NO. 33568-2-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FRAZIER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANAGAN COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Michael Frazier is a child who lacks the maturity and experience of an adult. He goes to high school, plays video games and messages his friends on his phone. He has a diminished ability to control his emotions, make reasoned decisions and identify the consequences his actions.

When Michael was charged with indecent liberties with forcible compulsion, he was treated as an adult. While knowledge and forcible compulsion require the fact finder to determine reasonableness, the court failed to determine whether a reasonable child would have known he had committed indecent liberties. Like all children, he cannot be expected to be held to an adult standard of reasonableness.

Even though Michael was treated like an adult, he was not afforded the rights enjoyed by them. Michael was denied the jury trial rights originally provided to juveniles in Washington and instead was compelled to have his case heard without a jury. With the lines between adult and juvenile court increasingly blurred, there is no justification to deny a juvenile this important right. Michael's due process rights were violated when the court heard his case without affording him the right to a jury.

B. ASSIGNMENTS OF ERROR

1. Indecent liberties with forcible compulsion requires the court to analyze whether a "reasonable child" had the knowledge to commit the crime.

2. Federal and state due process requires juveniles to be afforded the right to a jury trial when accused of crimes.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Children lack the maturity and experience of adults. They have less ability to control their emotions, identify consequences and make reasoned decisions about their actions. They are not simply "miniature adults." To ignore age in determining the reasonableness of a child's actions is "nonsensical." A child's knowledge and the reasonableness of their actions must be analyzed with respect to their youth and not whether an adult in the same circumstances would have known their actions were unlawful. Did the trial court err in failing to consider Michael's youth in determining Michael had the knowledge to commit indecent liberties with forcible compulsion?

2. Under the federal and state constitutions, juveniles enjoyed the right to a jury trial until it was denied by the legislature. Since that time, the distinction between juvenile and adult courts has become

increasingly blurred. Juveniles face many of the same consequences adults face, without the procedural protections afforded to adults. Adults enjoy many of the opportunities for rehabilitation which were the original basis for denying juveniles the right to a jury trial. Were Michael's due process rights under the federal and state constitution denied when the court failed to provide him with the right to a jury?

D. STATEMENT OF THE CASE

Michael was a sophomore at Okanagan Valley High School in the middle of his Christmas break when he began text-messaging or "snap-chatting" with his old girlfriend M.B. about coming over and "hanging out" with him and their friend S.B. RP 24. Because she had already dressed for work and was doing nothing at her own house, she came over to be with the two boys while they played video games on S.B.'s Xbox 360. RP 26. When she left, M.B. and Michael hugged each other and he gave her a kiss. RP 26-27.

M.B. and Michael had been boyfriend and girlfriend when Michael first moved to Okanagan in eighth grade. RP 20. The relationship lasted for about six months. RP 20. While they had initially been distant with each other after they broke up, they eventually

became friends again. RP 22. By their sophomore year, they shared many of the same friends. RP 22.

The two continued to text through "snap-chat" while she worked at the local movie theater. RP 27. She agreed to meet the boys after her shift was over. RP 27-28. The two boys walked to the fire hall where they waited for A.W. to show up and let them in, so they could play pool. The two boys got into M.B.'s car while they waited because it was cold outside. RP 29. When A.W. arrived, S.B. got out of the car, but Michael and M.B. decided to drive to the empty lot where the Food Depot used to be until it had closed down about five years ago. RP 30; RP 31.

Both Michael and M.B. agreed that after M.B. parked the car, Michael tried to hug and kiss her. RP 32. She said she resisted, knowing he had a girlfriend and that she was interested in another boy in the class. RP 41. In Michael's statement to the police and in his testimony at trial, Michael stated he stopped when M.B. said she was not interested in hugging and kissing him. RP 159, RP 136. Michael told both the police and the court he never touched her vagina or breasts. RP 163, RP 136. He denied forcing himself upon her. RP 163.

M.B. testified Michael had continued to touch her after she told him to stop, first on her leg and then on her vagina. RP 32, RP 37. She said the touching occurred both above and below her underwear. RP 38. She said he licked and bit her breasts under her shirt but over her bra. RP 39. She said she was unable to resist him because of her size and because he had pushed her up against the car door. RP 40. She testified Michael told her when she told him to stop that it did not matter how many times she said no, he would continue to force himself upon her. RP 41. No penetration occurred. RP 38.

Both Michael and M.B. agree M.B. then took Michael back to the fire hall where he went inside and played pool. RP 42-43. She left to go home. RP 80.

M.B. did not tell anyone about what had happened between her and Michael until school started again, two weeks later. RP 47. A day or two after M.B. had told C.F. her version of what had happened between her and Michael, C.F. asked Michael about it. RP 118. Michael told C.F. he felt bad about what had happened between them. RP 119. He agreed he had not been thinking with his head when he tried to be with M.B.. RP 120. He assured C.F. he did not go "all the way." RP 120.

After M.B.'s grandmother heard M.B.'s story, she called the police. RP 87. Michael was arrested for indecent liberties and gave a statement to the police consistent with his testimony before the court. RP 133.

The court found Michael guilty of indecent liberties with forcible compulsion. RP 186, CP 25. Both parties told the court it lacked the discretion to sentence Michael to anything other than the standard range, which was 15-36 weeks. RP 186, RP 187-88. The court then imposed an institutional commitment of 15-36 weeks, along with a requirement Michael register as a sex offender and stay away from M.B. for the rest of his life. RP 188-89, CP 44.

E. ARGUMENT

1. The State failed to prove Michael was guilty of indecent liberties because the State failed to establish Michael knew he was committing indecent liberties.

When Michael was accused of indecent liberties, he was a sophomore in high school. He hung out with his friends, played video games and spent time on his phone text messaging other children. He is not an exceptional child. Instead, Michael engages in the kind of conduct a person would expect from a child. He lacks the maturity and experience of an adult. *J.D.B. v. North Carolina*, 564 U.S. 261, ___, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011). He has less ability to control his emotions, identify consequences and make reasoned decisions about his actions. *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

Michael's age must be taken into account in determining his culpability and whether he knowingly committed indecent liberties. *See, J.D.B.*, 131 S.Ct. at 2404-05; *O'Dell*, 183 Wn.2d at 688. Because the State failed to address whether Michael knowingly committed indecent liberties, it failed to prove an essential element of the offense. Michael is entitled to reversal.

a. Michael's youthfulness must be taken into account in determining whether he had the knowledge to commit indecent liberties.

When the Supreme Court issued *J.D.B.*, it acknowledged a fact the non-judicial world had understood for a long time: children do not have the education, judgment, and experience of adults. *See J.D.B.*, 131 S.Ct. at 2403. Children are not simply "miniature adults." *J.D.B.*, at 2404 (*citing Eddings v. Oklahoma*, 455 U.S. 104, 115-16, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). Children lack the maturity to vote, sign contracts, and drink alcohol. They have significant restrictions placed upon their ability to drive. They may not marry without consent. Children must find co-signers before they are able to rent property and usually must agree to additional fees before they can rent a car. These observations restate what "any parent knows – indeed what any person knows – about children generally." *Id*. at 2403 (*citing Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)). They are constitutionally different from adults in their level of culpability. *Montgomery v. Louisiana*, 577 U.S. ___, 14-280, 2016 WL 280758, at *16 (U.S. Jan. 25, 2016).

In the past ten years, the United States Supreme Court has issued five decisions which reinforce the primacy of this principle. *See*

Montgomery, 2016 WL 280758, at *16 (affirming the retroactive effective of *Miller*); *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012) (holding that a mandatory sentence of life without the possibility of parole for a minor violates the Eighth Amendment)*; J.B.D.*, 131 S.Ct. at 2403*; Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (ruling that the imposition of life without the possibility of parole on juveniles for non-homicide crimes violates the Eighth Amendment); *Roper*, 543 U.S. at 569. In fact, children cannot be held to the same standards which will be expected of them when they grow up. *J.D.B.*, 131 S.Ct. at 2403. Courts must take this into consideration when determining a child's culpability.

Our courts have likewise acknowledged children must be treated differently. In *O'Dell*, Washington applied this principle to sentencing, even recognizing youthfulness must be taken into account for persons who were over the age of eighteen. 183 Wn.2d at 688. Until full neurological maturity, young people have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond. *Id*. at 364-65. Our courts recognize age may mitigate a defendant's

culpability and that age must be examined when children are charged with crimes. *Id*. at 366.

This is especially true for sex offenses because they are the types of crimes where youthfulness plays an especially important role. *See State v. J.P.S.*, 135 Wn.2d 34, 39, 954 P.2d 894 (1998) ("A child's age, maturity, experience, and understanding may all be relevant in deciding if a given child had knowledge of the act's wrongfulness at the time it was committed.") Our courts have correctly recognized it is more difficult to prove a child knew a sex offense was a crime than other offenses such as stealing or setting a fire. *Id*. at 43 (*citing State v. Linares*, 75 Wn.App. 404, 414, n. 12, 880 P.2d 550 (1994); *State v. J.F.*, 87 Wn.App. 787, 790, 943 P.2d 303 (1997); *State v. Erika D.W.*, 85 Wn.App. 601, 607, 934 P.2d 704 (1997)).

Michael is a normal child. He hangs out with his friends. He plays video games. He phone messages his friends on Snapchat. He goes to school. He does not appear to have any adult responsibilities. There is no evidence to suggest he has greater maturity than would be expected from a child his age. Michael's culpability should be judged from the perspective of his youthfulness.

b. By failing to address Michael's youthfulness, the State failed to establish Michael knowingly committed indecent liberties.

In examining indecent liberties with forcible compulsion, this Court must determine whether Michael's culpability is diminished because of his age. The failure to the trial court to analyze this issue and make findings of fact with regard to Michael's culpability entitles him to reversal.

An essential element of indecent liberties with forcible compulsion is knowledge. RCW 9A.44.100(1)(a). To be guilty of indecent liberties as charged here, a person must knowingly cause another person to have sexual contact by forcible compulsion. *See State v. Lough*, 70 Wn. App. 302, 325, 853 P.2d 920 (1993) *aff'd*, 125 Wn.2d 847, 889 P.2d 487 (1995) ("That 'knowingly' modifies both 'causes another person ... to have sexual contact" and "when the other person is ... physically helpless' is apparent from the sentence structure and punctuation of the statute.)

Knowledge requires a finding that the person is either (i) aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) has information which would lead a reasonable person in the same situation to believe that facts exist which

facts are described by a statute defining an offense. RCW 9A.08.010(1)(b). Our courts have consistently analyzed knowledge from the perspective of a reasonable person. *See, e.g., State v. Stribling*, 164 Wn. App. 867, 875, 267 P.3d 403 (2011); *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322, 1326 (1980).

When a child is accused of a crime, our courts have analyzed their culpability from the perspective of a child. In analyzing recklessness, *State v. Marshall* held that the statute defining criminal culpability unambiguously used the standard of "reasonable man 'in the same situation,'" and that "the juvenile status of a defendant is part of his situation and relevant to a determination of whether he acted reasonably." 39 Wn. App. 180, 183, 692 P.2d 855 (1984). This same standard has been applied to negligence. *See, e.g., Bauman by Chapman v. Crawford*, 104 Wn.2d 241, 248, 704 P.2d 1181 (1985) (en banc). Because *J.D.B.* requires a court to analyze the actions of a child under a "reasonable child" standard, rather than what an adult would do, the definition of knowledge must also be analyzed under that context and to ignore Michael's age in determining the reasonableness of his actions would be "nonsensical." *J.D.B.*, 131 S. Ct. at 2405.

A person must have knowledge they are forcibly compelling another. This issue was recently analyzed in *State v. W.R., Jr.*. 181 Wn.2d 757, 768, 336 P.3d 1134 (2014). In this case, the court found consent negates the mens rea required of forcible compulsion. *Id*. at 764. This is consistent with *Lough's* recognition that "knowingly" modifies unlawful touching and physical helplessness. *Lough*, 70 Wn.App. at 325; *c.f.*, *State v. Mohamed*, 175 Wn. App. 45, 55, 301 P.3d 504, 508 (2013).

It is also consistent with legislative history. Indecent liberties was originally codified in 1975. 1st ex.s. c 260 § 9A.88.100 (enacted 1975; codified as WA ST 9A.44.100). Forcible compulsion, victim age and incapacity were the original ways this offense could be committed. *Id*. It was not until 1993 that forcible compulsion was modified to include additional ways to commit the offense. S.B. 5577 (enacted 1993). Forcible compulsion has never been modified within the definition of indecent liberties. This Court should follow *W.R. Jr.* and find forcible compulsion requires knowledge. To find otherwise would make forcible compulsion a strict liability element, which would be inconsistent with judicial rulings and legislative intent.

Applying this element to adults is far more straightforward than it is to children. While an adult has developed the experience and maturity to know when their conflict is unlawful, the same is not true for children, especially when the child is accused of a sex offense. *J.P.S.*, 135 Wn.2d at 39. For Michael, there were many reasons why he would not have known he was committing indecent liberties. Michael had a previous relationship with M.B., which involved hugging and kissing. RP 151. M.B. drove the two of them to a dark and empty parking lot to talk. RP 30. They had hugged and he had kissed her earlier in the evening. RP6-27. They had engaged in text-messaging while she was at work. RP 27.

When they were alone in M.B.'s car, Michael acted like a reasonable child. Michael tried to have sexual contact with M.B., but he never attempted to penetrate her body. RP 38. There was no evidence he ever tried to have sexual intercourse with her. While an adult may have understood that the behavior M.B. and Michael engaged in before the two parked did not justify attempting to have sexual contact, the answer is not so clear for a sixteen year old boy.

The lack of knowledge that Michael's actions were unlawful is consistent with social science. Children do not understand the

consequences of their actions when they engage in sexual activity. Robin D'Antona, *Sexting, Texting, Cyberbullying and Keeping Youth Safe Online,* 6 J. Soc. Sci. 523, 524 (2010). Scholars and researchers have consistently reported that sexual exploration is a healthy part of adolescent development. Susan S. Kuo, *A Little Privacy, Please: Should We Punish Parents for Teenage Sex?*, 89 Ky. L.J. 135, 136 (2001) (*citing* Philip G. Zimbardo, *Psychology and Life* (13th ed. 1992)). Children are not predatory like adults. Timothy E. Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. Marshall L. Rev. 73, 113 (2003); Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, The Champion, Dec. 2009, at 20, 22 (*citing* Nat'l Ctr. on Sexual Behav. of Youth, Ctr. for Sex Offender Mgmt. (CSOM) & Office of Juvenile Justice and Delinquency Prevention, *Juveniles Who Have Sexually Offended: A Review of the Professional Literature Report* (2001)). They have a low rate of recidivism (between 2-14%) and are unlikely to become adult sex offenders. Shannon Parker, *Branded For Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 Va. J. Soc. Pol'y & L. 167, 188 (2014).

A child cannot be held to the same standards as an adult. *J.D.B.*, 131 S. Ct. at 2403. Culpability is different for a child than it is for an adult. *O'Dell*, 183 Wn.2d at 688; *Montgomery*, 2016 WL 280758, at *16; *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 1186, 161 L. Ed. 2d 1 (2005). A child's knowledge and the reasonableness of their actions must be analyzed with respect to their youth and not whether an adult in the same circumstances would have known their actions were unlawful. *J.D.B.*, 131 S.Ct. at 2404-05.

Michael's actions must be analyzed with respect to the child he is. Like all children, he lacks the maturity, understanding and education to fully understand his actions. The trial court failed to make this analysis and did not make findings with regard to how Michael's youth impacted his culpability. Because he was a child, this Court should find Michael did not knowingly commit the crime of indecent liberties. It should reverse his conviction for this offense.

2. The failure to provide Michael with a trial by jury denied Michael his due process rights.

Originally, children charged with crimes in Washington were afforded the right to a jury trial. Ch. 18, § 2, 1905 Wash. Laws (repealed, 1937). This right was taken away from them when the legislature determined the primary purpose of juvenile court was rehabilitation and the primary purpose of adult court was accountability. *See*, RCW 13.40 (Juvenile Justice Act of 1977). Washington courts have indicated that should the juvenile system become sufficiently like the adult criminal system, the right to a jury for juveniles should be restored. *See, e.g.*, *State v. Lawley*, 91 Wn.2d 654, 591 P.2d 772 (1979); *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997); *see also* Code of 1881, ch. 87, § 1078; *State v. Chavez*, 163 Wn.2d 262, 274, 180 P.3d 1250 (2008).

Increasingly, this distinction has eroded. Juveniles like Michael now face significant consequences from their convictions, including never being able to remove his conviction from his record, a potential lifetime of registration as a sex offender and involuntary commitment under RCW 71.09. Adults are now able to divert and otherwise avoid criminal convictions when they are able to demonstrate their rehabilitation. Because this distinction is now virtually non-existent,

this Court should find Michael's right to a jury trial was denied and reverse his conviction.

a. Juvenile court provides insufficient protection to justify denying Michael his right to a jury trial.

While the stated purposes of the juvenile and adult courts may be different, in many respects, the goals of the adult and juvenile systems have reached similar balances in terms of punishment and rehabilitation. Because Washington's juvenile court system has become more punitive while the adult system has focused upon rehabilitation, Michael should have been afforded the right to a jury trial. *In re L.M.*, 286 Kan. 460, 460, 186 P.3d 164 (Kan. 2008) ("Because the Kansas Juvenile Justice Code has become more akin to an adult criminal prosecution, it is held that juveniles henceforth have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments.") The failure to provide him with jury trial rights violated his due process and entitles him to a new trial.

i. <u>The advantages of remaining in juvenile court have decreased.</u>

Juveniles like Michael increasingly find themselves sentenced much like adults. Juvenile court sentences have been lengthened and the legislature has added a "clearly too lenient" aggravating factor to

allow manifest injustice sentences above the standard range. RCW 13.40.230(2). Although courts distinguish between an "adjudication" and a "conviction," this distinction is not apparent in the code. *See* RCW 13.04.011(1) ("[a]djudication" has the same meaning as "conviction" in RCW 9.94A.030, and the "terms must be construed identically and used interchangeably"); *see also, In re Det. of Anderson*, ___ Wn.2d ___, 91385-4, 2016 WL 454049, at *2 (Wash. Feb. 4, 2016) (*citing as example,* RCW 13.40.077 (recommended prosecutorial standards for juvenile court), RCW 13.40.215(5) (school placement for "a convicted juvenile sex offender" who has been released from custody), RCW13.40.480 (release of student records regarding juvenile offenders); RCW 13.50.260(4) (sealing juvenile court records); JuCR 7.12(c)-(d) (criminal history of juvenile offenders).

Michael is required to provide the court with a collection of his personal data. He must provide a DNA sample. RCW 43.43.754. He also submitted to fingerprinting and photographing by the Sheriff upon arrest. RCW 43.43.735. There are no provisions which require the Sheriff to ever destroy these records. In fact, no restrictions exist on the dissemination of juvenile records. RCW 10.97.050. Background checks

apply equally to adults and to children tried in juvenile court. RCW 43.43.830(6).

Michael must register as a sex offender. RCW 9A.44.130. While Michael has a greater ability to be removed from the registration list than if he were an adult, there it is no guarantee he will be. *See*, RCW 9A.44.143(2). While subject to registration, his status is a matter of public record. Upon discharge from custody, notice must be provided to law enforcement and to the schools Michael and others convicted of violent offenses, sex offenses or stalking plan to attend. RCW 13.40.215. The United States Department of Justice maintains an easily searchable national registry of registered sex offenders, including those convicted in juvenile court. *See* U.S. Dep't of Justice, *Dru Sjodin National Sex Offender Public Website*, available at https://www.nsopw.gov/en.

Michael may be involuntarily committed under RCW 71.09 without ever committing an adult offense. *See, e.g., Anderson,* at *3. In upholding Mr. Anderson's commitment, the Washington Supreme Court recently found juvenile convictions to qualify as predicate offenses in the context of RCW 71.09.030. *Anderson*, at *2. Recognizing many of the provisions in RCW 71.09 do not differentiate

between youth and adults, the court found they "nevertheless clearly apply to both." *Id*.

Youth who are convicted in juvenile court may be housed in adult prisons. RCW 13.40.280. When the State seeks to transfer a child to an adult prison, it is the child's burden to demonstrate why they should not be transferred. *Id*. Likewise, juveniles who are tried in adult court and who enjoy the right to a jury trial, may serve their sentences in a juvenile facility until they are twenty one. RCW 72.01.410.

Michael's record will never be sealed. RCW 13.50.260(1). Since 1997, the legislature has prohibited juveniles convicted of sex offenses from sealing their records. *See* Laws of 1997, ch. 338, § 40(11). Even when the ability to seal was made easier for juvenile offenders in 2015, children like Michael were exempted from sealing their records. RCW 13.50.260(4). For an indecent liberties conviction which was "actually committed" with forcible compulsion, sealing is not available. RCW 13.50.260(4).

ii. <u>Adult courts are adopting a more rehabilitative model for offenders.</u>

Meanwhile, our adult courts increasingly act to rehabilitate defendants. Therapeutic court programs have been created with the purpose of rehabilitation, rather than punishment. RCW 2.30.010 ("The

legislature further finds that by focusing on the specific individual's needs, providing treatment for the issues presented, and ensuring rapid and appropriate accountability for program violations, therapeutic courts may decrease recidivism, improve the safety of the community, and improve the life of the program participant and the lives of the participant's family members by decreasing the severity and frequency of the specific behavior addressed by the therapeutic court.") Eighty three therapeutic courts have been created in Washington. Washington Courts, *Drug Courts & Other Therapeutic Courts*, available at https://www.courts.wa.gov/court_dir/?fa=court_dir.psc. These courts are intended to rehabilitate, focusing on addiction, domestic violence, mental health and veterans. *Id*.

Every rehabilitative program created in juvenile court has an equivalent in adult court. Juveniles who are convicted of a sex offense may ask the court for a community based alternative sentence, as can adults. RCW 13.40.160; RCW 9.94A.670. Both juveniles and adults with drug dependency problems may seek drug treatment instead of a standard range sentence. RCW 13.40.0357; RCW 13.40.165. Juveniles may seek diversion and deferred sentences, but adults are increasingly able to seek local pre-filing diversion programs, "agreed orders of

continuances," and deferred prosecutions. RCW 13.40.070; RCW 13.40.127; RCW 35.50.255; RCW 3.66.068; RCW 3.50.330; RCW 10.05; *see also LEAD, Law Enforcement Assisted Diversion*, available at http://leadkingcounty.org/.

Minors and young persons who are tried in adult court with the right to a jury trial have the ability to be sentenced as if they were juveniles, even when jurisdiction lapses. *State v. Maynard*, 183 Wn.2d 253, 264, 351 P.3d 159 (2015) (remedy caused by ineffective assistance is to remand to adult court for further proceedings in accordance with the Juvenile Justice Act). Even where a young person over eighteen is prosecuted in adult court, youthfulness is a factor the court may consider in sentencing the person below the standard range. *O'Dell*, 183 Wn.2d at 688.

b. The Sentencing Reform Act is in conflict with Michael's lack of a right to a jury trial.

Increasingly, the Sentencing Reform Act treats juvenile criminal history as seriously as it does convictions which a person receives when they are an adult. With no right to a jury, juvenile history should not be scored for adult convictions at all. In striking down Florida's death penalty sentencing scheme, the United States Supreme Court reaffirmed the importance of the right to a jury trial where facts are used to impose a more significant punishment. *Hurst v. Florida*, ___ U.S. ___, 14-7505, 2016 WL 112683, at *3 (U.S. Jan. 12, 2016). The Sixth Amendment and the Fourteenth Amendment require that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); U.S. Const. amend. VI; XIV. Any fact which exposes a person to a greater punishment than that authorized by the jury's guilty verdict is an "element" that must be submitted to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This constitutional right has been applied to plea bargains, *Blakely v. Washington*, 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 230, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005),

criminal fines, *Southern Union Co. v. United States*, 567 U.S. ___, 132 S.Ct. 2344, 2357, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, 570 U.S., at ___, 133 S.Ct., at 2166 and capital punishment. *Ring v. Arizona*, 536 U.S. 584, 608, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). While prior convictions need to be proven to a jury for sentencing purposes, it is because the underlying facts have already been presented to a jury, except in the case of juvenile's adjudications. *State v. Newlum*, 142 Wn. App. 730, 744, 176 P.3d 529 (2008) ("Imposition of an exceptional sentence based solely on a defendant's criminal history does not violate the Sixth Amendment because a defendant's prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."); *see also*, RCW 9.94A.535.

For Michael, this criminal history will score if he is ever convicted of a future offense. RCW 9.94A.525(2)(a). All felony dispositions in juvenile court shall be counted as criminal history for purposes of adult sentencing, except under the general "wash-out" provisions that apply to adult offenses. *Id*. Should Michael be convicted of a future sex offense, this conviction would "triple score," in exactly the same way an adult conviction is considered. RCW 9.94A.525(17).

Because no provision exists to "wash-out" his conviction, it will be scored should he be convicted of any other offense during his lifetime. RCW 9.94A.525(2)(a).

Thus, Michael's adjudication will have a nearly indistinguishable effect from an adult conviction. Yet, unlike an adult conviction, Michael's "adjudication" was obtained without the fundamental protections afforded by a jury. Moreover, it was obtained without a finding of a *mens rea* appropriate to a juvenile.

c. The denial of jury trial rights for children is contrary to the Sixth Amendment.

i. <u>The Sixth Amendment makes no distinction between adults and juveniles.</u>

The Sixth Amendment makes no distinction between adults and juveniles. In fact, at the time of the drafting of the amendment, there was no such distinction.

> Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance of escape up to twelve, if lacking in mental and moral maturity. The majesty and dignity of the state demanded vindication for infractions from both alike. The fundamental thought in our criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers. The child was arrested, put into prison,

> indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal law, with the aim of ascertaining whether it had done the specific act -- nothing else -- and if it had, then of visiting the punishment of the state upon it.

Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909).

The original Juvenile Court Act of Illinois (1899) was a model quickly followed by almost every state in the Union. *See* Monrad Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. L. Rev. 167, 174 (1966).

Constitutional challenges to these new juvenile systems, which did not provide the full panoply of constitutional rights to juveniles, were made. But, most challenges were rebuffed by "insisting that the proceedings were not adversary, but that the State was proceeding as parens patriae." *In Re Gault*, 387 U.S. 1, 16, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). The rationale was questionable. Paulsen at 173 ("How could the reformers create this kind of court within a constitutional framework that insisted upon many of the institutions and procedures then thought to be irrelevant or subversive of the job of protecting children?")

Nonetheless in *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971), a fractured court found that a state

juvenile justice scheme that did not provide for a jury trial was constitutionally permissible. Writing for a four-member plurality, Justice Blackmun concluded that juvenile proceedings in Pennsylvania and North Carolina were not "yet" considered "criminal prosecutions" and thus the due process requirements of fundamental fairness did not impose the Sixth Amendment guarantee of a right to trial by jury on juvenile courts. *McKeiver*, 403 U.S. at 541. The plurality questioned the necessity of a jury to accurate fact-finding and emphasized the unique attributes of the juvenile system that, 25 years ago, still differentiated it from adult criminal prosecutions. *McKeiver*, 403 U.S. at 543-51.

ii. <u>The original intent of the Sixth Amendment guarantees juveniles the right to a jury trial.</u>

The current United States Supreme Court cases including *Hurst* and *Allyene* demonstrate that in interpreting the Federal Constitution issues of reliability, efficiency and semantics are unimportant. The only relevant question is "what was the intent of the Framers?" Here the actual language of the Sixth Amendment made no distinction between adults and juveniles in regard to the right to a jury trial. And we know from the commentators that, at the time, all persons over the age of 7 and charged with criminal activity were tried by a jury. Mack at 106.

Thus, no matter what rationale or label is applied to avoid the constitutional guarantee, where a person is charged with an act that results in imprisonment the only proper safeguard envisioned by the Framers is a jury trial.

d. The jury trial guarantees of the State Constitution provide juveniles the right to a jury.

Article I, § 21 provides the right to a jury trial shall remain "inviolate." Article I, § 22 provides "In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Washington Supreme Court has recognized that the right to a jury trial may be broader under Washington's Constitution than under the federal constitution. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003) (applying the factors in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). *Smith* noted the textual differences between the state and federal provisions as well as the structural differences of the federal and state constitutions supported such a conclusion. *Id*. at 150-52. So too, the fact that the manner in which crimes are prosecuted is a matter of local concern. *Id*. at 152.

Smith, however, concluded this potential broader reach of the state guarantee did not require a jury determination of a defendant's

prior "strikes" in a persistent offender proceeding. *Id*. In making this determination, the Court clarified the scope of the jury-trial right must be determined based on the right as it existed at the time the constitution was adopted. 150 Wn.2d at 153. *Smith* based its conclusion on one principal fact, that there was no provision for jury sentencing at the time the State constitution was enacted, as an 1866 law had done away with the practice. *Id*. at 154. Thus, because the right did not exist at common law or by statute at the time of the enactment of the State constitution, it was not embodied within the jury trial rights of Article I, § 21 and Article I, § 22.

By contrast, at the time the Washington Constitution was adopted, there was no differentiation between juveniles and adults for purposes of the provision of a jury. Even after the juvenile courts' inception, juveniles were statutorily entitled to trial by jury from 1905 until 1937, when the Legislature struck the right to a jury trial in juvenile court. Ch. 65, § 1, 1937 Wash. Laws at 211. The original juvenile court statute in Washington State provided that "[i]n all trials under this act any person interested therein may demand a jury trial, or the Judge, of his own motion, may order a jury to try the case." Ch. 18, § 2, 1905 Wash. Laws (repealed, 1937). This provision remained

substantially unchanged through revisions of the statute in 1909, 1913, 1921, and 1929.

Beginning in 1909, our juvenile laws made special provision for transfer to a "police court of cases" where it appeared that "a child has been arrested upon the charge of having committed a crime." Ch. 190, § 12, 1909 Wash. Laws at 675. The capacity statute, also enacted in 1909, specifically contemplates the possibility that a "jury" will hear a case where a child younger than 12 stands accused of committing a "crime." RCW 9A.04.050. Thus, juveniles were entitled to jury trials at the time the Washington Constitution was adopted in 1889 and for more than 40 years thereafter – until the Juvenile Justice Act was amended to delete that right.

In *State v. Schaaf*, the Court concluded the absence of a separate juvenile court at the time of the adoption of the Constitution did not lead to the conclusion that juveniles were now entitled to a jury trial. 109 Wn.2d 1, 14, 743 P.2d 240 (1987). *Schaaf* concluded that even though the right to a jury trial existed at all points prior to 1938, the framers of the Washington Constitution could not know of later efforts to legislate away the right, and thus could not have intended to provide the right in the first place or intended to foreclose its denial in the

future. The effort in *Schaaf* to limit the framers' intent based on legislation that came decades later is directly at odds with *Smith*. *Smith* held the right to a jury trial guaranteed by the state constitution is precisely the right which existed by statute and common law in 1889. 150 Wn.2d at 153. Because a juvenile in 1889 had the right to a jury, a juvenile in 2016 has the right to a jury trial.

e. The failure to provide Michael with the right to have his case heard before a jury denied him his due process.

The recognition children are constitutionally different impacts their right to a jury trial. This is especially true should this Court determine trial courts are not required to apply the reasonable child analysis to the knowledge element of indecent liberties. If children are to be held to the same standards as adults, they must enjoy the same due process rights.

The failure to provide Michael with his right to a jury denied him due process under both the federal and state constitutions. With the purposes of adult and juvenile court continuing to merge, the constitutional right to a jury trial for all persons accused of crimes becomes clear. This court should adopt the original intent of the federal and state constitutions and return to Michael his jury trial rights.

F. CONCLUSION

The State failed to prove Michael had the knowledge to commit indecent liberties with forcible compulsion. Instead of holding him to adult standards of reasonableness, this Court must analyze Michael's culpability within the context of his youthfulness. This requires the trial court to determine whether a reasonable child acted with knowledge of forcible compulsion. Because Michael's actions were analyzed as if he were an adult, he is entitled to reversal.

Even though Michael was judged as an adult, he was not afforded the protections provided to an adult. The failure to provide him with his right to a jury trial denied Michael his due process rights. This Court should find Michael was entitled to a jury trial and reverse this case because Michael was denied his due process rights.

The right to a jury trial is not inconsistent with the goal of juvenile rehabilitation. Because juvenile courts has become increasingly punitive, the distinction between juvenile and adult courts have become increasingly blurred, and the right to a jury trial for juveniles exists in both the federal and state constitution, the failure to provide Michael with this right entitles him to a reversal. This Court

should find Michael's due process rights were violated and remand this case.

DATED this 22nd day of February 2016.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33568-2-III
	)	
MICHAEL FRAZIER,	)	
	)	
JUVENILE APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KARL SLOAN OKANOGAN COUNTY PROSECUTOR'S OFFICE PO BOX 1130 OKANOGAN, WA 98840-1130	(X) ( ) ( )	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] MICHAEL FRAZIER C/O GENERAL DELIVERY OKANOGAN, WA 98840	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF FEBRUARY, 2016.

X_____

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