74061-0

FILED
June 1, 2016
Court of Appeals
Division I
State of Washington

No. 74061-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN G. ,

Appellant.

BRIEF OF APPELLANT

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

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A. ASSIGNMENT OF ERROR

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

2. RCW 13.04.021 violates the Sixth and Fourteenth Amendments.

B. ISSUES PRESENTED

1. 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?

2. 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?

C. STATEMENT OF THE CASE

A group of four individuals gathered at the home of Tricia Nevins one evening. CP 76. Ms. Nevins and another adult, her boyfriend Jace Jeffries, purchased alcohol for the group. Ms. Nevins and Mr. Jefferies, together with Kevin G. and another minor, Keoni, drank throughout the evening to the point of extreme intoxication. CP 76. Ms. Nevins recounted that at one point as she stood on her porch she urinated on herself and later vomited. *Id*. She later passed out on the couch.

Throughout the evening Mr. Jefferies grew increasingly angry at Ms. Nevins, believing she was flirting with Kevin. 5/7/15 RP 91. Eventually Mr. Jefferies left the house. CP 77.

When Mr. Jefferies returned he saw Kevin exit the bedroom without a shirt on. *Id*. The court found Ms. Nevins, at that point told Mr. Jefferies, Kevin raped her. *Id.*

Keoni recalled spending a lengthy period of time in the bathroom vomiting. Keoni testified he did not hear any screaming or yelling. CP 76.

The State charged Kevin with one count of second degree rape. The juvenile court found Kevin guilty.

The court found Kevin had sexual intercourse with Ms. Nevins. CP 77. The court found he did so with forcible compulsion, by forcing her legs open and using the weight of his body to hold her down during intercourse. *Id*.

D. ARGUMENT

1. 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 "inviolate." 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."

The Supreme 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

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

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 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.

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 1905 ch. 18, § 2 (repealed, 1937).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

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 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.

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 statue 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 do not alter the scope of that right. The later decision in *Smith* disavowed the analysis employed in *Schaaf*.

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 Kevin 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 has 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, 457 (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, section 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."

The 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." *Mace*, 98 Wn.2d 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 backgrounds checks as authorized by RCW 43.43.830(6). Kevin 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.

Kevin 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, Kevin must register as a sex offender. RCW 9A.44.130. While Kevin 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 removed. See, RCW 9A.44.143(2). Just as an adult conviction, the present juvenile conviction could subject Kevin 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.

Kevin'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 Kevin 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 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 an adult convicted of a felony is entitled to

have the sentencing court consider youthfulness as a factor the 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.

2. 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, 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 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. *McKeiver*, 403 U.S. 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. ___, 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

Because it was obtained in violation of his right to a jury trial, Kevin's conviction must be reversed.

Respectfully submitted this 1st day of June, 2016.

s/ Gregory C. Link
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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 74061-0-I
	)	
KEVIN G.,	)	
	)	
JUVENILE APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** 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 1ST DAY OF JUNE, 2016.

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