NO. 99766-7

SUPREME COURT OF THE STATE OF WASHINGTON,

STATE OF WASHINGTON,

Respondent,

vs.

S.D.H.,

Appellant.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Meghan E. Dunlap, Deputy Prosecuting Attorney, Cowlitz County Prosecuting Attorney's Office.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly decided this matter. The Respondent respectfully requests the Court deny review of the April 13, 2021, Court of Appeals' Opinion in *State of Washington v. S.D.H.*, Court of Appeals No. 53841-5-II.

III. ISSUES PRESENTED FOR REVIEW

(1) Should the Supreme Court accept review of S.D.H.'s Petition for Review, when he has failed to meet any of the grounds governing review pursuant to RAP 13.4(b)?[1]

IV. STATEMENT OF THE CASE

On February 26, 2019, just before 6:00 a.m., Caitlyn McCall walked to her job at Beachway Gas and Grocery and opened up the store "just like any other day." RP 13, CP 2. She completed her opening tasks and then

[1] Although S.D.H.'s commitment to JR was 103-129 weeks, he was released early. He is currently being held for homicide and robbery in Georgia. *See* https://www.wsfa.com/2021/05/11/couple-identified-union-springs-double-murder-victims/; https://www.wsfa.com/2021/05/17/new-charge-added-against-union-springs-double-homicide-suspects/. Here, his issue regarding manifest injustice appears to be moot.

went to the restroom to brush her teeth. RP 13. While in the restroom, the store's buzzer informed her that she had a customer. RP 13. She exited the restroom and greeted S.D.H. who had entered the store. RP 13. S.D.H.'s face was completely covered and she "instantly felt scared." RP 13. S.D.H. wore a blue hospital mask, a black sweatshirt, black pants, and a backpack with a "Peace Health" logo.[2] CP 2. McCall asked S.D.H. to remove his hood. RP 13. Instead of complying, he "started charging the front counter and register." RP 13. S.D.H. "pulled a gun out of his waistband" and pointed it at McCall's face, demanded money from the cash register, and threatened to "F*** her up." RP 13, CP 2. McCall believed the weapon to be "a black semi-automatic handgun." CP 2.

During the robbery, McCall did everything S.D.H. told her to do while trying to hide behind the glass for protection. RP 13. She had never been so scared in her life. CP 13. Her fear was heightened because a close friend had recently been murdered while working as a cashier in Kelso. CP 13. McCall provided S.D.H. with approximately $300 cash from the register, and he fled out the door on foot. CP 2.

After S.D.H. fled, McCall was able to contact Longview police, and they responded shortly after 6:00 a.m. CP 1. A K-9 track led officers

[2] This offense was committed prior to the Covid-19 pandemic and mask mandates.

southeast from the store to a nearby apartment rented by S.D.H.'s mother, a former Beachway employee. CP 2. S.D.H. was at the residence when law enforcement arrived. CP 2. Officers detained him, and he shouted and cursed at them. CP 2. Inside S.D.H.'s bedroom, law enforcement located the clothing S.D.H. had worn during the robbery, an airsoft gun, the "Peace Health" backpack, and the blue hospital mask. CP 2.

On July 22, 2019, S.D.H. pled guilty to one count of robbery in the first degree. CP 22. At sentencing, S.D.H. asked the court for a manifest injustice sentence downward. RP 9. The State presented testimony by Caitlyn McCall. RP 12-14. McCall described seeing her life flash before her eyes during the robbery, and being so afraid that she could no longer work at her job. RP 13-14.

S.D.H. called Marty Beyer, a child welfare and juvenile justice consultant, who testified about S.D.H.'s background. CP 29-52. Her report extensively detailed S.D.H.'s regular use of marijuana and reports of assaulting peers and even police officers. CP 31-32, 36, RP 81. Ms. Beyer's report also indicated that resources such as counseling were provided to S.D.H., but were not effective to stop his escalating criminal behavior. CP 38. The State cross-examined Ms. Beyer using the State's pre-sentencing investigation authored by psychologist Wendy Hartinger. RP 54. S.D.H. disclosed to Ms. Hartinger information that he did not disclose to Ms. Beyer.

He told her he was in the Crips gang and that most of his activities with the gang are unknown to police. RP 65-68.

The trial court ruled that in designing RCW 13.40.0357 (juvenile standard sentencing range statute), the legislature set the sentencing range applicable to S.D.H. for robbery in the first degree according to age. RP 122. S.D.H. would have been sentenced to a longer Juvenile Rehabilitation ("JR") range if he had been even one year older when committing the robbery. RP 122. The legislature set up the sentencing framework to consider sentencing juveniles in juvenile court. RP 122. The trial court considered RCW 13.40.150, and found that S.D.H. did not make a clear and convincing showing of a basis to support a manifest injustice sentence downward from the standard range of 103-129 weeks at JR. RP 127.

The trial court found that S.D.H.'s actions during the robbery threatened serious bodily injury to Ms. McCall. RP 123. "Whether it was a fake gun or not, the victim in this case feared for her life. So there is no question that the conduct did, in fact, threaten serious bodily injury based on his actions." RP 123.

The trial court also found that S.D.H. did not act under strong and immediate provocation. RP 123. Instead, he had formed a plan. Prior to the robbery, S.D.H. had:

> [T]alked to a friend about robbing a place, and the friend told him that was not a good idea. That did not stop him. He took the air soft gun and colored it specifically to look like a real gun. Stayed up all night beforehand, thinking about what he was going to do. He did not stop at that; but, in fact, carried through with his plan. Yes, a simple plan; or was it?

RP 126.

Further, the trial court found that S.D.H. did not compensate or make a good faith effort to compensate McCall or Beachway Gas and Grocery prior to detection. RP 124. In fact, he "lied about what he did with the cash he had stolen. Certainly, his family was in hard times; but again, what's to say that won't happen again?" RP 126. S.D.H. gave the money to his mother to hide. RP 126.

In determining whether S.D.H. was suffering from a mental or physical condition that significantly reduced his culpability for the robbery, the trial court acknowledged that S.D.H. had been through trauma in his life. RP 124. However, that trauma did not equate to a mental or physical condition that significantly reduced his culpability for the robbery. RP 124.

S.D.H. did not have any prior criminal history and the court found the factor did not apply. RP 124.

The trial court then considered whether S.D.H. could serve his sentence within the local community. RP 125-26. Based upon the evidence, this was not a reasonable option due to S.D.H.'s lack of appropriate

supervision by his mother, his history of failing to follow through with services, and his claim that he was involved in illegal activities unknown to law enforcement. RP 125-26.

The trial court found that Ms. Beyer's testimony was not applicable within the framework set up by the legislature in mitigating S.D.H.'s sentence. RP 126. "Even if the Court could . . . find it more appropriate to tailor a sentence according to a specific person, which the Court does not find under these circumstances," the trial court doubted whether S.D.H. would participate for the extensive amount of time it would take to make such a plan successful. RP 127. The trial court sentenced S.D.H. to 103-129 weeks at JR, which is the standard range for a 15-year-old. RP 127.

V. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because S.D.H.'s petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

S.D.H. claims that the Court of Appeals' decision conflicts with *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) and *State v. M.S.*, 484 P.3d 1231 (2021), which are both Supreme Court cases. He also argues that the difference in standards between the Juvenile Justice Act ("JJA") and the Sentencing Reform Act ("SRA") for considering a manifest injustice downward violates equal protection and is an issue of substantial public interest. However, there is no conflict with *Houston-Sconiers* because the SRA and the JJA cannot be meaningfully compared. Additionally, S.D.H. failed to raise the issue on appeal of non-statutory mitigating factors addressed in *M.S.*, so *M.S.* cannot be in conflict with the Court of Appeals. There is no significant constitutional issue because Juveniles who are sentenced in adult court and juveniles who are sentenced in juvenile court are not similarly situated, and there is a rational basis for treating them differently. Finally, because the JJA and the SRA have fundamentally different purposes, using different standards in the two different systems does not raise an issue of substantial public concern. S.D.H. has not met any of the criteria for review under RAP 13.4(b).

A. S.D.H.'s claim that the Court of Appeals' decision is in conflict with *Houston-Sconiers*, is flawed because *Houston-Sconiers* was based on sentencing juveniles in adult court under the Sentencing Reform Act – not the Juvenile Justice Act.

Because the Court of Appeals' decision is not in conflict with *Houstin-Sconiers*, review should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only for one of four reasons. One reason review will be accepted is "[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." RAP 13.4(b)(1). S.D.H. claims that the Court of Appeals' decision here is in conflict with *Houston-Sconiers*, which was decided pursuant to the SRA. However, the SRA and the JJA are not meaningfully comparable because they serve fundamentally different purposes. Thus, the two decisions are not in conflict, and S.D.H. fails to meet the criteria for review.

In *Houston-Sconiers*, The Supreme Court held that under the SRA, "[t]rial courts have full discretion to impose sentences below SRA guidelines and/or statutory enhancements based on youth." 188 Wn.2d at 18. S.D.H. argued on appeal that *Houston-Sconiers* should be applied to juveniles sentenced in juvenile court under the JJA. The Court of Appeals disagreed. Slip Opinion at 2.

In *State v. J.C.M-O*, 483 P.3d 1282, 1285 (2021), J.C.M-O argued that the *Houston-Sconiers* holding requires both an adult court and a

juvenile court to consider youth as a mitigating factor when considering a manifest injustice downward. The Court of Appeals, Division Three disagreed, holding that "*Houston-Sconiers* only relates to cases when the State prosecutes a minor in adult court." *Id.* "[S]entencing courts have discretion to sentence outside the standard range in SRA cases, 'when sentencing juveniles in *in adult court.*'" *Id.* (*quoting State v. Houston-Sconiers*, 188 Wn.2d at 9). "Applying the rationale behind *Houston-Sconiers* in juvenile court makes no sense. Since the JJA already reflects youth of the offender, the juvenile court would consider the youth of the accused twice if it followed *Houston-Sconiers*." *J.C.M-O*, 483 P.3 at 1285. "The trial court cannot abuse its discretion as a matter of law as to the sentence's length if the trial court imposes a sentence within the standard range set by the legislature." *Id. at* 1284 (2021) (*citing State v. Brown*, 145 Wn. App. at 78, 184 P.3d 1284). Additionally, *State v. Bacon*, 190 Wn.2d 458, 464, 415 P.34d 207 (2018) held courts need to have "legislative authorization" for the sentences they impose. There is no legislative authorization to depart from RCW 13.40.0357 absent the finding of a manifest injustice.

Here, the Court of Appeals stated that "the JJA, as opposed to the SRA, exists to address the unique issues of juvenile justice, including rehabilitation and accountability." Slip Opinion at 11. The Court held that

"extending *Houston-Sconiers* to the juvenile courts would give juvenile courts unintended discretion within a juvenile disposition scheme that already takes youthfulness into account." Slip Opinion at 12. "The legislature specifically made age a variable within the juvenile standard range disposition grid and, thus consideration of age is already mandatory when a juvenile court determines the appropriate punishment." Slip Opinion at 12. Additionally, the Court explained:

> SDH notes that *Houston-Sconiers* states that the Eighth Amendment requires courts to exercise discretion in considering the mitigating qualities of youth 'whether the youth is sentenced in juvenile or adult court' 188 Wn.2d at 18. SDH interprets this to mean that *Houston-Sconiers* grants juvenile court unbridled discretion in sentencing youth. But *Houston-Sconiers* was explaining that adult courts have the same discretion to consider mitigating circumstances of youth as juvenile courts. 188 Wn.2d at 18. And as discussed above, the juvenile justice system is designed to take the mitigating factors of youth into consideration.

Slip Opinion at 12, Footnote 9. S.D.H.'s claim that the Court of Appeals' decision in this case conflicts with *Houston-Sconiers* is without merit because the SRA and the JJA cannot be meaningfully compared. Therefore, they are not in conflict. Because S.D.H. has failed to show a conflict between the Court of Appeals' decision and *Houston-Sconiers*, S.D.H.'s petition for review should be denied.

B. S.D.H.'s claim that the Court of Appeals' decision is in conflict with *State v. M.S.* is flawed because S.D.H. failed to preserve the issue that non-statutory mitigating factors apply.

Because S.D.H. did not preserve the issue on appeal that non-statutory factors apply when considering a manifest injustice downward, this Court should deny review of S.D.H.'s petition for review. For the Supreme Court to review an issue under RAP 13.4(b)(1), the decision must be in "conflict" with a Supreme Court decision. S.D.H. now argues, for the first time, that juvenile judges may consider non-statutory factors when considering a mitigating sentence downward, thus the decision is in conflict with *M.S.* However, S.D.H. failed to preserve this issue by raising it on appeal. Since the Court of Appeals did not consider or decide this issue, the decision here cannot be in conflict with *M.S.*

In *M.S.*, the Washington State Supreme Court held that aggravating factors can be considered when the trial court considered whether a juvenile should receive a manifest injustice upward. 484 P.3d at 1240. The Court of Appeals opinion here states that S.D.H. made two arguments: (1) "[T]hat under *Houston-Sconiers*, the court had complete discretion to impose a manifest injustice disposition downward without his having to show that the standard range disposition would impose an excessive penalty on him," and (2) [T]hat the application of the JJA violated the equal protection clause because it requires a juvenile offender in juvenile court to prove that a

standard range would effectuate a manifest injustice by clear and convincing evidence." Slip Opinion at 1-2.

Here, S.D.H. did not argue to the Court of Appeals that the court had to consider mitigating factors when considering a manifest injustice. Instead, S.D.H. argued that due to the holding in *Houston-Sconiers* the court should consider youth as a mitigating factor. Youth has already been accounted for pursuant to RCW 13.40.0357.

Additionally, *M.S.* is not in conflict with this case because *M.S.* dealt with a manifest injustice upward that was granted. Here S.D.H. was sentenced to the standard sentencing range. Because S.D.H. did not argue that the court must consider mitigating factors when considering a manifest injustice downward, there is no conflict between the Court of Appeals' decision and *M.S.* Because S.D.H. did not meet the criteria for review under RAP 13.4(b), his petition for review should be denied.

C. S.D.H.'s claims do not present a constitutional issue or an issue of substantial public interest.

Because S.D.H.'s claims do not present a constitutional issue or an issue of substantial public interest, this Court should deny his petition for review. Review will be granted if "a significant question of law under the Constitution of the State of Washington or of the United States is involved," or if "the petition involves an issue of substantial public interest that should

be reviewed by the Supreme Court." RAP 13.4(b). S.D.H. claims that because the JJA has a higher burden of clear and convincing evidence than the SRA to show that a manifest injustice should be granted, it violates equal protection. This argument fails to account for the fundamental differences between the JJA and the SRA.

The first step in examining an equal protection claim is to determine whether the individual claiming the violation is similarly situated to another individual. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). The classification must be relevant to the State's purpose in treating the classes disparately. *Id.* Juveniles in adult court are not similarly situated to juveniles in juvenile court. *State v. Manro*, 125 Wn. App. 165, 174, 104, P.3d 708 (2005).

The Court of Appeals explained:

> The JJA and SRA have distinct legislative purposes, different sentencing schemes, and impose different consequences. An adjudication and disposition of a juvenile under the JJA does not result in prison time, RCW 13.40.0357, and does not result, as a matter of law in conviction of a crime. RCW 13.04.240. Juveniles under the JJA generally face substantially shorter terms of punishment than those under the SRA. *Compare* RCW 13.40.0357 *with* RCW 9.94A.510. Under the JJA, rehabilitation ranges are lower than standard sentencing ranges under the SRA, and a juvenile cannot be confined past age 25. RCW 13.40.0357, .40.300(2).

Slip Opinion at 16. Here, S.D.H. failed to identify any classification or explain how he was similarly situated to someone in another class. Offenders who are sentenced in juvenile court are not similarly situated to offenders who are sentenced in adult court. Also, there is a rational basis to treat offenders differently when they are sentenced in adult and juvenile courts. The primary purpose of the JJA is rehabilitation, whereas the primary purpose of the SRA is punishment. The two systems cannot be meaningfully compared to one another because they have fundamentally different purposes.

Last, S.D.H. claims this case presents an issue of substantial public interest. However, attempting to compare a system that already takes youth into account with one that does not, is not an issue of substantial public interest. The JJA's sentencing statutes already account for youth. S.D.H. was sentenced to less JR time than a 16 year-old would have been sentenced to for the same offense because he was younger. Because S.D.H. had not met any of the criteria for review under RAP 13.4(b), his petition for review should be denied.

VI. CONCLUSION

Because S.D.H.'s petition fails to meet any of the considerations governing acceptance of review under RAP 13.4(b, it should be denied.

Respectfully submitted this 11th day of June, 2021.

Meghan Dunlap

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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that RESPONSE TO PETITION FOR REVIEW was filed electronically via the Washington State Appellate Courts' Portal and which will automatically cause such filing to be served on the opposing counsel listed below:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 11, 2021.

Julie Dalton

Julie Dalton, Legal Specialist

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

June 11, 2021 - 2:37 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. S.D.H.
Superior Court Case Number:	19-8-00051-4

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