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THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

M.A.G.,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

The juvenile court did not properly analyze the admission of hearsay statements and erroneously admitted unduly prejudicial evidence. Moreover, M.A.G. was denied his right to a jury trial. This Court should reverse M.A.G.'s convictions and remand the matter to juvenile court for a new trial.

B. ASSIGNMENTS OF ERROR

1. The court erroneously admitted hearsay evidence.

2. The court erred in entering findings 3, 4, and 5 in its order on Admissibility of Child Hearsay.

3. RCW 13.04.021 violates Article I, section 21 and Article I, section 22.

4. RCW 13.04.021 violates the Sixth and Fourteenth Amendments.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Hearsay is generally inadmissible. RCW 9A.44.120, however, permits admission of hearsay statements by young children when the statement is deemed to be reliable. The reliability of the statements is assessed according to nine factors articulated in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). These factors must be “substantially

met” before the hearsay statements may be admitted. Where a proper application of the *Ryan* reveals hearsay statements were not reliable, did the court error in admitting the evidence?

2. Article I, section 21 and Article I, section 22 of the Washington Constitution provide for a jury trial for all individuals accused of a crime. The scope of the jury-trial right is determined by the framers’ intent and the right as it existed at the time the Washington Constitution was adopted. Where, at the time the constitution was adopted, and for nearly 50 years thereafter, juveniles charged with crimes were afforded a jury trial, do Article I, section 21 and Article I, section 22 require a jury trial for a juvenile accused of a crime?

3. The Sixth and Fourteenth Amendments to the United States Constitution require the states to provide a jury trial to all individuals accused of a crime. The scope of this right is determined by the framers’ intent and the right as it existed at the time the Sixth Amendment was adopted. Where, at the time the amendment was adopted, juveniles charged with crimes were afforded a jury trial, does the Sixth Amendment require a jury trial for a juvenile accused of a crime?

D. STATEMENT OF THE CASE

K.E., 8 years-old, was visiting her aunt's house for the weekend. Also present were several other members of her extended family including M.A.G., her 16 year-old cousin. CP 43.

Several days later, under questioning by her mother, K.E. told her mother that while at her aunt's house M.A.G. had touched her vagina. CP 44. K.E.'s mother testified that K.E. told her M.A.G. tried to have sex with her but could not. *Id.*

After her mother reported her allegations, K.E. met with an interviewer from the prosecutor's office. CP 44. During the taped questioning, K.E. repeated the allegations she had made when questioned by her mother. *Id.*

The State charged M.A.G. with one count each of attempted first degree rape of a child and first degree child molestation. CP 26-27.

At trial in juvenile court, M.A.G. objected to the testimony of K.E.'s mother and the prosecutor's interviewer arguing it was improper hearsay. RP 81, 221. The court admitted the evidence concluding it was admissible under RCW 9A.44.120. CP 35-36.

The trial court convicted M.A.G. of both counts. CP 49.

M.A.G. appealed and the court appointed counsel. In April 2017, appointed counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) asserting there were no nonfrivolous issues and asking to withdraw as counsel. Shortly after filing the *Anders* brief in this case, and six months before his motion to withdraw was granted, appointed counsel took a position as a deputy prosecuting attorney.

In October 2017, this Court granted appointed counsel's motion to withdraw.

Various amici curiae filed a motion to reconsider arguing M.A.G. was denied his right to counsel on appeal. In response this Court appointed new counsel to file a motion to reconsider.

After new counsel was appointed, M.A.G. filed a motion to reconsider asserting he was denied his right to the assistance of counsel on appeal in two ways. First, counsel and this Court did not comply with the requirements of *Anders*. Second, counsel effectively withdrew long before his motion to withdraw was granted. This court agreed and withdrew its opinion.

E. ARGUMENT

1. The trial court erroneously admitted hearsay evidence.

a. Hearsay is generally inadmissible.

Generally hearsay statements are not admissible at trial. ER 802. Out-of-court statements made by young children may be admissible at trial under RCW 9A.44.120 only in specific circumstances and only when the statements are determined to be reliable. *Ryan*, 103 Wn.2d at 177. *Ryan* identified several factors which must be assessed in determining the reliability of statements. Those factors are:

(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; and (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 (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Id at 175–76.

While no single factor, taken alone, is decisive, “the factors must be ‘substantially met’ before a statement is demonstrated to be

reliable.” *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). Here, the juvenile’s court analysis of these factors was superficial, incomplete and erroneously led to the admission of prejudicial hearsay statements.

b. The court improperly admitted hearsay evidence.

At trial, and over M.A.G.’s objection, the court permitted the State to offer the testimony of K.E.’s mother and an interviewer employed by the prosecutor regarding statements attributed to K.E.. CP 35-36; RP 229. This testimony bolstered K.E.’s own testimony regarding the details of what she claimed M.A.G. had done. The court’s reasoning rests on improper application of the *Ryan* factors.

The trial court noted K.E. made the statements to more than one person, first to her mother and then to an employee of the prosecutor’s office after the initial allegations were reported. CP 35. But the fact the fact that she repeated the claim after her mother contacted authorities does not demonstrate the reliability of the statements her mother attributed to her.

Ryan requires the court asks whether the statements were “made spontaneously [or] in response to questioning.” 103 Wn.2d at 176.

K.E.'s statements were undeniably made in response to questioning, the court wrongly concluded the statements were spontaneous.

The statements attributed to K.E. were the product of questioning by her mother. In the absence of any claim by K.E. that anyone had done anything to her, her mother pointedly asked her "has anyone touched you?" RP 80. When K.E. did not affirmatively respond, her mother told her that because she was nearly 9 she "[had] to tell [her] mom more than what [she] used to." RP 81. Only after that prodding did K.E. claim anything had occurred. Those statements were plainly not spontaneous.

K.E.'s statements to the prosecutor's interviewer were certainly not spontaneous. Those statements were made only after the initial allegations were reported and were plainly the product of an interview. K.E.'s statements to the prosecutor's interviewer could not possibly be viewed as spontaneous.

Nonetheless, the trial court concluded the statements were "spontaneous as defined by the case law." CP 36. The court reached that conclusion without differentiating between the spontaneity of the statements to her mother and those made to the interviewer. In its oral ruling, the court reasoned the spontaneity factor only asked whether

there was an “effort to manipulate.” RP 225. Such reasoning is result driven. A spontaneous declaration may suggest the absence of motivation of the reporting witness while a statement that is the product of questioning may suggest the opposite. The point of the factors is to assist in identifying such motives or their absence. If one analyzes the *Ryan* factors only after concluding the purity of the reporting witness’s motivation the analysis is rendered meaningless.

Moreover, *Ryan* made clear, the court must not only assess the declarant’s motives but also those of the witness who claims to have heard the statements. In that case, the Court specifically noted that due to the circumstances of the questioning, the reporting witnesses were “arguably predisposed” to seek to confirm abuse. 103 Wn.2d at 176. Here, K.E.’s mother had previously accused M.A.G.’s father of molesting her. RP 150. Despite those past allegations M.A.G.’s father was never prosecuted or convicted based on those allegations. That history is plainly relevant to K.E.’s mother’s motivations and her claims of what her daughter told her. *Ryan* requires the court to assess that motivation. The trial court did not do so.

Moreover, that motivation should be explored when examining the relationship between K.E. and the reporting witness; her mother.

Ryan noted the fact that the reporting witness was the child's mother meant the relationship was "understandably of a character which makes their objectivity questionable." 103 Wn.2d at 176. *Ryan* recognized parents "understandably" wish to protect their children when it recognized the parent-child relationship gives reason to question the reliability. That is especially true where the parent has previously leveled similar unfounded allegations against the accused's family. The trial court did not properly address this factor.

Ryan further requires a court determine whether there are assertions of past fact. The statements attributed to K.E. were unquestionably assertions of past facts. The juvenile court, however, did not address this in either its oral or written ruling.

The Court's analysis of the *Ryan* factors is incomplete and erroneous. As in *Ryan*, a proper application of the analysis leads to the conclusion that the statements were not reliable. The juvenile court should not have permitted admission of the hearsay statements.

c. This Court should reverse M.A.G.'s convictions and remand the matter to juvenile court.

A trial court's evidentiary error requires reversal if it prejudices the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is prejudicial where, within reasonable probabilities, the outcome would have differed but for the error. *Bourgeois*, 133 Wn.2d at 403.

Here the error is prejudicial. The testimony of K.E.'s mother and the interviewer bolstered the testimony of K.E. The trial court findings conclude the testimony of K.E.'s mother and the interviewer was credible, and those findings detail that testimony. CP 44-45. The court could not have made such findings had it properly excluded the testimony under *Ryan*. Reversal is required.

Additionally, this Court should remand this case to the juvenile court despite the fact that juvenile jurisdiction has lapsed with the M.A.G.'s eighteenth birthday and completion of his sentence. M.A.G. was sentenced on October 17, 2016. CP 49. The court imposed a total sentence of 45 to 76 weeks. CP 50. M.A.G. turned 18 on January 21, 2017. CP 49. The disposition order extended juvenile court jurisdiction to permit the completion of the sentence. CP 54. Thus, juvenile court

jurisdiction was extended to at least late July, 2017 and perhaps as late as January 2018.

Long before that, and as this Court is aware, M.A.G.'s appointed counsel on appeal effectively withdrew from this case, leaving M.A.G. without counsel. M.A.G.'s motion to reconsider asserted he was denied his right to the assistance of counsel on appeal in two ways. First, counsel and this Court did not comply with the requirements of *Anders*. Second, counsel effectively withdrew long before his motion to withdraw was granted. This Court agreed.

Critically, had previous counsel timely raised the challenge to the erroneous admission of hearsay, M.A.G.'s remedy would have been remand to juvenile court as that court's jurisdiction had not lapsed. Instead, because he was denied the effective assistance of counsel on appeal, M.A.G. can only now raise this claim after juvenile jurisdiction has lapsed.

When a court addresses the denial of the right to counsel "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *State v. Maynard*, 183 Wn. 2d 253, 262, 351 P.3d

159 (2015) (citing *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981)).

In *Maynard* the Court found counsel ineffective for failing to move to extend jurisdiction in order to permit her client time to accept the State's plea offer. Before he could accept the offer he turned 18. Because jurisdiction lapsed the State refiled the charges in adult court where the client faced a harsher sentence. Upon finding counsel ineffective the Court remanded the matter to juvenile court reasoning that was the remedy which placed him "in the same position he was in before the violation of his right to effective representation." *Maynard*, 183 Wn.2d at 262.

Similarly, upon concluding the erroneous admission of hearsay evidence requires returning M.A.G.'s case to juvenile court places him in the same position he was in before he was denied his right to counsel. Indeed, anything else causes further harm from denial of counsel on appeal.

If this Court agrees the erroneous admission of hearsay warrants a new trial, but disagrees that remand to juvenile court is the proper remedy, M.A.G. withdraws the argument.

2. The Washington Constitution affords juveniles the right to a jury trial.

a. The Washington Constitution is more protective of the right to jury trial than the federal constitution.

Article I, section 21 provides the right to a jury trial shall remain “inviolable.” Article I, section 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.”

This Court has concluded application of the criteria of *State v. Gunwall*¹ indicates a broader right to a jury trial under the Washington Constitution. *State v. Smith*, 150 Wn.2d 135, 156, 75 P.3d 934 (2003). 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.

Smith clarified:

in order to determine the scope of the jury trial right under the Washington Constitution, it must be analyzed

¹ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

in light of the Washington law that existed at the time of the adoption of our constitution.

150 Wn.2d at 153.

Smith concluded the broader state guarantee did not require a jury determination of a defendant's prior "strikes" in a persistent offender proceeding. *Id.* *Smith* rested that conclusion on one principle 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. Therefore, 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, section 21 and Article I, section 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. Code of 1881, ch. 87, §1078. Even after the juvenile court's inception in 1905, juveniles were statutorily entitled to trial by jury until 1937 when the Legislature struck the right.

Laws of 1937, ch. 65, § 1, at 211.² Beginning in 1909, 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 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 nearly 50 years thereafter. Under *Smith* that history leads to the conclusion that juveniles must be afforded a jury trial today.

b. In Smith, the Court disavowed the Gunwall analysis it employed in State v. Schaaf with respect to jury trial for juveniles.

In *State v. Schaaf*, the Court 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* concluded that even

² 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.” Laws of

though the right to a jury trial for juvenile 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.

It is clear, the examination in *Schaaf* of the framers' intent based upon legislation that came decades later was disavowed in *Smith*.

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. *Schaaf's* reliance on a statute enacted nearly 50 years after the drafting of Article I, section 21 is incompatible with the standard announced in *Smith*. The jury trial right protected in Article I, sections 21 and 22 is that which existed in 1889.

Subsequently enacted statutes cannot alter the scope of that right. The later decision in *Smith* disavowed the analysis employed in *Schaaf*. In any event the two analyses are wholly incompatible and only one can remain. Resolution of the conflict within this Court's case law impacts

1905 ch. 18, § 2 (repealed, 1937). This provision remained substantially unchanged through revisions of the statute in 1909, 1913, 1921, and 1929.

a significant constitutional right and is a matter of substantial public interest meriting review under RAP 13.4.

c. The scope of the state constitutional right to a jury is triggered by the “criminal stigma” which attaches to the proceeding rather than the label attached to the proceeding.

As the Court subsequently disavowed its own analysis in *Schaaf* it is important to address the other aspects of *Schaaf’s* reasoning. *Schaaf* reasoned that the jury-trial right did not extend to juvenile adjudications because for several decades Washington had made every effort “to avoid accusing and convicting juveniles of crimes.” 109 Wn.2d at 15. That observation is no longer true in law or fact.

The information in this case states:

By this Information, the Prosecuting Attorney for Whatcom County, Washington, accuses you of the **crime(s)** of Rape in the Second Degree

CP 1 (Emphasis added.) The filing of an Information is precisely the same manner of charging that is employed in adult cases. The substantive offenses alleged are precisely the same in juvenile and adult proceedings. Any distinction in the manner of charging that *Schaaf* believed to exist is indiscernible and was certainly not appreciated by

the prosecutor in this case. The State plainly believed, and rightly so, it was charging M.A.G. with a “crime.”

What *Schaaf* seems to have meant was that the State had made every effort to avoid calling juvenile offenses “crimes” and to use the term adjudication to avoid the term “conviction.” The Legislature has said “An order of court adjudging a child a juvenile offender or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime.” RCW 13.04.240. But that is not so categorical as it might appear, as the Legislature has also said “‘Conviction’ means an adjudication of guilt pursuant to Title 10 or 13 RCW” RCW 9.94A.030(9). Indeed only a few years after *Schaaf* the Court held juvenile offenders had been “convicted” of a crime for purpose of a DNA collection statute, recognizing:

the Legislature’s use of “conviction” in statutes to refer to juveniles appears to be endemic. Numerous other statutes, including sections of the Sentencing Reform Act of 1981, RCW 9.94A, and the Juvenile Justice Act of 1977, RCW 13.40, use “convicted” to reference both adult and juvenile offenders.

Matter of Juveniles A, B, C, D, E, 121 Wn.2d 80, 87-88, 847 P.2d 455 (1993). More recently, the Court relied upon *A, B, C, D, E* to conclude a juvenile adjudication is a “conviction” upon which the state can

predicate a petition for indefinite confinement as a sexually violent predator. *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)). The Legislature has not truly sought to distinguish between “convictions” and “adjudications” or “offenses” and “crimes.”

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, sections 21 or 22 use the term “conviction” nor otherwise limit their reach based upon that term. Instead, Article I, section 21 simply guarantees “the right of trial by jury shall remain inviolate.” Article I, section 22 guarantees the right to an impartial jury to all persons in criminal prosecutions. 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). Just as the Legislature cannot avoid a jury determination of facts by terming them “aggravating factors” as opposed to “elements” it cannot deny a jury trial by terming a conviction an “adjudication.”

This Court has observed

As for those offenses which carry a criminal stigma and particularly those for which a possible term of imprisonment is prescribed, the constitution requires that a jury trial be afforded unless waived.

Pasco v. Mace, 98 Wn.2d 87, 100, 653 P.2d 618 (1983). *Mace* recognized the mere possibility of incarceration triggered the right to jury: “no offense can be deemed so petty as to warrant denying a jury if it constitutes a crime.” *Id.* at 99. The Court explained any offense defined by the legislature as either a felony or misdemeanor is a “crime.” *Id.* (quoting RCW 9A.20.010). Second degree rape is a Class A felony. RCW 9A.44.050.

A juvenile adjudication, just like a felony conviction, or even the municipal court proceeding at issue in *Mace*, plainly carries a possible term of imprisonment. Moreover, whether it is formally termed a “criminal conviction” or not, an adjudication of second degree rape

carries the same stigma as an adult conviction. To most observers any distinction between an adjudication and a conviction is lost. Future landlords or employers are unlikely to appreciate any distinction when performing background checks as authorized by RCW 43.43.830(6). M.A.G. will be required to register as a sex offender, provide public notification of his offense, just as any adult convicted of the crime.

RCW 9A.44.130. 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>. Future neighbors or coworkers learning such information are not likely to distinguish his "offense" from other convictions.

The criminal stigma and possibility of incarceration are the same regardless of the label the Legislature has attached to the proceeding. Indeed, the stigma and range of possible incarceration is far greater in this case than the municipal proceedings at issue in *Mace*. As *Mace* recognized, such proceedings must include a jury unless that right is waived. 98 Wn.2d at 100.

d. There are no significant distinctions between juvenile and adult proceedings which justify the denial of the right to a jury trial.

i. The degree to which juvenile proceedings “resemble” an adult proceedings is not the constitutional standard for providing the right to a jury.

Schaaf concluded the right to a jury trial does not attach because “juvenile proceedings do not yet so resemble adult proceedings.” 109 Wn.2d at 13. That is a standard divorced from the language of Article I, sections 21 and 22. The constitutional provisions do not limit the jury right to proceedings which resemble adult proceedings. In fact, the absence of such a limitation is readily explained by the fact that in 1889, and until 1937, juveniles were entitled to a jury. Thus, the framers had no basis to limit the right to only those cases which “resemble an adult proceeding.” The framers’ understanding based upon the then-existing law was that juries were provided in **all** proceedings. In light of that, it is nonsensical to ask how much one proceeding resembles another as a means to determine when a jury must be provided.

That standard is inherently manipulable. In *Blakely* the Court rejected challenges to its bright-line definition of an element as a fact

which increases the penalty to which a person is exposed, noting the alternative was to leave it to judges to determine whether the fact-finding went “too far” beyond undefined limits. *Blakely*, 542 U.S. at 308. The court rejected that alternative, observing:

Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them. . . .
. . . . [T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Id.

The same can be said of the Washington Constitution. The degree to which one proceeding resembles another is inherently subjective, especially in the absence of any pronouncement of what degree of resemblance is necessary; must one proceeding mirror the other in all respects or is 75% or 95% overlap sufficient? That, of course, assumes there is some means to even measure that overlap. As *Blakely* recognized, such a standard is a goalpost that can always be moved. The framers’ inclusion of the right to a jury trial in two separate provisions of the Washington Constitution seems a likely indication they did not trust government to define the scope of that right, perhaps

even less so than the federal framers who only included a single provision.

There is every reason to conclude the framers broadly extended the right based simply upon the belief and then-current practice that every person enjoyed the protections of a jury whenever charged with an offense. Indeed, when the juvenile courts were established less than 20 years later, there was no qualification of the right to jury trial. The metric of whether a proceeding resembles adult criminal proceedings was foreign to the framers and cannot determine whether one prosecution or another is afforded the protections of a jury.

ii. Juvenile proceedings do in fact resemble adult felony and misdemeanor proceedings in all meaningful respects.

Even if one employs the malleable “resemble” standard, it is difficult if not impossible to distinguish juvenile and adult proceedings. Importantly, the relevant comparison is not just with adult felonies but misdemeanors as well, as each group is afforded the jury-trial right without reservation. Further, that comparison cannot be limited to current adult felony procedures but must account for historical practices too, as adult felony defendants have always enjoyed the protections of a jury despite the various historical procedural permutations.

M.A.G. is required to provide the court with a collection of his personal data. He must provide a DNA sample and submit to fingerprinting and photographing by the Sheriff upon arrest. RCW 43.43.735; RCW 43.43.754. No statutory provisions require future destruction of these records and 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).

As discussed previously, M.A.G. must register as a sex offender. RCW 9A.44.130. While M.A.G. has a greater ability to be removed from the registration list than if he were an adult, there is no guarantee he will be removed. See, RCW 9A.44.143(2). Just as an adult conviction, the present juvenile conviction could subject M.A.G. to involuntarily commitment under RCW 71.09. *Anderson*, 185 Wn.2d at 86.

Children 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.

M.A.G.'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 recent legislation eased sealing requirements for many juvenile, children like M.A.G. were exempted from sealing their records based upon their offense. RCW 13.50.260(4).

As juvenile convictions take on an increasingly punitive focus, the options available to adults charged with felonies have become increasingly broadened to include a greater focus on rehabilitation. 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 for adults. 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. 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, options long available to adult misdemeanor defendants and increasingly available for adult felony defendants. 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/>. Suspended sentences and probation-only sentences have long been available to misdemeanor defendants, and prior to the 1984 advent of the Sentencing Reform Act, were available for all but the most serious adult felonies. RCW 9.92.060. Indeed, for

felonies committed prior to 1984, such sentences are still available today.

Minors and young persons 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. *See Maynard*, 183 Wn.2d at 264 (remedy caused by ineffective assistance is to remand to adult court for further proceedings in accordance with the Juvenile Justice Act). Even an adult convicted of a felony is entitled to have the sentencing court consider youthfulness as a factor in sentencing the person below the standard range. *State v. O'Dell*, 183 Wn.2d 680, 688, 358 P.3d 359 (2015).

It is clear 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. Rehabilitative models in adult sentencing have never justified the denial of the right to a jury trial for adults. Nor could one seriously contend that altering the purposes of the SRA to focus more on rehabilitation would permit the denial of jury trials in adult criminal case. A rehabilitative approach to juvenile or adult prosecutions cannot be determinative or alter the right to a jury trial.

e. RCW 13.04.021 violates Article I, sections 21 and 22.

Smith requires courts define the right to a jury trial by the right which existed in 1889. Subsequent, or even nearly contemporaneous, Legislative acts cannot enter the inquiry. In so holding, the Court disavowed the analysis employed in *Schaaf*. Because juveniles had the right to a jury trial in 1889, they have that right today. The Legislature's effort to strip away that right in RCW 13.04.021 deprives juveniles of that right.

3. The Sixth Amendment requires a jury in criminal prosecutions.

a. The Sixth Amendment makes no distinction between adults and juveniles.

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, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (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 in 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. *Id.* at 543-51.

b. *The original intent of the Sixth Amendment guarantees juveniles the right to a jury trial.*

Recent United States Supreme Court cases including *Blakely*, *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013) demonstrate that in interpreting the Sixth Amendment, 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.

F. CONCLUSION

The trial court did not properly analyze the admission of hearsay statements and erroneously admitted unduly prejudicial evidence. this court should reverse m.a.g.’s convictions and remand the matter for a jury trial in juvenile court.

Respectfully submitted this day of July 2018.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 49658-5-II
)	
M.A.G.,)	
)	
Juvenile Appellant.)	

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