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No. 66577-4-I

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

STATE OF WASHINGTON,
Respondent,
v.
QUINCY CHILDRESS,
Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION

Quincy Childress was a 15-year-old child at the time of the crime charged in this case. His childhood had been terrible. The State removed him from his parents' home when he was two years old and placed him in a series of foster homes in which he was sexually and physically abused.

Following his repeated victimization, Quincy began wetting the bed and acting out sexually, but he had no criminal history before the offense at issue here. In 2009, a counselor at Cypress House reported that Quincy had put his thumbs on her throat and briefly penetrated her vagina with his finger. The State charged Quincy with second-degree rape, and asked the juvenile court to decline jurisdiction and transfer the case for adult prosecution.

The juvenile court declined jurisdiction, concluding the crime was serious and the juvenile system was not likely to be able to rehabilitate Quincy. The court acknowledged the many studies Quincy presented showing that juvenile sex offenders rarely commit sex offenses as adults, and that scientists cannot accurately predict which few juveniles will sexually reoffend as adults. But the court relied on an evaluation performed on Quincy in 2008 when he was 13 years old which had labeled him a high risk to offend. The court

did not acknowledge the fact that the 2008 risk assessment was performed using two of the tools found to be inaccurate according to the articles Quincy cited. The court also did not address the fact that the 2008 evaluation by its own terms was inaccurate and obsolete. The evaluation stated:

It should be noted that there is no empirically validated method for appraising the risk of a young person to engage in harmful/delinquent behavior. ... [C]onclusions of these risk assessments should be considered invalid outside the period of at most, 6 to 12 months.

This Court should reverse because the State failed to prove by a preponderance of the evidence that declination of juvenile jurisdiction was in the best interest of the child or the public. The court's findings are not supported by substantial evidence. Additionally, the declination procedure violated Quincy's Sixth and Fourteenth Amendment rights, because he was subjected to significantly greater punishment based on facts not proved to a jury beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR

1. The juvenile court abused its discretion in declining jurisdiction.

2. The juvenile court erred in concluding “[t]hat it is in the best interest of the Respondent or the public to decline Juvenile Court jurisdiction and transfer the case to adult Court for prosecution as an adult.” CP 248.

3. The juvenile court erred in concluding “that decline of jurisdiction is appropriate in this case.” CP 248.

4. In the absence of substantial evidence, the juvenile court erred in finding “[t]he protection of the community requires waiver, given the seriousness of the alleged offense.” CP 247.

5. In the absence of substantial evidence, the juvenile court erred in finding that “[t]he alleged offense was committed in an aggressive, violent, premeditated, or willful manner.” CP 247.

6. In the absence of substantial evidence, the juvenile court erred in finding that “Juvenile Court procedures, services and facilities are not likely to result in reasonable rehabilitation of the Respondent or adequate protection of the public.” CP 248.

7. The juvenile court abused its discretion in denying the motion to reconsider the order declining jurisdiction.

8. The juvenile court declination procedure violates the Due Process Clause of the Fourteenth Amendment because it requires

proof of certain facts by only a preponderance of the evidence rather than beyond a reasonable doubt.

9. The juvenile court declination procedure violates the Sixth Amendment right to a jury trial because it requires that a judge, not a jury, find facts justifying declination.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The juvenile court has exclusive jurisdiction over 15-year-old alleged offenders unless the State proves that prosecuting the child as an adult would be in the best interest of the child or the public. Here, the juvenile court declined jurisdiction on the basis that Quincy was alleged to have committed a serious offense and was unlikely to be rehabilitated by treatment in the juvenile system. But the facts of the alleged crime were unremarkable relative to other second-degree rapes, and the risk assessment the court relied on to find Quincy untreatable was, by its own terms, inaccurate and obsolete. Did the juvenile court abuse its discretion in declining jurisdiction?

2. The Sixth and Fourteenth Amendments require that every fact essential to punishment be proved to a jury beyond a reasonable doubt. Quincy was sentenced to a term of 84 months to life in prison. The facts most essential to this punishment – that

declination of juvenile court jurisdiction would be in the best interest of the child or the public based on a consideration of various factors – were found by a judge by a preponderance of the evidence. Absent these findings, Quincy’s maximum punishment was 40 weeks’ detention. Did the declination procedure violate Quincy’s Fourteenth Amendment right to due process and Sixth Amendment right to a jury?

D. STATEMENT OF THE CASE

Appellant Quincy Childress was born on August 13, 1994. CP 256. In May of 1996, Quincy’s mother left Quincy and his brother in the care of their father and moved to Washington, D.C. CP 265. After Quincy’s father neglected him and his brother, the children were removed from the home and placed in the custody of the State. CP 265. Quincy’s parents’ rights were terminated in 1998. CP 265.

The State placed Quincy and his brother in a series of foster homes. In January of 2002, DSHS recommended that the courts approve the foster family’s proposed adoption of Quincy and his brother. CP 267. However, the pre-adoptive father groomed Quincy and his brother for sexualized behavior and both pre-adoptive parents were emotionally abusive. CP 267. Among other

things, the foster father sexually abused the children by grabbing their genitals during bath time. CP 267.

The State removed Quincy and his brother from the home in which they had been sexually abused. CP 267. Shortly thereafter, Quincy engaged in sexualized behavior by asking his foster sister “if she wanted to play the hump game.” CP 267. Both Quincy and his brother also began to have problems wetting the bed and playing “humping” games at school. CP 268. The boys were diagnosed with fetal alcohol syndrome and ADHD. CP 268.

The State removed the boys from one abusive home only to place them in another. As with the previous home in which Quincy was sexually abused, the State again recommended adoption by the next foster family. However, Quincy and his brother were eventually removed from this home because they suffered physical abuse at the hands of their foster parents. CP 269.

As of 2007, Quincy and his brother had resided in at least 10 different foster homes. CP 252. As one social worker summarized, “[t]hese children have had an extensive history that involved physical abuse, neglect and emotional upheaval.” CP 271.

In 2007, Quincy was expelled from school for writing sexually explicit notes. He was also charged with fourth-degree

assault for throwing a crayon at his foster mother. He was then placed in Ruth Dykeman's Children's Center. CP 271.

In 2008 Quincy was placed at Northwest Children's Home in Lewiston, Idaho. He was arrested for allegedly attempting to sexually assault a program manager there. In the meantime, his mother had reconnected with him and sought reinstatement of her parental rights. Accordingly, Quincy was placed in the Pennsylvania Clinical School in order to be closer to his mother. CP 273. However, Quincy's older half-sister alleged that he sexually assaulted her during a visit, so Quincy moved back to Washington and was placed at Tamarack House and Cypress House, homes operated by Pioneer Human Services. CP 278.

In November of 2009 a counselor at Cypress House reported that Quincy had put his thumbs on her throat and briefly penetrated her vagina with his finger. 3 RP 37-45.¹ Police officers arrested 15-year-old Quincy, and the State charged him in juvenile court with second-degree rape. CP 496-97. The State

¹ There are three volumes of verbatim reports of proceedings in this case:
1RP: April 14th and September 21st in Juvenile Court
2RP: the remainder of the September 21st proceedings in Juvenile Court
3RP: trial and sentencing in Superior Court

subsequently asked the juvenile court to decline jurisdiction and transfer the case to the adult division of superior court.

Quincy opposed transfer. CP 489-93. He argued that most of the relevant factors cut in favor of the juvenile court retaining jurisdiction. He pointed out that although second-degree rape is an inherently violent crime, “[t]he Legislature has provided that Rape 2 charges against juveniles shall be prosecuted in juvenile court, unless something is proven which calls for decline.” This particular case was not “unusually chilling” relative to other second-degree rape cases. CP 490.

As to rehabilitation and community protection, Quincy argued there are “real safeguards provided by up to 5 years of juvenile commitment, during which time the respondent will pass through adolescence and have available a spectrum of treatment and counseling through JRA.” CP 493. If for some reason this proved insufficient, the State could then file a petition for Quincy's commitment pursuant to RCW ch. 71.09. CP 492.

The juvenile probation counselor who filed a report on behalf of the state said, “My position is that the Adult system will provide a longer period of confinement for the Respondent, thus protecting the community from him. I cannot determine through all of the

social information if this Respondent can be successfully treated by the age of 21.” CP 246.

At the declination hearing, the court invited the complaining witness to speak first. She said, “I’m here today to request that [Quincy] be charged as an adult for the crime he committed against me. He committed an adult act against an adult, and so he should be treated as one.” 1 RP 7.

The prosecutor then argued, “[Quincy] has been identified since he was 13 as a high risk for sexual offense and for a violent offense. ... And how can a young man his age be treated so he doesn’t reoffend, so the community is safer? And I don’t have the answer to that, your Honor.” 1 RP 11. He concluded, “I am asking for decline, because I just simply don’t have the answer that he can be successfully treated.” 1 RP 12.

Quincy’s attorney pointed out that this was not good enough under the law to decline jurisdiction. He said, “the presumption would be that he would stay in juvenile court unless it can be proven that it should be declined.” 1 RP 12. He also noted that the declination procedure essentially circumvents due process because in a proceeding under RCW ch. 71.09 the State would have to prove beyond a reasonable doubt that Quincy was likely to reoffend

but in a declination proceeding it has to prove a similar factor by only a preponderance of the evidence. 1 RP 15-16.

Despite his earlier claim that the State had no idea whether Quincy could be successfully treated, the prosecutor responded to Quincy's argument by insisting that Quincy "is, as we know, he's a time bomb and he is going to go off again." 1 RP 17. Quincy's attorney reminded the court that the State was required to prove the juvenile system was inadequate. 1 RP 18.

The juvenile court declined jurisdiction. The court stepped through the Kent factors orally, and on a written order checked off the factors that favored transfer to adult court. 1 RP 19; see Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

The court checked the following factors:

- The protection of the community requires waiver, given the seriousness of the alleged offense;
- The alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- The alleged offense was against a person or persons;
- Juvenile Court procedures, services and facilities are not likely to result in reasonable rehabilitation of the Respondent or adequate protection of the public.

CP 247-48.

The court did not check the following factors, and indicated they did not cut in favor of declination:

- The alleged offense resulted in personal injury;
- The complaint has prosecutive merit;
- The alleged offense was committed with adult co-defendants, making trial and disposition of the entire matter in one Court desirable;
- The sophistication and maturity of the Respondent as shown by his home, environment situation, emotional attitude and pattern of living is such that the Respondent should be treated as an adult;
- The Respondent's history of police contacts, Juvenile Court proceedings, probation periods, or commitments to juvenile institutions indicate that the Respondent should be treated as an adult.

CP 247-48.

In addressing the first factor, the Court misunderstood the adult sentencing scheme and stated, "the standard range for this offense would be 78 to 102 months, six and a half to eight and a half years in the Department of Corrections, and parole would be up to an additional ten years after incarceration." 1 RP 20. This is how the State had characterized the adult sentence, but Quincy's attorney had earlier tried to explain that in fact an indeterminate life sentence is required for second-degree rape. CP 491. In any

event, the Court found the protection of the community required waiver given the seriousness of the offense. 1 RP 20-21.

The court found the second factor favored decline because the offense appeared to be premeditated. 1 RP 21. As to the third factor, there was no dispute that the offense was against a person. The court found the “prosecutive merit” factor was neutral.

The court found that because there were no adult co-defendants, the fifth Kent factor favored prosecution in juvenile court. 1 RP 21. Similarly, the court found the “maturity” factor weighed against transfer to adult court. 1 RP 22. The court also found that the factor regarding “previous history” weighed against decline. 1 RP 22.

As to the final factor – prospects of adequate protection of the public and likelihood of reasonable rehabilitation – the court recognized that the probation report stated this factor “is not known.” But the court said Quincy had a history of “sexualized behaviors” for which therapy had not been successful. 1 RP 22-23. Thus, the court found the final factor weighed in favor of decline, and that “it is appropriate to decline jurisdiction in juvenile court.” 1 RP 23.

Quincy filed a motion to reconsider. CP 86-95. He attached numerous studies showing that adolescent sexual offending is rarely associated with later adult offending. CP 96-242. Furthermore, a National Task Force on Juvenile Sex Offending concluded that “there are no scientifically validated instruments or criteria to assess risk of re-offense” for juvenile sex offenders.” CP 156. Another study concluded that none of the instruments developed in the last 20 years – including those used to evaluate Quincy – were able to significantly predict which youth sexually reoffended. CP 156.

Yet another author gathered findings showing that “delinquents in general are at higher risk for offending during their adolescent years and tend to desist from offending in early adulthood.” CP 176. “Thus, variables that predict repeated sexual misconduct in an adolescent may differ from those that predict persistence into adulthood.” CP 176. As one psychologist summarized, “juvenile sex offending does not predispose a youth to adult sex offending and ... it is beyond the reach of science to identify which [juveniles] are likely to sexually recidivate as adults.” CP 160.

Cognitive changes related to brain development, hormonal changes related to the onset of puberty, the role of family and peer relationships, judgment, impulse control, bonds to school and other pro-social groups, and the response to social stressors such as child abuse could all play an important role in repeated adolescent sexual misconduct but may have little influence on persistent adult sexual offending. As a result, developmentally sensitive interventions, targeted over a short time frame, are apt to be more effective and to have fewer unintended negative effects.

CP 177.

Quincy also noted that recent Supreme Court cases endorsed findings like those cited above. The Court has emphasized that juveniles are different and must be treated differently by the justice system. CP 88-89 (citing Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)).

The court denied the motion to reconsider. It stated, “The court still concludes that the decline is appropriate due to the 2008 risk assessment and the other facts presented at the 4/14/10 decline hearing.” CP 82. The court did not address the fact that the 2008 risk assessment that was performed on Quincy when he was 13 years old was performed using two of the tools found to be inaccurate according to the articles Quincy cited. The court also did not address the fact that the 2008 evaluation itself stated:

It should be noted that there is no empirically validated method for appraising the risk of a young person to engage in harmful/delinquent behavior. ... Adolescence is a period of significant change and growth in many developmental areas such as cognitive functioning, emotional awareness, social competency, and both physical and sexual development. ... [C]onclusions of these risk assessments should be considered invalid outside the period of at most, 6 to 12 months.

CP 293.

Quincy was transferred to adult court, convicted as charged, and given a mandatory indeterminate life sentence despite an offender score of zero. CP 19-34. He timely appeals. CP 2-18; 81.

E. ARGUMENT

1. THE JUVENILE COURT ABUSED ITS DISCRETION IN DECLINING JURISDICTION BECAUSE THE STATE FAILED TO PROVE IT WOULD BE IN THE BEST INTEREST OF THE CHILD OR THE PUBLIC.

a. Under Washington law, the State bears the burden of proving, by a preponderance of the evidence, that the declination of juvenile jurisdiction would be in the best interest of the child or the public. Under RCW 13.04.030(1)(e)(i), juvenile courts have exclusive original jurisdiction over all proceedings relating to children alleged to have committed offenses unless the juvenile court transfers jurisdiction of a particular child to adult criminal court

pursuant to RCW 13.40.110. RCW 13.40.110, in turn, provides, “The court after a decline hearing may order the case transferred for adult criminal prosecution upon a finding that the declination would be in the best interest of the juvenile or the public.” RCW 13.40.110(3). The court “shall set forth in writing its findings, which shall be supported by relevant facts and opinions produced at the hearing.” RCW 13.40.110(4).

The State bears the burden of proving by a preponderance of the evidence that declination and transfer is appropriate. State v. Massey, 60 Wn. App. 131, 137, 803 P.2d 340 (1991). The juvenile court should consider the following eight criteria when determining whether to decline jurisdiction:

1. The seriousness of the alleged offense and whether the protection of the community requires waiver;
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
3. Whether the alleged offense was against persons or property, with greater weight given to offenses against persons especially if personal injury resulted;
4. The prosecutive merit of the complaint;
5. The desirability of trial and disposition of the entire offense in one court when the juvenile’s associates in the alleged offense are adults;

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living;
7. The record and previous history of the juvenile, including previous contacts with law enforcement agencies and juvenile courts, or prior commitments to juvenile institutions; and
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.

State v. Holland, 98 Wn.2d 507, 516 n.2, 656 P.2d 1056 (1983)

(citing Kent, 383 U.S. at 566).

This Court reviews a declination order for abuse of discretion and factual findings for substantial evidence. State v. M. A., 106 Wn. App. 493, 498, 23 P.3d 508 (2001). But the trial court's exercise of discretion in a juvenile declination hearing is "uniquely limited." State v. Foltz, 27 Wn. App. 554, 556, 619 P.2d 702 (1980). "[T]he court's exercise of discretion must be consonant with the purposes of the Juvenile Justice Act of 1977 which are, broadly, to provide for the handling of juvenile offenders through a separate and independent system providing both punishment and treatment where necessary." Id.

b. The State failed to prove declination would be in the best interest of the child or the public in this case. The juvenile court erred in concluding the State proved transfer to adult court would be in the best interest of the child or the public. First, there was no discussion whatsoever of Quincy's best interest. It cannot be reasonably argued that sending a child to adult court to face a life sentence is in his best interest, just as it cannot be reasonably argued that it was in Quincy's best interest to place him in foster homes where he was sexually, physically, and emotionally abused. The trial court misunderstood the adult sentence to which it was exposing Quincy, erroneously stating the sentence would be six and a half to eight and a half years in the Department of Corrections, when in fact, an indeterminate life sentence is mandatory for second-degree rape. 1 RP 20; RCW 9.94A.507.

Nor did the State prove transferring the child to adult court would be in the best interest of the public. Essentially, the court found that incapacitation was required because the crime was serious and premeditated and if kept in the juvenile system Quincy was likely to reoffend rather than be rehabilitated. Substantial evidence does not support the juvenile court's findings to this effect.

First, as Quincy noted in the declination hearing, this offense was not particularly serious or aggressive relative to other second-degree rapes. Rape is by its nature a serious crime, but the legislature has determined that 15-year-olds should not be automatically declined for second-degree rape charges. RCW 13.04.030. Thus, there must be something unique to this rape charge to warrant the finding that it was a serious premeditated offense requiring decline to protect the public. Cf. State v. Stubbs, 170 Wn.2d 117, 124-28, 240 P.3d 143 (2010) (factors that inhere in the crime itself and are therefore accounted for in the standard range may not be used to enhance a sentence).

This Court's decision in M. A. is instructive on this point. There, a juvenile was charged with assault and the trial court found that the seriousness of the charge supported declination. M. A., 106 Wn. App. at 499. On appeal, the juvenile argued that this factor could not support declination because it would be present whenever first-degree assault charges are filed. Id. But this Court recognized that the particular assault charged in that case was more brutal than the mine-run first-degree assault: "the assault as alleged, which resulted in severe, life-threatening, and permanently debilitating injuries to the victim, exhibited extreme cruelty and was

indeed gravely serious.” Id. In contrast, Quincy’s alleged rape, while serious, was not more brutal than the mine-run second-degree rape. Quincy was alleged to have placed his thumbs on the victim’s throat and briefly penetrated her vagina with his finger. The crime was serious only in the sense that all second-degree rapes are serious. Many second-degree rapes are more brutal. See, e.g., In re Detention of Danforth, 153 Wn. App. 833, 838, 223 P.3d 1241 (2009), review granted on other grounds, 233 P.3d 888 (2010) (adult male hit 12-year-old victim over the head with a rock, pulled down his pants, and anally raped him in an alley). Thus, the seriousness of the offense does not support decline.

More importantly, the State failed to prove Quincy could not be rehabilitated by the juvenile system and that the protection of the public therefore required prosecution as an adult. As noted above, Quincy had problems because when he was very young the State placed him in multiple foster homes where he was sexually and otherwise physically abused. This caused him to engage in inappropriate sexual behaviors both at home and at school, but until this incident he had no felony record. The prosecutor argued that Quincy was a “ticking time bomb” that was “going to go off,” but this argument was completely unsupported by the evidence. The

State's own probation report stated, "I cannot determine through all of the social information if this Respondent can be successfully treated by the age of 21." CP 246. This is not proof of inability to rehabilitate.

The studies Quincy presented showed that "juvenile sex offending does not predispose a youth to adult sex offending." CP 160. For juveniles, "developmentally sensitive interventions, targeted over a short time frame, are apt to be more effective." CP 177.

The court acknowledged these studies, but concluded that it should give great weight to the individual evaluation of Quincy which occurred in 2008 when Quincy was 13. CP 82. This conclusion was erroneous for two reasons: first, the 2008 risk assessment that was performed on Quincy when he was 13 years old was performed using two of the tools found to be inaccurate according to the articles Quincy cited. CP 156; CP 293-94. Second, the 2008 evaluation by its own terms was no longer relevant and was of questionable accuracy even in 2008:

It should be noted that there is no empirically validated method for appraising the risk of a young person to engage in harmful/delinquent behavior. ... Adolescence is a period of significant change and growth in many developmental areas such as

cognitive functioning, emotional awareness, social competency, and both physical and sexual development. ... [C]onclusions of these risk assessments should be considered invalid outside the period of at most, 6 to 12 months.

CP 293 (emphasis added). The court declined jurisdiction primarily based on this risk assessment which by its own terms was no longer valid. This constitutes an abuse of discretion.

The studies Quincy presented concluded it is highly unlikely a juvenile sex offender will commit a sex offense as an adult. This is so because “[c]ognitive changes related to brain development, hormonal changes related to the onset of puberty, the role of family and peer relationships, judgment, impulse control, bonds to school and other pro-social groups, and the response to social stressors such as child abuse could all play an important role in repeated adolescent sexual misconduct but may have little influence on persistent adult sexual offending.” CP 177. The individualized evaluation performed on Quincy reached the same conclusion. CP 293. Thus, the appropriate response to Quincy’s alleged juvenile sex offense is rehabilitation in the juvenile system, not indefinite incarceration in adult prison. CP 177 (“developmentally sensitive interventions, targeted over a short time frame, are apt to be more effective and to have fewer unintended negative effects”). The

State failed to present any evidence to the contrary, let alone proof by a preponderance of the evidence.

Recent Supreme Court cases endorse the above findings and hold that because juveniles are both categorically less culpable and more amenable to rehabilitation they must be treated differently by the justice system. See Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (sentence of life without possibility of parole unconstitutional as applied to juveniles); Roper, 543 U.S. 551 (death penalty unconstitutional as applied to juveniles). The Court recognized that juveniles “have a lack of maturity and an underdeveloped sense of responsibility,” they are “more vulnerable or susceptible to negative influences,” and “their characters are not as well formed” as those of adults. Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 569-70). Thus, “[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 573). Judges cannot, “with sufficient accuracy, distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.” Graham, 130 S.Ct. at 2032.

The Supreme Court gave great weight to findings by doctors and psychologists that “parts of the brain involved in behavior control continue to mature through late adolescence.” Graham, 130 S.Ct. at 2026. “Juveniles are more capable of change than are adults.” Id. Thus, “it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” Id. at 2026-27.

In sum, scientific studies and Supreme Court caselaw are unanimous in concluding that most juvenile offenders can be rehabilitated and that neither psychologists nor judges are capable of predicting which juveniles represent the small minority who are not amenable to treatment and are likely to reoffend as adults. In this case, the very evaluation the court relied upon to decline jurisdiction supported retention of Quincy in the juvenile system. Like the studies Quincy cited and the Supreme Court’s pronouncements in Graham and Roper, the 2008 evaluation recognized “there is no empirically validated method for appraising the risk of a young person to engage in harmful/delinquent behavior.” It warned, “conclusions of these risk assessments should be considered invalid outside the period of at most, 6 to 12 months.” CP 293. Yet the juvenile court relied on it three years

later to find Quincy could not be rehabilitated in the juvenile system and had to be transferred for prosecution as an adult. The court's findings are not supported by substantial evidence. The State failed to prove by a preponderance of the evidence that transfer was appropriate, and this Court should reverse.

c. Reversal is required. As explained above, the juvenile court abused its discretion in declining jurisdiction because the State failed to prove declination was in the best interest of the child or the public. No evidence at all was presented that declination was in the best interest of the child, and the evidence relied upon for the "best interest of the public" determination was, by its own terms, inaccurate and obsolete. The remedy is reversal of the order declining jurisdiction. Foltz, 27 Wn. App. at 558.

2. THE DECLINATION PROCEDURE VIOLATED QUINCY'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE QUINCY WAS SUBJECTED TO A SIGNIFICANT INCREASE IN PUNISHMENT BASED ON FACTS FOUND BY A JUDGE BY A PREPONDERANCE OF THE EVIDENCE.

a. The Constitution requires that every fact essential to punishment be proved to a jury beyond a reasonable doubt. The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of a crime charged beyond a

reasonable doubt. U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The Sixth Amendment guarantees the right to a jury in a criminal trial. U.S. Const. amend VI; Blakely v. Washington, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In combination, these constitutional clauses guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment – whether or not the fact is labeled an “element.” Apprendi v. New Jersey, 530 U.S. 466, 476, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Id. at 490 (internal citations omitted).

b. Quincy’s maximum punishment was increased from 40 weeks to life based on facts found by a judge by a preponderance of the evidence. Quincy’s Sixth and Fourteenth Amendment rights were violated because the facts most essential to his punishment were found by a judge by only a preponderance of the evidence. In Washington, a 15-year-old charged with second-degree rape

cannot be subjected to an indeterminate life sentence unless the State proves all of the following:

- (1) The “aggravating” Kent factors outweigh the “mitigating” Kent factors such that it would be in the best interest of the child or the public for the juvenile to be tried as an adult; and
- (2) The juvenile engaged in sexual intercourse with the complainant; and
- (3) The sexual intercourse was by forcible compulsion; and
- (4) The act occurred in the State of Washington.

RCW 9A.44.050(1)(a); RCW 9.94A.507; RCW 13.04.030(1)(e)(i); RCW 13.40.110(3); Massey, 60 Wn. App. at 137; RCW 13.40.160; RCW 13.40.0357.

Elements (2), (3), and (4) above must be proved to a jury beyond a reasonable doubt, but element (1) need only be proven to a judge by a preponderance of the evidence. Id. This is so despite the fact that element (1) has the greatest effect on punishment: Absent element (1), Quincy could have been sentenced to only 30-40 weeks’ detention. RCW 13.40.0357.² But because the judge found element (1) by a preponderance of the evidence, Quincy is serving a life sentence with a minimum term of 84 months. CP 22.

² A juvenile judge could have imposed incarceration up to Quincy’s 21st birthday upon proof of certain additional facts by clear and convincing evidence. RCW 13.40.160.

The fact that Quincy's sentence was increased by at least 812% based on facts found by a judge by a preponderance of the evidence is a clear constitutional violation.

This Court addressed a similar argument in State v. H. O., 119 Wn. App. 549, 81 P.3d 883 (2003), and concluded that because the facts found by a judge by a preponderance of the evidence determined only the appropriate "forum", they did not have to be proved to a jury beyond a reasonable doubt.³ Id. at 554. This Court should reconsider H.O. in light of significant intervening precedent, including Blakely, 542 U.S. 296, United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

In Blakely, the Court held the defendant's Sixth and Fourteenth Amendment rights were violated when he was sentenced to 90 months based on a judicial finding by a preponderance of the evidence that he acted with "deliberate cruelty." Blakely, 542 U.S. at 298. Absent that finding, the maximum possible punishment was 53 months. Id.

³ Division Two followed H.O. in In re Personal Restraint of Hegney, 138 Wn. App. 511, 158 P.3d 1193 (2007).

In Booker, the Court held the defendant's Sixth and Fourteenth Amendment rights were violated when he was sentenced to 360 months based on a judicial finding by a preponderance of the evidence that he possessed a certain amount of drugs. Booker, 543 U.S. at 227. Absent that finding, the maximum possible punishment was 262 months. Id.

In Cunningham, the Court held the defendant's Sixth and Fourteenth Amendment rights were violated when the trial court imposed an "upper term" sentence based on a judicial finding by a preponderance of the evidence that certain aggravating factors existed and outweighed the mitigating factors. Cunningham, 549 U.S. at 275-76. The trial judge found by a preponderance of the evidence that the victim was particularly vulnerable, that the defendant's conduct was violent, and that the defendant was a serious danger to the community. Id. at 275. The judge weighed those facts against the mitigating factor of minimal criminal history, and determined that an upper-term sentence should be imposed. Id. at 275-76. Absent these findings, only a "middle term" sentence was available. Id. at 288. Because the facts necessary to impose an upper term sentence were not proved to a jury beyond a

reasonable doubt, the sentence was unconstitutional. Id. at 288-89.

The facts necessary to make available an adult sentence in Quincy's case are remarkably similar to those necessary to impose an upper term in Cunningham. Indeed, the Kent factors are strikingly similar to traditional "aggravating" and "mitigating" factors. The juvenile court judge here declined jurisdiction based on finding by a preponderance of the evidence that Quincy committed a serious crime with premeditation and was unlikely to be rehabilitated by the juvenile treatment system. These findings increased the maximum possible sentence from a term of 30-40 weeks to a life sentence with a minimum term of incarceration of 78-102 months. Stated in Cunningham terms, the judge's findings by a preponderance of the evidence made available an "upper term" sentence of 78 months to life, whereas without these findings only a "lower term" sentence of 30-40 weeks was available (unless additional findings were made by clear and convincing evidence, thus resulting in a "middle term" sentence of incarceration until age 21).

The Supreme Court has made clear that regardless of what one calls a fact – an "element," a "sentencing factor," a "forum

factor,” or something else – an individual has a right to have “all facts legally essential to the punishment” proved to a jury beyond a reasonable doubt. Blakely, 542 U.S. at 313 (emphasis added).

This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

Cunningham, 549 U.S. at 281. But here, the facts exposing Quincy to a greater potential sentence were found by a judge by only a preponderance of the evidence. This Court should hold the declination procedure violated Quincy’s Sixth and Fourteenth Amendment rights.

c. Even if facts supporting declination need not be found by a jury, they must be proved beyond a reasonable doubt. The State may argue that a juvenile has no right to jury findings in a declination hearing because juveniles have no right to a jury at the adjudicatory stage. See McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion). This argument should be rejected in light of the authority above.

In any event, it cannot be denied that juveniles, like adults, have a Fourteenth Amendment right to proof beyond a reasonable

doubt. Winship, 397 U.S. at 364-65. This standard of proof is an essential component of due process and fair treatment. Id. at 359. It makes no sense to say that this standard applies to the elements that supported a sentence of 30-40 weeks, but does not apply to the elements that made available the 84-months-to-life sentence that was ultimately imposed upon Quincy.

And again, to label the former “elements” but the latter “forum factors” misses the point. The “relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?” Apprendi, 530 U.S. at 494 (emphasis added). The effect of juvenile declination – indeed its very purpose – is to expose juveniles to the possibility of a much greater sentence for the same offense than they otherwise would receive. In fact, that was the purpose of transferring Quincy in this case. 1 RP 22-23.

Ironically, if Quincy had remained in juvenile court, the State would have had to prove additional factors by clear and convincing evidence if it wanted Quincy to be held in detention up to his 21st birthday instead of the standard range of 30-40 weeks. RCW 13.40.160. But because the State wanted Quincy held even longer – for an indeterminate life sentence with a minimum of 78-102

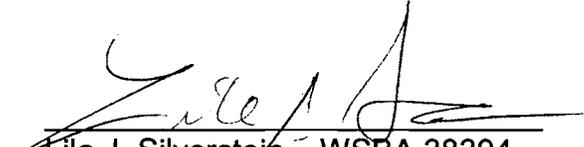
months – it only had to prove additional factors by a preponderance of the evidence. This standard of proof violates due process. This Court should reverse and hold a juvenile court may not decline jurisdiction unless the State proves beyond a reasonable doubt that the “aggravating” Kent factors outweigh the “mitigating” Kent factors such that it would be in the best interest of the child or the public for the juvenile to be tried as an adult.

F. CONCLUSION

For the reasons above this Court should reverse Quincy’s conviction, reverse the juvenile court order declining jurisdiction, and remand for trial in juvenile court.

DATED this 3rd day of October, 2011.

Respectfully submitted,


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