RP (2/8/06) 38.

<sup>2</sup> During her testimony at the child hearsay hearing, Ms. Valentine testified that the conversation occurred “later,” meaning at some point after the July 3<sup>rd</sup> disclosure. RP (2/8/06) 35. At trial, she testified that the conversation occurred on January 5, 2006. RP (2/23/06) 44.

Ms. Valentine testified that she'd discussed the incident with L.V. approximately fifty times (although she also testified that these discussions occurred almost daily in the 7 months between the incident and the hearing date.) RP (2/8/06) 42. She said that L.V. brought up the incident frequently, and that her main concern was whether she had done anything wrong. RP (2/8/06) 45. Ms. Valentine denied ever having asked any questions about the incident (although she later admitted that she'd asked numerous questions). RP (2/8/06) 44; RP (2/23/06) 50-53.

Ms. Valentine prepared a written statement for the police on July 6, 2005. Her written statement differed from the account in her testimony. The statement did not mention L.V.'s claim that Ben had "begged" her to play the game, that Ben had showed L.V. his "bottom," that L.V. had touched Ben's "mushroom," or that Ben had instructed her not to tell her family. RP (2/8/06) 37, 38-40, 43. Instead, the written statement described a brief touching that lasted no more than a few seconds.

The state also presented the testimony of Mark Valentine, L.V.'s father. RP (2/8/06) 49-55. He testified that after his daughter's bath on July 3, L.V. told him (with Ms. Valentine present) that something happened at the nursery that she did not like. He testified that L.V. said that Ben wanted to play the "snake game," that he put the snake down his pants, and that she did not want to play. RP (2/8/06) 50. Mr. Valentine

said that L.V. told him Ben grabbed her wrist, put her hand on his “mushroom,” and that she closed her eyes. RP (2/18/06) 50. According to Mr. Valentine, L.V. said Ben told her this was what he did with his girlfriend, and that it was a secret. RP (2/8/06) 51.

Mr. Valentine acknowledged that he did not use the words “beg” or “mushroom” in his statement to the police, and did not indicate that any forced contact occurred. RP (2/8/06) 52-54.

L.V.’s counselor, Kathy Shea, also testified at the child hearsay hearing. She reviewed her work with L.V., noting that she’d seen L.V. nine times as of the February 8<sup>th</sup> hearing. RP (2/8/06) 55-63, 57. Ms. Shea testified that their first session was on July 13, 2005, and that L.V. told her that Ben had played the “snake game,” pulled his pants down, grabbed her wrist, and rubbed his penis until she got the snake. RP (2/8/06) 57. Ms. Shea testified that L.V. said she’d asked Ben if she could close her eyes, that she did close her eyes, and that she saw Ben smile. RP (2/8/06) 57. According to Ms. Shea, L.V. made a drawing on that first day. The drawing, which was admitted at the child hearsay hearing (and later at trial), allegedly depicted what Ben had done. RP (2/8/06) 58-63; RP (2/23/06) 83-84. A second drawing allegedly depicting the offense was also admitted at the hearing and at trial. Ms. Shea was unable to say when the second drawing was created. RP (2/8/06) 62.

The court ruled that all of the hearsay statements and both drawings were admissible, and entered a written order to that effect on February 8, 2006. The order included the following findings, drafted by Court Commissioner Knebes:

- ...4) LV was six years old at the time of this alleged incident on July 3, 2005. She is presently in first grade at Queen of Angels school. She appears to be an intelligent young girl and, through her answers to question, demonstrated that she had the mental capacity at the time of the incident to receive an accurate impression of the incident.
- 5) LV possesses a good memory of the incident and has been continually processing the incident through sessions with her counselor. She also demonstrated a reasonable memory regarding other past events.
- 6) LV is a very verbal six year old and possesses the capacity to express in words those thoughts that she has regarding this incident.
- 7) LV demonstrated a capacity to answer simple questions and responded appropriately to all of the questions that were asked of her.
- 8) The Court notes that LV has not been accused of being prone to fantasy, fabrication or any other personal traits that would undermine her competency as a witness....
- ...12) There is no showing that LV had any motive to lie. She viewed the respondent as her friend and there are no indications that she had any other motive except to tell the truth.
- 13) As noted above, LV appears to have good character. She did not present any exaggeration, fantasy or dishonesty and she testified with sincere, direct testimony in the presence of over

thirty people in the courtroom including her alleged perpetrator.

- 14) LV has been consistent in her statements from the first time she disclosed them to her mother on the eve of the alleged incident. The statements have been made to her mother, father, and counselor who are the persons we would expect a small child to make disclosures to.
- 15) LV's statements have been spontaneous. Although she apparently brought up the alleged molestation almost daily in her mother's presence, her mother testified that she has never asked LV about the incident. There's no showing that her father or counselor asked LV about the incident other than when LV has brought up the incident her counselor may have directed her to process her thoughts or feelings through verbal play therapy.
- 16) LV's statements to her parents were made the day of the alleged incident. The first statement made to her counselor was made ten days after the incident immediately upon entering the counselor's office. The timing of her statements, the persons the statements were made to and the circumstances surrounding the statements all lend reliability to them.
- 17) At the Child Hearsay hearing, Respondent's attorney pointed out inconsistencies between the written statements of the parents and the statements made at the hearing. Certainly there was more detail provided in the statements at the hearing as opposed to the written statements. The general tenor of the written and oral statements is consistent, but Respondent's attorney has pointed out specific differences that might affect the interpretation of those statements. Those differences affect the weight the Court may give to such testimony at trial, but does not affect admissibility or make the statements unreliable....

Supp. CP.

The case proceeded to a bench trial, again with Commissioner Knebes presiding. RP (2/23/06) 2-170. L.V. testified that she was at church in the nursery with Ben, and they were playing “the snake game” where one person hides a stuffed snake and the other person looks for it. RP (2/23/06) 13. She said that Ben put the toy snake in his pants and had her retrieve it. She testified that Ben held her wrist, that she saw and touched his penis, and that he was smiling. RP (2/23/06) 13-14.

Mr. Valentine and Ms. Shea testified about L.V.’s hearsay statements, and the court also admitted her two drawings depicting the incident. RP (2/23/06) 31-86.

Ms. Valentine also relayed L.V.’s statements. RP (2-23-06) 31-61. In her testimony, she said that L.V. had told her that Ben moved her hand up and down his “mushroom.” RP (2/23/06) 42. Ms. Valentine said she’d told L.V. she was a “hero,” and that she’d discussed the incident with L.V. fifty to sixty times at that point. RP (2/23/06) 47.

On cross-examination, she acknowledged telling the investigating officer on July 11, 2005 about the questions she’d asked L.V. about the incident. RP (2/23/06) 50-53.

Officer Ensor testified that he had interviewed L.V. on July 11, 2005, and that she said that Ben did not move her hand on him, and that he said nothing to her after the incident. RP (2/23/06) 124-125.

Ben testified in his own defense, and told the court that he was in the nursery while church was in session because the regular childcare worker could not be there. RP (2/23/06) 130. He said that he and L.V. were playing hide the snake-- a nonsexual game that the children often played-- and he decided to hide it in his pants. RP (2/23/06) 135. When L.V. guessed that it was in his pants, he held his waistband away from himself, and helped her get it, attempting to ensure that she did not accidentally touch him. RP (2/23/06) 135-136. Despite his precaution, she did accidentally touch him. RP (2/23/06) 136, 143. He said that the entire incident lasted one to two seconds, that he did not have an erection, and that he was not seeking sexual gratification. RP (2/23/06) 136, 138.

Commissioner Knebes found Ben guilty, and stated that he believed L.V. and not Ben. RP (2/23/06) 168-169. A Pre-Sentence Investigation was ordered, and Ben submitted to a psychosexual evaluation, including a polygraph. Supp. CP. In that polygraph, Ben gave a description of the incident consistent with the one he'd offered at trial (although he admitted that he'd become erect after she touched him). He was found to be truthful. Supp. CP. It was also determined that he had not offended against any other children. Supp. CP.

The court gave Ben a Special Sex Offender Disposition Alternative (SSODA) on April 15, 2006. RP 8-18. Ben appealed. CP 6-7.

## ARGUMENT

### **I. THE TRIAL COURT ERRED BY ADMITTING L.V.'S HEARSAY STATEMENTS UNDER RCW 9A.44.120.**

RCW 9A.44.120 provides (in relevant part) that "[a] statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another... not otherwise admissible by statute or court rule, is admissible in...juvenile offense adjudications...if [t]he court finds... that the time, content, and circumstances of the statement provide sufficient indicia of reliability."

Reliability is established with reference to the nine *Ryan* factors:

(1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously;... (5) the timing of the declaration and the relationship between the declarant and the witness; [6] the statement contains no express assertion about past fact, [7] cross examination could not show the declarant's lack of knowledge, [8] the possibility of the declarant's faulty recollection is remote, and [9] the circumstances surrounding the statement... are such that there is no reason to suppose the declarant misrepresented defendant's involvement. *State v. Ryan*, 103 Wn.2d 165 at 175-176, 691 P.2d 197 (1984).

Not every factor need be satisfied; instead, it is enough if the factors are substantially met. *State v. Woods*, 154 Wn.2d 613 at 623-624, 114 P.3d 1174 (2005). Analysis of factor seven is not required when the child testifies at trial; however, the remaining factors apply in all cases. *Woods, supra*, at 624. Under the terms of the statute, the burden is on the

state to establish the reliability of a child's hearsay statement before it can be admitted under the statute. RCW 9A.44.120.

A trial court's findings are reviewed for substantial evidence. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to convince a rational, fair-minded person. *Rogers Potato*, at 391. In the absence of a finding on a factual issue, an appellate court presumes that the party with the burden of proof failed to sustain their burden on the issue. *State v. Armenta*, 134 Wn.2d 1 at 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259 at 265, 39 P.3d 1010 (2002).

In this case, child hearsay hearing was held on February 8, 2006, and the court entered written findings and conclusions on that same date, admitting the hearsay statements into evidence. Supp. CP. The trial court's written findings addressed only the first five *Ryan* factors. See Findings and Conclusions, Supp. CP. Some of the court's findings are not supported by substantial evidence, and the findings and conclusions (as a whole) do not support admission of L.V.'s hearsay statements.

The child hearsay evidence admitted at trial consisted of statements allegedly made to the parents the day of the incident (which were likely colored by more than 50 subsequent conversations about the offense with the mother alone), a statement made to the child's therapist

ten days after the incident, a drawing from July 15, 2005, a drawing of the offense made at an unknown time, and a statement made to the mother on January 5, 2006. RP (2/23/06) 7-125.

A. *Ryan* factor No. 1: Declarant's apparent motive to lie.

In support of its decision to admit the hearsay, the trial court found that "There is no showing that L.V. had any motive to lie. She viewed the respondent as her friend and there are no indications that she had any other motive except to tell the truth." Finding No. 12, Supp. CP. This finding is not supported by substantial evidence. First, there was no testimony whatsoever that L.V. viewed Ben as her friend. RP (2/8/06) 14-70. Second, L.V. was afraid that *she* would be in trouble and that her parents would be angry *at her* for what had happened. RP (2/8/06) 33, 36, 45. Although her fear was unfounded, it provided a motive for her to exaggerate Ben's actions when she spoke to her parents. If she exaggerated to them, she was likely exaggerating when she repeated her story to the therapist. Indeed, as time passed, the allegation developed from a brief and possibly inadvertent touching to a longer molestation that included forced rubbing and possibly ejaculation. RP (2/23/06) 7-125.

Because the court's finding is not supported by substantial evidence, it must be stricken. Furthermore, because L.V. had an apparent

motive to lie, the first *Ryan* factor weighs in favor of excluding the hearsay statement.<sup>3</sup>

B. *Ryan* factor No. 2: Declarant's general character.

The court noted that "L.V. has not been accused of being prone to fantasy, fabrication or any other traits that would undermine her competency as a witness." Finding No. 8, Supp. CP. The court also found that "L.V. appears to have good character. She did not present any exaggeration, fantasy or dishonesty and she testified with sincere, direct testimony in the presence of over thirty people in the courtroom including her alleged perpetrator." Finding No. 13, Supp. CP.

There was no testimony introduced about L.V.'s general character. RP (2/8/06) 14-70. The state presented no affirmative evidence of L.V.'s good character or her reputation. The absence of an accusation and her in-court performance do not establish factor number two, without some affirmative testimony of her general good character. The prosecution's failure to offer such testimony translates to a failure to meet its burden with respect to the second *Ryan* factor.

---

<sup>3</sup> Whether L.V.'s motive was to lie outright or to exaggerate is irrelevant, especially in this case, where the defense turned on whether or not Ben acted for the purpose of sexual gratification.

C. *Ryan* factor No. 3: Whether more than one person heard each statement.

Under *Ryan* Factor No. 3, a hearsay statement is more reliable if more than one person heard the statement. This is so because a single listener may misunderstand or misremember a statement, while a second listener provides corroboration. *United States v. Thomas*, 571 F.2d 285 at 290 (5<sup>th</sup> Cir., 1978).<sup>4</sup>

The trial court did not specifically address this factor in its findings. Since the burden is on the state to establish this factor, the absence of a finding must be held against the state, and is presumed to signify a failure to meet the burden of proof. *Armenta, supra; Byrd, supra*.

Furthermore, it is clear that here, as in *Ryan*, only the mother heard L.V.'s first statement. RP (2/8/06) 33. *See Ryan at 176* (“[T]he initial statements of the children were made to one person, although subsequent repetitions were heard by others.”) Although the mother and father both heard the statement to L.V.'s father (RP (2/8/06) 50), this does not render

---

<sup>4</sup>*U.S. v. Thomas* is the original source for the third *Ryan* factor. It was cited in *United States v. Alvarez*, 584 F.2d 694, 702 (5<sup>th</sup> Cir., 1978), which was the first case to list the first five *Ryan* factors, also known as the “Parris factors.” The Supreme Court cited *Alvarez* as its source for these five factors in *State v. Parris*, 98 Wn.2d 140 at 146, 654 P.2d 77 (1982).

the statement reliable. *See Ryan, supra* (child's repetition of initial statement to others still unreliable).

The statements to the counselor were apparently made with only the counselor present. The counselor's instructions regarding the drawings, the child's understanding of those instructions, and any statements the child may have made explaining the drawings were also witnessed only by the counselor. RP (2/8/06) 55-63.

The child's statement to her mother on January 5, 2006 was also made only to the mother. RP (2/8/06) 35.

Thus, with the exception of the child's statement to the father, each statement was heard by only one person.<sup>5</sup> This diminishes their reliability, and *Ryan* factor No. 3 weighs against admission.

D. *Ryan* factor No. 4: Whether the statements were spontaneous.

The trial court found that L.V.'s statements were spontaneous. Finding No. 15, Supp. CP. The evidence as a whole does not support this finding. During trial, the mother acknowledged asking L.V. numerous questions about the incident. RP (2/23/06) 50-53. Although this evidence was not available to the trial court during the child hearsay hearing, it is

---

<sup>5</sup> The statement to the father can be characterized as a repetition of the initial statement, and is thus not necessarily more reliable for this fact. *Ryan, supra*.

part of the record on appeal and should be considered by this court on review of the issue. Furthermore, the counselor did not testify about her methodology, which undoubtedly included some questioning, and, in fact, the court found that the counselor “may have directed” L.V. during therapy. Finding No. 21, Supp. CP; RP (2/8/06) 55-63.

Because it is not supported by substantial evidence, Finding No. 21 must be vacated. L.V.’s hearsay statements were not spontaneous, and the fourth *Ryan* factor weighs against admission.

E. *Ryan* factor No. 5: Timing of the declaration and the relationship between the declarant and the witness.

The court also found that L.V.’s statements to her parents were made the day of the alleged incident. Finding No. 22, Supp. CP. This, too, is incorrect. It is apparent from the record as a whole that the parents’ testimony was based on a composite recollection of the more than 50 conversations that the mother had with L.V. since the incident occurred. The mother’s initial written statement (completed shortly after the initial disclosure) differed significantly from her testimony in court. Her in-court testimony included detail and different facts, drawn from the repeated discussions about the incident. For example, the mother testified that Ben “begged” L.V. to play the “snake game,” that she saw his “bottom,” that he pulled down his pants, that he had her kneel, that she touched his

“mushroom,” that he forced her to rub his penis, and that, afterwards, he told her not to tell anyone. RP (2/23/06) 31-60. None of these allegations appeared in the written statement Ms. Valentine prepared for the police on July 11, 2006. RP (2/23/06) 48-55.

Mr. Valentine’s written statement, made shortly after the disclosure, also differed significantly from his in-court testimony. RP (2/8/06) 49-55.

Division I has held that a witness’s faulty recollection of the statement is not a bar to admissibility under *Ryan*:

*Ryan* does not require the trial court to determine if the witness's memory or articulation of the child's statement is reliable. Indeed, any deficiencies in the witness's memory or perception may be explored on cross examination. *State v. McKinney*, 50 Wn. App. 56 at 62, 747 P.2d 1113 (1987).

This is not strictly true; the third *Ryan* factor (whether the statement was heard by more than one person) evidences the Supreme Court’s concern with the accuracy of the witness’s perception and memory of the statement.

Furthermore, where the witness’s testimony is actually a composite of numerous statements made over a seven-month period, the witness’s faulty recollection comes into play as it relates to the timing of the statement under the fifth *Ryan* factor. Here, the timing of the composite statement is impossible to ascertain. Although the child made one

allegation the day of the incident, that allegation was not presented by the either parent's testimony. Instead, the parents' testimony was the sum of numerous statements made over time. Accordingly, the timing of the statement is in doubt, and does not support admission of the hearsay.<sup>6</sup>

L.V.'s January 5 statement to her mother was made six months after the incident. The timing of this statement makes it suspect, especially given the numerous conversations and the increasing seriousness of the child's accusation.

The court found that L.V.'s first statement to her counselor was made ten days after the incident. The court also admitted a "therapeutic drawing" dated July 15 (twelve days after the incident), and another drawing depicting the offense that was created on an unknown date. Because these statements and drawings were made after the initial disclosure, the counselor was likely inclined to believe that the offense had occurred, and was "arguably predisposed to confirm what [she] had been told." *Ryan*, at 176. Nothing about the timing of these statements (and associated drawings) adds to their reliability. Instead, since the statements and drawings admitted through the counselor were made after L.V. had

---

<sup>6</sup> As noted previously, this is not a case where the details of the incident are unimportant, since the defense was that any touching was not for purposes of sexual gratification.

discussed the incident with her parents (possibly numerous times), the timing suggests that the statements were unreliable in their details.

The trial court also found that “[t]he statements have been made to her mother, father and counselor who are the persons we would expect a small child to make disclosures to.” Finding No. 14, Supp. CP. While this might be correct, the finding does not support admission of the hearsay. The closer a child’s relationship with the listener, the more likely it is that the evidence will be distorted. *See, e.g., Ryan* at 176 (“Their relationship to their children is understandably of a character which makes their objectivity questionable.”) As noted above, L.V.’s statements were likely colored by her own fears about her parents’ reactions. Furthermore, her parents’ ability to objectively hear and recall the statements were likely affected by their fears and expectations about potential harm to their child. *Ryan, supra, at 176.*

Analysis of the timing and relationships weighs in favor of excluding the statements and the drawings. *Ryan, supra.*

F. *Ryan* factors Nos. 6, 8 and 9.

The trial court failed to address *Ryan* factors six, eight, and nine.<sup>7</sup> Accordingly, this court must presume that the state failed to sustain its burden with regard to these factors. *Armenta, supra; Byrd, supra.*

Furthermore, factor six supports suppression of the hearsay, because L.V.'s statements were all express assertions of past facts. Factor eight favors suppression of the therapist's statements: L.V.'s memory was likely contaminated before she spoke with the therapist (since, at that point, she had discussed the incident with her mother). Furthermore, the ongoing therapy relationship likely also resulted in distortion of the child's memories. Finally, the therapist was unable to specify when L.V. made the second drawing of the offense. RP (2/8/06) 62. Factor nine also supports suppression. L.V.'s fears that her parents would be angry *at her* made it likely that she exaggerated Ben's actions, and the evidence suggests that she further embroidered her account as time passed. This problem was likely exacerbated by her mother's well-intentioned comments that L.V. was a hero for making the accusation.

---

<sup>7</sup> As noted above, factor seven is inapplicable where the child testifies at trial. *Woods, supra.*

For all these reasons, the hearsay statements of L.V. should have been excluded. The conviction must be reversed and the case remanded to the trial court for a new trial without consideration of the hearsay statements. *Ryan*.

**II. THE TRIAL JUDGE VIOLATED THE APPEARANCE OF FAIRNESS BY EXPRESSING HIS OPINION ABOUT L.V.'S CREDIBILITY PRIOR TO THE COMMENCEMENT OF TRIAL.**

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The Washington Constitution also guarantees due process. Wash. Const. Article I, Section 9.

The due process clause of each constitution guarantees a criminal defendant the right to a fair trial in a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899 at 904, 117 S.Ct. 1793 (1997). Furthermore, "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133 at 136 (1955), quoting *Offutt v. United States*, 348 U.S. 11, at 14 (1954). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). "The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." *Madry*, at 70; *Brister v. Tacoma City Council*, 27

Wn. App. 474 at 486, 619 P.2d 982 (1980), *review denied*, 95 Wn.2d 1006 (1981).

A decision may be challenged under the appearance of fairness doctrine for prejudgment of “issues of fact about parties in a particular case” or “partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party...” *Buell v. City of Bremerton*, 80 Wn.2d 518 at 524, 495 P.2d 1358 (1972), *quoted with approval in OPAL v. Adams County*, 128 Wn.2d 869 at 890, 913 P.2d. 793 (1996).

To prevail under the appearance of fairness doctrine, a claimant must only provide *some* evidence of the judge’s actual or potential bias. *State v. Dugan*, 96 Wn.App. 346 at 354, 979 P.2d 85 (1999). The appearance of fairness doctrine can be violated without any question as to the judge's integrity. *See, e.g., Dimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966).

The scope of a hearing under RCW 9A.44.120 “is restricted to issues pertaining to reliability rather than credibility.” *State v. Gregory*, 80 Wn. App. 516 at 521, 910 P.2d 505 (1996). In this case, Commissioner Knebes personally drafted written findings to support his decision to admit child hearsay. Those findings went beyond the minimal facts necessary to establish reliability, and instead included Commissioner Knebe’s

judgment that the child was credible. Specifically, the findings included the following language:

LV possesses a good memory of the incident... There is no showing that LV had any motive to lie. She viewed the respondent as her friend and there are no indications that she had any other motive except to tell the truth... LV appears to have good character. She did not present any exaggeration, fantasy or dishonesty and she testified with sincere, direct testimony in the presence of over thirty people in the courtroom including her alleged perpetrator... LV has been consistent in her statements from the first time she disclosed them to her mother on the eve of the alleged incident.  
Supp. CP.

These statements evidence some potential for bias on the part of Commissioner Knebes. In particular, the Commissioner's statements that "LV possesse[d] a good memory of the incident" and that "LV has been consistent in her statements from the first time she disclosed them to her mother" indicated that he had determined L.V.'s account to be credible. In fact, the evidence suggested that L.V.'s account changed over time, and that her memory had become tainted by the more than 50 conversations she'd had with her mother (and her therapist) about the incident.

Because he went on to preside over the trial, serving as the factfinder, Commissioner Knebes' potential for bias violated the appearance of fairness doctrine. *Dugan, supra*. Having ruled on the child

hearsay issue, Commissioner Knebes should have transferred the case to another judge.

Because the trial court violated the appearance of fairness doctrine, Ben was denied due process. Accordingly, his conviction must be reversed and the case remanded to the trial court. *Dugan, supra*.

**III. RCW 13.40.021(2), WHICH PROHIBITS JURY TRIALS FOR JUVENILES, IS UNCONSTITUTIONAL WHEN APPLIED TO JUVENILES CHARGED WITH SEX OFFENSES.**

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

A. Analysis under *State v. Gunwall* establishes that the Washington Constitution provides broader protection than the U.S. Constitution.

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Absent controlling precedent, a party

asserting that the state constitution provides more protection than the federal constitution must analyze the issue under *Gunwall*. *State v. Ladson*. 138 Wn.2d 343, 979 P.2d 833 (1999). Since this issue does not fall squarely within any controlling precedent, the *Gunwall* factors must be examined. Analysis under *Gunwall* supports an independent application of Wash. Const. Article I, Section 21 and Section 22 to this case and mandates reversal of the conviction.

1. The language of the state constitution requires jury trials for juveniles charged with sex offenses.

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

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

Thus juveniles who are “accused” in “criminal prosecutions...shall have the right to. . . trial by an impartial jury” (under the plain language of Article I, Section 22), and a juvenile’s right to a jury trial as it existed in 1889 “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656. The current statutory scheme, requiring bench trials in juvenile court, even for juveniles charged with sex offenses, directly violates both provisions of the constitution. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions favor an independent application of the state constitution in this case.

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

constitution. *Pasco v. Mace*, at 99-100. This difference in language between also favors an independent application of the state constitution.

3. State constitutional history, state common law history, and pre-existing state law require jury trials for juveniles charged with sex offenses.

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

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

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

In *Estes v. Hopp*, 73 Wn.2d 263, 268, 438 P.2d 205 (1968), the Washington Supreme Court described the juvenile system as rehabilitative

and nonadversarial, and noted that a primary benefit was the system's private and informal character. *Estes v. Hopp* at 268. In *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 772 (1977), the Supreme Court noted a shift from rehabilitation toward punishment, and warned that jury trials would be required once "juvenile proceedings [became] akin to an adult criminal prosecution." *Lawley* at 656. In *State v. Schaaf, supra*, the Court examined amendments to the act and concluded that "Juvenile proceedings remain rehabilitative in nature and distinguishable from adult criminal prosecutions." *Schaaf*, 109 Wn.2d at 4. In *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997), the Court again suggested that juveniles would be entitled to a jury trial once juvenile proceedings "substantively" resembled adult criminal trials or when juveniles were "encumbered with the far more onerous ramifications of... adult conviction." *Monroe v. Soliz, supra, at 427*.

The Court of Appeals has reexamined the issue and reached the same conclusions, relying on the reasoning of *Schaaf* and *Monroe v. Soliz*. See, e.g., *State v. Chavez*, 2006 Wash. App. LEXIS 1849 (2006); *State v. Meade*, 129 Wn. App. 918, 120 P.3d 975 (2005); *State v. Tai N., supra*; *State v. J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999).

Significant changes have occurred in Washington's system since the Supreme Court last examined the issue. Amendments to the statutes

and new court decisions have eliminated many of the distinctions between the juvenile system and the adult criminal system. The emphasis has shifted from rehabilitation to punishment, and the conditions referenced in *Lawley* and *Soliz* have come into play. The present incarnation of the juvenile system resembles the adult system, just as it did when the constitution was adopted in 1889.

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

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

Third, the goals of the juvenile system and the adult system have converged, and now both systems strike a similar balance between punishment and rehabilitation. Every rehabilitative aspect of the juvenile system has an adult counterpart. For example, juvenile sex offenders may

be eligible for SSODA; adult sex offenders may be eligible for SSOSA. Both programs favor treatment over incarceration. *Compare* RCW 13.40.160(3) with RCW 9.94A.670. Similarly, juveniles with drug problems may be eligible for treatment under the CDDA program (RCW 13.40.0357 and RCW 13.40.165) while their adult counterparts may be eligible for treatment under DOSA (RCW 9.94A.660) or, where available, under Drug Court (RCW 2.28.170). Juvenile offenders can be eligible for diversion (RCW 13.40.070) or deferred disposition (RCW 13.40.127), while adult offenders can go through local prefiling diversion programs (if charged with felonies)<sup>8</sup> or can resolve misdemeanors through “Agreed Orders of Continuance,” deferred sentences (RCW 35.50.255, RCW 3.66.068, RCW 3.50.330), and deferred prosecutions (RCW 10.05).

Fourth, juveniles adjudicated in the juvenile system are increasingly housed in adult prison. Provisions have been added to RCW 13.40.280 easing the transfer process when assaults on staff or other youth are alleged—the burden now shifts to the juvenile to show he or she should *not* be transferred to adult prison. RCW 13.40.280(4). Thus a

---

<sup>8</sup> Although not created by statute, such programs are clearly contemplated. *See* RCW 9.94A.411.

juvenile can be incarcerated in adult prison until the age of 21, without benefit of a jury trial.

Fifth, confidentiality and privacy have disappeared from juvenile proceedings, and juvenile offenders are now stigmatized in the same manner as adults. Proceedings and records are open to the public (RCW 13.40.140(6); RCW 13.50.050(2)); furthermore, juvenile records can generally not be destroyed,<sup>9</sup> and can only be sealed under circumstances equivalent to SRA provisions allowing adult felonies to be vacated. RCW 13.50.050; RCW 9.94A.640. Juvenile conviction records can be disseminated without restriction, RCW 10.97.050, and listed on background checks under RCW 43.43.830(4). Juveniles convicted of Class A sex offenses must generally register as sex offenders for life, juveniles convicted of Class B sex offenses must generally register for at least 15 years, and juveniles convicted of Class C sex offenses must generally register for at least 10 years.<sup>10</sup> RCW 9A.44.130; RCW 9A.44.140. The current scheme

---

<sup>9</sup> The sole exception is where the entire criminal record consists of only one referral for diversion. RCW 13.50.050.

<sup>10</sup> There are three exceptions to these rules: First, adults and juveniles who stay out of trouble for ten years may petition for relief of the registration requirement. Second, juveniles who were 15 or older at the time of the offense may petition for relief, which will be granted "only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of" the registration statute. RCW 9A.44.140. Juveniles who were under age 15 may petition and be granted relief if they haven't been adjudicated of any additional sex or kidnapping offenses within the 24 months

also requires community and school notification whenever juveniles convicted of stalking, sex offenses, or violent offenses leave JRA custody. RCW 13.40.215.

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

Seventh, Juvenile convictions play a significant role in adult sentencing. The SRA's definition of "criminal history" now specifically includes juvenile adjudications and no longer draws any distinction between juvenile and adult convictions. All juvenile adjudications (including misdemeanors) are to be included in an adult's criminal history, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.030(12). In 1997, the Legislature dispensed with special treatment for juvenile felony adjudications in calculation of an adult offender score.<sup>11</sup> Under the current system, all juvenile felonies count in the calculation of the adult offender score, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.525. Juvenile convictions "wash out" of the offender score in

---

following the conviction and can prove by a preponderance of the evidence that future registration will not serve the purposes of the registration statute. RCW 9A.44.140.

<sup>11</sup> The only exceptions are for nonviolent offenses and for drug convictions scored against current drug offenses. RCW 9.94A.

the same manner as adult offenses. RCW 9.94A.525. Multiple prior juvenile convictions are now scored under the “same criminal conduct” analysis used to weigh multiple adult prior convictions, rather than the more lenient method previously in effect. RCW 9.94A.525. Furthermore, serious juvenile traffic convictions and felony traffic offenses enhance a sentence for vehicular homicide and vehicular assault in the same manner as adult convictions. RCW 9.94A.525. Juvenile felony convictions for violent offenses or sex offenses also count as if they were adult convictions, and score as multiple points against other violent or sex offenses. RCW 9.94A.525. Adults with juvenile records are now ineligible for some of the special programs available under the SRA. *See, e.g.*, RCW 9.94A.690(1)(a)(ii) (work ethic camp), RCW 9.94A.660 (DOSA), RCW 9.94A.650 (First time offender waiver).

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

Furthermore, *Schaaf* and the other cases addressing the issue of juvenile jury trials have all compared the two systems as a whole; they have not focused on the way the juvenile justice system treats the individual defendant in a given case. This is not the correct comparison. Instead, the focus should be on the deprivation of the appellant's constitutional rights. The appellant's particular circumstances, including the offenses charged, should be compared with the offenses that trigger an adult defendant's constitutional right to a jury trial.<sup>12</sup> It is of little import that some theoretical juvenile charged with minor offenses might have rehabilitative options available; instead, the actual concrete facts of an individual juvenile's case must be evaluated to see if the jury right applies.

Applying this test to the facts of this case, it is clear that Ben should have been afforded a jury trial. His charges made him ineligible for nearly all of the special rehabilitative programs available to other juveniles. Despite the complete absence of any criminal history, he could not participate in Diversion or Youth Court (RCW 13.40.070, RCW 13.40.580 *et seq.*), Deferred Disposition (RCW 13.40.127), the Suspended Disposition Alternative ("Option B," RCW 13.40.0357), the Chemical

---

<sup>12</sup> The Washington Supreme Court has decided that the right to a jury trial attaches to any offense, no matter how petty, that constitutes a crime rather than an infraction. *Pasco v. Mace*, at 99.

Dependency Disposition Alternative (“Option C,” RCW 13.40.0357, RCW 13.40.160(4), and RCW 13.40.165), the Mental Health Disposition Alternative (RCW 13.40.160(5) and RCW 13.40.167), or the Juvenile Offender Basic Training Camp program (“boot camp,” RCW 13.40.320).<sup>13</sup>

In the absence of these key rehabilitative options, the juvenile system’s treatment of Ben did not differ from the adult system’s treatment of adults charged with petty crimes. Indeed, adults charged with misdemeanors and gross misdemeanors have a greater range of rehabilitative options available than Ben does, but are still guaranteed jury trials under the state and federal constitutions.

For juveniles charged with sex offenses (such as the offense here), juvenile court is a formal, adversarial system with serious consequences. Refusal to allow juvenile cases to be tried to a jury reflects indifference to individual rights, and is antithetical to our state constitution’s strong jury protections. The framers of our state constitution would not have tolerated this result.

The context in which our state constitution was adopted and the development of the law in Washington since territorial days require jury

---

<sup>13</sup> The only special program he could have been eligible for was the Option C Chemical Dependency Disposition Alternative. RCW 13.40.165.

trials for juveniles charged with sex offenses. *Gunwall* factors 3 and 4 favor an independent application of Article I, Section 21 and Section 22. In order to give the proper interpretation to these constitutional provisions, juveniles charged with sex offenses must be restored the right to trial by jury.

4. Differences in structure between the federal and state constitutions favor an independent application of the state constitution.

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

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

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial for juveniles charged with sex offenses is a matter of State concern; clearly there is no need for national uniformity on the issue. *Schaaf*, 109 Wn.2d at 16. Indeed, several states provide jury trials to all juveniles on independent state constitutional grounds. See e.g. *State v. Eric M.*, 122 N.M. 436, 925 P.2d 1198, 1199-1200 (N.M. 1996); *State ex rel. Anglin v. Mitchell*, 596

S.W.2d 779, 789 (Tenn. 1980); *RLR v. State*, 487 P.2d 27, 35 (Alaska 1971).<sup>14</sup> *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and Section 22 of the Washington Constitution. Our state constitution provides greater protection to juveniles charged with sex offenses than does the federal constitution, and requires that the critical facts be submitted to a jury.

B. Benjamin C. was denied his constitutional right to a jury trial because the court found him guilty of a sex offense without obtaining a valid waiver the right.

Waiver of the right to a jury trial must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn.App. 419 at 427-428, 35 P.3d 1192 (2001). Because the constitutional right to a jury trial is one of the most fundamental of constitutional rights, it cannot be waived “without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois* 484 U.S. 400 at 418 n. 24, 108 S.Ct. 646 (1988). In the

---

<sup>14</sup> Other states provide for jury trials by statute. *See, e.g.*, Massachusetts General Laws Chapter 119 Section 55A.

absence of a valid waiver, a conviction obtained without a jury trial must be reversed. *Treat, supra.*

In this case, Ben did not waive his constitutional right to a jury trial. Accordingly, the conviction was obtained in violation of his right to a jury trial. The conviction must be reversed and the case remanded to the trial court.

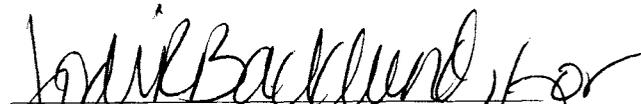
**CONCLUSION**

For the foregoing reasons, the conviction must be reversed, and the case remanded to the Juvenile Court for a jury trial. At trial, L.V.'s hearsay statements and drawings must be excluded.

Respectfully submitted on October 19, 2006.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

  
\_\_\_\_\_  
Manek R. Mistry, No. 22922  
Attorney for the Appellant

