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 REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE REASONABLE CHILD STANDARD REQUIRES YOUTH TO BE TAKEN INTO ACCOUNT WHEN REASONABLENESS IS AN ELEMENT OF KNOWLEDGE.

In *J.D.B. v. North Carolina*, the United States Supreme Court adopted the "reasonable child" standard. 564 U.S. 261, ___, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (2011). Children and young persons have less ability to control their emotions, identify consequences and make reasoned decisions about their 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. The State's failure to prove this essential element entitles Michael to reversal.

a. The reasonable child standard is independent from capacity and the infancy defense.

In its response brief, the State argues the infancy defense does not apply to Michael. Respondent's brief, 10. Michael does not, of course, make this argument. Capacity is a statutory right based upon RCW 9A.04.050. It only applies to youth who are under the age of twelve. RCW 9A.04.050.

b. Mental disorders and incapacity are not at issue.

The State also addresses mental incapacity and diminished capacity. Respondent's brief, 14. This defense was not raised at trial, nor in Michael's opening brief.

c. Youth must be factored into whether a child acted reasonably, when reasonableness is an element of the crime.

By focusing upon infancy and mental incapacity, the State fails to acknowledge the now established recognition that youth are not "miniature adults" and must be treated differently by the courts. *See, e.g., J.D.B.*, 131 S.Ct. at 2404 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115-16, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)). Both the United States and Washington Supreme Courts have found youth are constitutionally different from adults and must be treated accordingly. *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016); *O'Dell*, 183 Wn.2d at 688. While many of these cases have addressed culpability at sentencing, *J.D.B.* makes clear that the reasonableness of a youth's conduct must be analyzed not from the viewpoint of an adult, but from a child. 131 S.Ct. at 2404-05.

The importance of age and maturity has been applied to culpability for both very young children at capacity hearings and young adults prosecuted in adult courts. *See*, *State v. J.P.S.*, 135 Wn.2d 34, 39, 954 P.2d 894 (1998) (declining to find capacity, the court focuses upon age, maturity, experience, and understanding); *O'Dell*, 183 Wn.2d at 688 (authorizing a sentence below in the standard range in adult court based upon the inability of young people to control their emotions, clearly identify consequences and make reasoned decisions). *State v. Marshall* has also held that in defining criminal culpability "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 is consistent with *J.D.B.*, which requires a court to analyze the actions of a child under a "reasonable child" standard, rather than what an adult would do, stating that to do otherwise would be "nonsensical." 131 S. Ct. at 2405.

d. The State failed to establish Michael had the culpability necessary to commit indecent liberties.

The State does not contest that knowledge is an established element of indecent liberties. Respondent's brief, 18. The State fails to analyze this element, however, again focusing upon capacity, rather

than the recognition that the actions of a child must be analyzed under a "reasonable child" standard. 131 S. Ct. at 2405.

Instead of addressing the "reasonable child" standard, the State again argues children over the age of 12 have criminal capacity. *Marshall*, 39 Wn.App. at 183. Relying upon *Marshall* to argue children over the age of 12 have criminal capacity avoids addressing the requirement that where the law applies a reasonableness standard, the actions of the child must be addressed as they would for a reasonable child and not those of an adult. 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 failure to do so requires reversal. *E.g., J.D.B.*, 131 S. Ct. at 2405.

A child cannot in fact 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*, 136 S. Ct. at 736; *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. Reversal is required.

2. DUE PROCESS REQUIRES THAT JUVENILES ACCUSED OF CRIMES BE AFFORDED THE RIGHT TO A JURY TRIAL.

The reliance upon history to argue against the right to a jury trial for youth is misplaced. Respondent's brief, 21. To the contrary, an historical analysis of the right to a jury trial should compel this court to conclude the current denial to youth of the right to a jury trial is both inconsistent with original intent and a denial of due process.

a. The right to a jury trial for all persons accused of crimes is guaranteed by the Washington Constitution, regardless of age.

The State argues the right to a jury trial does not apply to juveniles under the Washington constitution. Respondent's brief, 23.

Article I, § 21, however, 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." Application of the *Gunwall* criteria indicates there is a broader right to a jury trial under the Washington Constitution than

the federal right. *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)). The Court noted the textual differences between the state and federal provisions as well as the structural differences of the federal and state constitutions support 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.

When the Washington Constitution was adopted, jury trial rights were afforded to both juveniles and adults. Code of 1881, ch. 87, §1078. Even after the creation of a juvenile court in 1905, juveniles were statutorily entitled to trial by jury until the right was denied to them in 1937. Laws of 1937, ch. 65, § 1, at 211. Washington's juvenile laws made special provision for transfer to police court of cases where it appeared that "a child has been arrested upon the charge of having committed a crime." Laws 1909, ch. 190, § 12, at 675. The capacity statute, also enacted in 1909, specifically contemplated 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 nearly 50 years thereafter. Under *Smith* that

history leads to the conclusion that juveniles must be afforded a jury trial today. *See also, In the Matter of the Det. of M.W. & W.D.*, ___ Wn.2d ___, ___ P.3d ___, Slip. Op. 90570-3, 2016 WL 3249495, at *12 (Wash. June 9, 2016).

The State properly recognizes that *State v. Schaaf* concluded the history of providing juries to juveniles at the time of the adoption of the Constitution did not lead to the conclusion that juveniles must now be afforded a jury trial. 109 Wn.2d 1, 14, 743 P.2d 240 (1987). *Schaaf* arrives at this conclusion even though the right to a jury trial for juvenile existed at all points prior to 1938 and was made inviolate by the framers of the Washington Constitution.

Smith disavows this analysis. In *Smith*, the court found,

> Because this law was not enacted until after the constitution was adopted, it could not have had any effect on the drafters' intent when they wrote article I, sections 21 and 22.

Smith, 150 Wn.2d at 154.

The Supreme Court has also recently affirmed this historical analysis in determining when there is a constitutional right to a jury trial. *M.W.*, ___ Wn.2d at ___, 2016 WL 3249495, at *12. To determine whether there is a right to a jury trial, the court applies a two-part test, first determining the scope of the right when the Constitution

was enacted and then if the type of action at issue is similar to one that would include the right to a jury trial at that time. *Id*., citing *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 884, 224 P.3d 761 (2010).

M.W. and *Smith* make concrete that the proper analysis to determine whether there is a jury trial right should be based upon the historical right. Reliance by the State on a statue enacted nearly 50 years after the drafting of Article I, § 21 is incompatible with this precedence. The jury trial right protected in Article I, § 21 and § 22 is that which existed in 1889. Subsequently enacted statutes do not alter the scope of that right. The failure to provide Michael with the right to a jury denied him due process and requires reversal.

b. The distinction between adjudications and convictions is no longer significant.

The State argues the juvenile justice systems is sufficiently different to deny juveniles the right to a jury trial. Respondent's brief, 31. This argument is no longer true in law or fact.

In addressing the scope of the Sixth Amendment right to a jury, the United States Supreme Court noted the "label" attached to a fact or fact-finding process does not determine the scope Sixth Amendment right. *Blakely v. Washington*, 542 U.S. 296, 306, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Even if the Legislature had carefully drawn and

observed a distinction between "offenses" and "crimes" and "adjudications" and "convictions," such a distinction does not determine the scope of the jury right. Neither Article I, § 21 or § 22 use the term "conviction" nor otherwise limit their reach based upon that term. Instead, Article I, § 21 simply guarantees "the right of trial by jury shall remain inviolate." Article I, § 22 guarantees the right to an impartial jury to all persons in criminal prosecutions.

While the Legislature distinguishes at times between a conviction and a juvenile adjudication, the Legislature also says "'Conviction' means an adjudication of guilt pursuant to Title 10 or 13 RCW . . . ." RCW 9.94A.030(9). In many statutes, the term "conviction" is used to describe the requirements a juvenile must comply with when found guilty of a crime. *See, e.g., Matter of Juveniles A, B, C, D, E,* 121 Wn.2d 80, 87-88, 847 P.2d 455, 457 (1993) ("the Legislature's use of 'conviction' in statutes to refer to juveniles appears to be endemic). The Supreme Court has relied upon this holding to conclude a juvenile adjudication is a "conviction" upon which a petition for indefinite confinement as a sexually violent predator may be predicated. *In re the Detention of Anderson*, 185 Wn.2d 79, 86, 368 P.3d 162 (2016) (citing 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 must comply with many of the same consequences as he would have had he been convicted as an adult. He must provide a DNA sample and is subject to fingerprinting and photographing. RCW 43.43.754; RCW 43.43.735. No restrictions exist on the dissemination of his records and there is no distinction with regard to background checks between youth and adults. RCW 10.97.050; RCW 43.43.830(6).

Because this is a sex offense, Michael must register as a sex offender. RCW 9A.44.130. While there is a greater ability to be removed from the list as a youth, there is no mandatory removal for Michael. *See*, RCW 9A.44.143(2). This information is easily searchable, as 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. Involuntary commitment under RCW 71.09 based solely upon juvenile offenses is also possible. *Anderson*, 185 Wn.2d at 86. Recognizing many of the provisions in RCW 71.09 do not differentiate between youth and adults, the court found they "clearly apply to both." *Id*.

Any sentence Michael may have served could have been served in adult prison. 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.* And while the State argues that provisions of RCW 13.40.010 have been amended to incorporate restorative justice and increase the likelihood a youth will be found eligible for a deferred disposition, these provisions are not applicable to youth like Michael. RCW 12.40.010.

Instead, Michael will be forever known as a sex offender. Michael's record will never be sealed. RCW 13.50.260(1). The Legislature prohibits juveniles convicted of sex offenses from sealing their records. See Laws of 1997, ch. 338, § 40(11). While the State also notes that the ability to seal was made easier for juvenile offenders in 2015, children like Michael are exempted from this change. 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).

Meanwhile, 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/.

Juvenile prosecutions differ from current and historical adult felony and misdemeanor prosecutions in only two ways – the name attached and the absence of a jury. This is an insufficient basis for denying Michael the right to a jury trial. Because Michael was denied his due process right to a jury trial, reversal is required.

c. The framers of the United States Constitution did not exclude juveniles from the Sixth amendment right to a jury trial.

The State attempts to distinguish between the right to a jury trial under the federal constitution by arguing juveniles are not subject to criminal prosecution in juvenile court. Respondent's brief, 21. As with the Washington constitution, this is not a valid distinction.

The Sixth Amendment makes no distinction between adults and juveniles. At the time of the drafting of the amendment, there was no such distinction. Julian Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 106 (1909). When challenges to a non-jury trial system created after the Constitution was enacted were denied, it was because "the [juvenile] proceedings were not adversary" and "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). As argued above, this is not a valid distinction in Washington State.

More importantly, there is no indication the right to a jury trial was ever intended to be denied to juveniles. The only relevant question in determining whether this right was intended to be excluded from juveniles is to examine the framer's intent. Issues of reliability, efficiency and semantics are unimportant. *Hurst v. Florida,* ___ U.S.

___, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016); *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). 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.

B. CONCLUSION

Reversal is required because of the State's failure to establish Michael did not act as a reasonable child and because Michael was not afforded his due process right under the Washington and federal constitution to a jury trial.

DATED this 15th day of June 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 33568-2-III
	)	
M.R.F.,	)	
	)	
JUVENILE APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JUNE, 2016.

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