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No. 36385-6-III

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

STATE OF WASHINGTON,

Respondent,

v.

F.B.T.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF KLICKITAT

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Constitution requires that a child's specific characteristics be taken into account to determine the voluntariness of a *Miranda*¹ waiver. 13-year-old F.B.T. was a special education student with a low IQ, who was deemed incompetent by a court at the time of police questioning. Any claimed waiver of his *Miranda* rights cannot meet the constitutional standards for voluntariness, requiring suppression of his statement. This Court should also give constitutional force to the truth that "children are different" in the context of police interrogations, and hold that under Article I, § 9, police may not interrogate children without the presence of a non-adversarial adult.

F.B.T.'s manifest injustice sentence should be reversed where he was deprived of notice, prior to trial, of the aggravating factors that would be alleged in support of a manifest injustice sentence. Additionally, the court relied on nonstatutory aggravating factors that exceed the legislature's mandate, and there was insufficient evidence of the aggravating factors. These errors entitle F.B.T. to reversal of the manifest injustice sentence, as does the court's modification of F.B.T.'s judgment and sentence after he filed his notice of appeal.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

A. ARGUMENT IN REPLY

1. F.B.T.'s confession was involuntary under the totality of the circumstances.

a. A “totality of the circumstances” approach requires analysis of the special factors of youth, which in F.B.T.’s case, compel the conclusion that he did not voluntarily waive his *Miranda* rights.

The State acknowledges that 13-year-old F.B.T.’s low IQ, receipt of special educational services, and finding of incompetence at the time he was questioned by police “would give anyone pause.” Brief of Respondent (BOR) at 18. However, the State fails to account for these critical factors in claiming that F.B.T.’s confession was nevertheless voluntary. BOR at 18-24.

Courts “have a responsibility to examine confessions of a juvenile with special care.” *State v. Unga*, 165 Wn.2d 95, 103, 196 P.3d 645 (2008) (citing *In re Gault*, 387 U.S. 1, 45, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)). This Court is required to consider F.B.T.’s “age, experience, education, background, and intelligence; and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.” *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

13-year-old F.B.T. was deemed incompetent by a court when police sought a legal waiver from him. CP 26. His intellectual functioning was borderline, and he was a special education student. CP 8, 25-26. Given F.B.T.'s age, experience, education, and background, *Fare*, 442 U.S. at 725, the State cannot establish that F.B.T.'s waiver of his *Miranda* rights was "the product of a rational intellect and a free will." *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984). Even when three months after he was interrogated, F.B.T. was found competent, he functioned at a lower level than his peers; he was preyed on by other youth in juvenile detention because of "his incapacity to know what's going on" and lack of social skills. RP 35-36.

"Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *State v. Mayer*, 184 Wn.2d 548, 556, 362 P.3d 745 (2015) (citing *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed.2d 410 (1986) (quoting *Fare*, 442 U.S. at 725)).

In holding that a child's age properly informs the *Miranda* custody analysis, the Supreme Court recognized that a "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *J.D.B. v. North Carolina*, 564 U.S.

261, 265- 272, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Indeed, when police read F.B.T. his *Miranda* rights and sought a legal waiver in order to question him about events that could result in incarceration for the remainder of his childhood, 13-year-old F.B.T. had never before been permitted to make any consequential legal decisions for himself. *See e.g. J.D.B.*, 564 U.S. at 273 (“the legal disqualifications placed on children as a class—*e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal”); *see also* RCW 26.28.015(4) (children under age 18 may not enter into any legal contractual obligation); RCW 26.28.015(5) (until age 18, a child is not able to make decisions in regard to their own body).

Not generally permitted to execute legal decision making, a child is “unable to know how to protect his own interests or how to get the benefits of his constitutional rights.” *Gallegos v. Colorado*, 370 U.S. 49, 54, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962). F.B.T.’s “waiver” of his *Miranda* rights in the face of police questioning must be considered in this context. The prosecutor’s citation to the fact that F.B.T. was not handcuffed after police took him from his home at 8:00 p.m. has little weight in light of the F.B.T.’s lack of physical autonomy under the law

when police took him to the police station. BOR at 18. Pertinent factors in *J.D.B.* were not only that police failed to provide *J.D.B. Miranda* warnings, but the child was not informed he was free to leave. *J.D.B.*, 564 U.S. at 266. *J.D.B.* was removed from his classroom and interrogated at his school. *Id.* at 265. Presumably, *J.D.B.* could have simply returned to his class if did not wish to engage in police questioning. By contrast, police picked F.B.T. from his home at night and drove him to the police station. RP 147, 196. F.B.T. was not told whether he was free to leave. Ex. 1. And having been taken by car to police station, F.B.T. was not physically free to get himself home if he did not wish to engage in police questioning. *See* RCW 46.20.031 (legal driving age is 16).

This Court should also reject the State’s argument that F.B.T.’s failure to request the assistance of an attorney or question the officer about his legal rights or how to exercise them indicates a knowing and voluntary waiver. BOR at 19. *Gallegos* dismissed this identical argument, finding that “a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police” *Gallegos*, 370 U.S. at 54.

The State cites to *Unga* in support of its claim that the officers’ repeated admonitions to “tell the truth” do not render F.B.T.’s confession involuntary. BOR at 20 (citing *State v. Unga*, 165 Wn.2d 95, 102, 196

P.3d 645 (2008)). Though a police officer's promise "does not render a confession involuntary per se," it is a factor to be considered in deciding whether a confession was voluntary. *Id.* at 101. Though police can use various psychological tactics such as "playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess," there must still be evidence the confession "is a product of the suspect's own balancing of competing considerations." *Unga*, 165 Wn.2d at 102 (citing *Miller v. Fenton*, 796 F.2d 598, 605 (3d Cir. 1986)). In *Unga*, the 16-year-old teenager misunderstood a detective's promise that the teen would not be charged with a crime if he would tell the officer about a different crime, which the Court found was not a promise that rendered the teenager's confession involuntary under a totality of the circumstances analysis. *Id.* at 98-99, 111.

By contrast here, the police officers admonished 13-year-old F.B.T. to "tell the truth" 16 times over the course of a nearly 50 minute interrogation. Brief of Appellant (AOB) at 19-20 (citing RP 153-184). This repeated pressure to "tell the truth" shaped what F.B.T. said to the officers and was coercive. This is especially concerning in light of what is known about the unreliability of juvenile confessions, especially for the

particularly young and cognitively impaired. *See, e.g.,* Raneta Lawson Mack, *These Words May Not Mean What You Think They Mean: Toward A Modern Understanding of Children and Miranda Waivers*, 27 B.U. Pub. Int. L.J. 257, 279 (2018) (“Studies have demonstrated that personal characteristics such as youth, mental illness, cognitive disability, suggestibility, and a desire to please others may induce false confessions.”).

The prosecutor notes that F.B.T. had prior contact with law enforcement and the juvenile justice system. BOR at 18. But F.B.T. was found incompetent by a court in relation to these charges and police contact. CP 26. Moreover, the fact that the interrogating officers had prior contact with F.B.T. does not make any claimed *Miranda* waiver less coercive where police officers were used as the primary form of discipline and coercion by F.B.T.’s school and family in the past. *See, e.g.,* CP 24-26 (police called multiple times when F.B.T. acted out at home; police previously instructed F.B.T.’s father to “whoop his ass”).

The prosecutor misconstrues the legal significance of F.B.T.’s complaints during the interrogation indicating that he wanted to go home and was hungry. BOR at 21. These plaintive requests to go home were not just assertions of his right to silence, but more importantly reflect the coercive nature of the interrogation. BOR at 21. The officers’ deception

and lack of response to F.B.T.'s pleas show how F.B.T.'s youth and cognitive limitations were exploited during this interrogation, which contributes to the involuntariness of his confession. BOA at 17-22.

F.B.T.'s age and particular limitations, in addition to the pressure officers exerted over the course of nearly one hour after F.B.T. was taken from his home into police custody made him unable to knowingly, intelligently and voluntarily waive his rights, and the statement procured by police in violation of his Fifth Amendment rights is inadmissible.

Miranda, 384 U.S. at 478-79.

b. This Court should hold that Article I, §9 provides more protections to juveniles interrogated by police than its federal counterpart.

The State cites to only pre-*Gunwall*² cases to support its claim that article I, section 9 of the Washington Constitution affords no greater protections to children subject to police interrogation than does the Fifth Amendment. BOR at 13. Rather than engage in a *Gunwall* analysis, or address the *Gunwall* factors analyzed by F.B.T. (AOB at 26-30), the State makes a conclusory citation to a pre-*Gunwall* case to argue our State constitutional provision against self-incrimination provides the same protections as its federal counterpart. BOR at 15 (citing *State v. Moore*, 79

² *State v. Gunwall*, 106 Wn.2d 54, 720 P.3d 808 (1986).

Wn.2d 51, 57, 483 P.2d 630 (1971)). And the State's argument that Article I, section 9 is even less protective than the Fifth Amendment based on pre-*Miranda* case law certainly has no merit. BOR at 14.

The State argues that the seminal case law after *Dutil* establishing that children are constitutionally different from adults at sentencing does not affect *Dutil's* holding. BOR at 16 (citing *Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980)); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)). *Dutil* was decided nearly 40 years ago, before *Gunwall*. *Dutil's* adoption of *Fare's* totality of the circumstances approach to juvenile confessions was based on the Court's ignorance about the unreliability of juvenile confessions:

We have not been shown that this method of determination has produced injustice in the juvenile courts, or that it has resulted in the validation of false or coerced confessions.

Dutil, 93 Wn.2d at 94. *Dutil* declined to provide additional protections to juveniles who are interrogated police “[u]ntil we are shown that additional safeguards are necessary to protect children from those evils...” *Id.*

Since *Dutil*, evidence of the unreliability of juvenile confessions has become an issue of national public concern. Craig J. Trocino, *You Can't Handle the Truth: A Primer on False Confessions*, 6 U. Miami Race & Soc. Just. L. Rev. 85, 87 (2016) (citing to cases of the Central Park Five, Henry Lee McCollum, and Fairbanks Four, three cases of false

confessions by young people that have gained national attention). Nearly forty years later, this Court cannot deny the “evils” that result from treating children as adults in the context of police interrogation:

A survey of false confession cases from 1989-2012 found that although only 8% of adult exonerees with no known mental disabilities falsely confessed to crimes, in the population of exonerees who were younger than 18 at the time of the crime, 42% of exonerated defendants confessed to crimes they had not committed, as did 75% of exonerees who were mentally ill or mentally disabled. Overall, one sixth of the exonerees were juveniles, mentally disabled, or both, but they accounted for 59% of false confessions. Indeed, youth and intellectual disability are the two most commonly cited characteristics of suspects who confess falsely.

Dassey v. Dittmann, 877 F.3d 297, 334 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677, 201 L. Ed. 2d 1072 (2018) (internal citations omitted). Given that “we now have a robust and growing body of rigorous, peer-reviewed, legal and psychological research demonstrating how current interrogation tactics influence people, and particularly juveniles and intellectually impaired people, to act against their own self-interest in such a seemingly irrational manner,” *id.*, *Dutil’s* holding should be revisited by this Court.

And of course the State’s argument that “[t]he *Miller* line of cases does not pertain to this issue and involves different constitutional provisions” is simply wrong. BOR at 16-17. The Supreme Court in *J.D.B.* drew on *Roper* and *Graham* (which preceded *Miller*) in this same context of police interrogation. *J.D.B.*, 564 U.S. at 273-75 (citing *Roper v.*

Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) and *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)).

The State ignores the fact that our Court analyzes whether a “state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context.” *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994); BOA at 23-24. Forty years after *Dutil*, there is now ample evidence of the harm that comes when courts “ignore the very real differences between children and adults” in the police interrogation of juveniles. *J.D.B.* 564 U.S. at 281. Our state courts provide additional constitutional protections to children in other contexts, and analysis of the *Gunwall* criteria establishes this Court should provide additional protections to children under our state constitution when police interrogate a child about conduct that could result in imprisonment for the rest of their childhood or adult lives. This Court should adopt additional protections for juveniles, and not permit police to interrogate a child without the presence or advice of a non-adversarial adult or attorney. *See In re E.T.C.*, 141 Vt. 375, 379, 449 A.2d 937 (1982). The failure to provide F.B.T. additional protections under Article I, § 9 provides an independent basis for reversal and remand to suppress F.B.T.’s statement to police.

2. Due process requires a juvenile receive notice, prior to trial, of the aggravating factors alleged in support of a manifest injustice sentence.

a. Courts may not impose illegal sentences, which means sentencing errors may be raised for the first time on appeal.

The State ignores case law and governing authority that allows a child to appeal a manifest injustice sentence. BOR at 25.

F.B.T. had statutory right to appeal a disposition outside the standard range. RCW 13.40.160; RCW 13.40.230. “[E]stablished case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Where F.B.T.’s manifest injustice sentence was constitutionally infirm, it cannot stand, and he is entitled to review regardless of whether it was raised below. RAP 2.5(a).

b. F.B.T. was entitled to notice of the aggravating factors prior to trial.

The prosecutor’s argument that F.B.T. was provided sufficient notice cites to authority that is no longer good law after *Blakely v. Washington*. BOR at 27 (citing *State v. Moro*, 117 Wn. App. 913, 920, 73 P.3d 1029 (2003)). *Moro* is predicated on the outdated, pre-*Blakely* proposition that: “[d]ue process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence. No such notice is required because an exceptional sentence is a

possibility in all sentencing.” *Moro*, 117 Wn. App. at 920. This holding that the accused is not entitled to notice of the aggravating factors prior to trial is no longer good law after *Blakely*, which defined “maximum sentence” as the sentence the court may impose “*solely on the basis of the facts reflected in the ... verdict or admitted by the defendant.*” *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original); AOB at 33. In Washington, this requires notice of the alleged aggravators prior to trial. *State v. Siers*, 174 Wn.2d. 269, 272, 282, 274 P.3d 358 (2012); *see also* RCW 9.94A.537(1).

Thus, absent notice of the aggravating factors the State seeks to prove beyond a reasonable doubt prior to trial, it is simply no longer the case that an exceptional sentence is a possibility in every sentencing. The prosecutor’s reliance on *Moro*’s statement of outdated case law is unpersuasive. BOR at 27.

Insofar as the Juvenile Justice Act (JJA) can be construed to require the judge to impose a manifest injustice sentence when it finds the statutory factors provided for in RCW 13.40.150(3)(i) without notice, prior to trial, it violates *Blakely*’s limit on judicial discretion to impose a sentence outside the standard range without notice and proof beyond a reasonable doubt. BOR at 27; *Blakely*, 542 U.S. at 303. For instance, RCW 9.94A.537(1)’s requirement that a defendant receive notice of the

State's intent to seek an exceptional sentence prior to entry of the plea or trial came as a result of *Blakely's* requirement that the maximum sentence a court may impose is limited to the facts established by the verdict. *Blakely*, 542 U.S. at 303. After *Blakely*, the Legislature amended the Sentencing Reform Act (SRA) to conform with this due process requirement: "[t]he legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington*, 542 U.S. ... (2004)." Laws of 2005, ch. 68 sec. 1. The same determination of the JJA's constitutionality must be made by this Court so that the legislature may comply with *Gault*, *Winship*, *Apprendi*, and *Blakey's* constitutional demands. BOA at 31-36.

The State also argues that it was the Juvenile Court Administrator who primarily advocated for the sentencing recommendation, not the prosecutor. BOR at 27. However, *Blakely* concerns the allegation of additional facts outside the verdict that will be used to increase punishment, not who alleges them. *See Blakely*, 542 U.S. at 303; *see also United States v. Haymond*, ___, U.S. ___, 139 S. Ct. 2369, 2376, 204 L. Ed. 2d 897 (2019) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 519, 120 S. Ct. 2348, 2355, 147 L. Ed. 2d 435 (2000) ("Even when judges did enjoy discretion to adjust a sentence based on judge-found aggravating or

mitigating facts, they could not ‘swell the penalty above what the law ha[d] provided for the acts charged’ and found by the jury.’’’).

The JJA must conform with the constitutional mandate of *Winship*, *Gault*, *Apprendi*, and *Blakely*, which requires notice, prior to trial, of the aggravating factors that will be alleged to impose a sentence outside the standard range.

c. This Court’s decision that juveniles do not have a jury trial right does not mean that due process does not apply to the allegation of aggravating factors.

That juveniles are not entitled to a jury trial does not mean that they are not entitled to due process and the core due process protections of *Gault*, *Winship*, *Apprendi*, and *Blakely*.

State v. Tai N. decided only that non-jury trials of juvenile offenders remained constitutionally sound after *Blakely v. Washington*. *State v. Tai N.*, 127 Wn. App. 733, 740, 113 P.3d 19 (2005). *Tai N.* did not determine the scope of a juvenile’s constitutional due process rights after *Blakely*, including whether a juvenile is entitled to notice of the aggravating factors the court can find in support of an exceptional sentence. *Tai N.*, 127 Wn. App. at 733.

The *Tai N.* court reasoned that the statutory protections that governed juvenile court proceedings adequately addressed *Blakely*’s requirement of proof beyond a reasonable doubt of the aggravating

factors. *Id.* 742. Because of the statutory guarantee of proof by clear and convincing evidence, which the *Tai N.* court interpreted as equivalent to proof beyond a reasonable doubt, the court did not decide whether *Apprendi* and *Blakely* require the same standard of proof as a matter of constitutional due process. *Id.*

There is no doubt that the due process clause is applicable in juvenile proceedings. *Schall v. Martin*, 467 U.S. 253, 263, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984). Notice is the cornerstone of this due process right: “[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity.” *Gault*, 387 U.S. at 33 (internal citations omitted). Thus, the fact that *Tai N.* does not require a jury finding of the aggravating factors beyond a reasonable doubt does not mean that a child is not entitled to *Apprendi* and *Blakely*’s due process requirement of notice of the factors alleged in support of a sentence outside the standard range.

It is not enough that F.B.T. got notice *after* he was found guilty at trial, as claimed by the prosecutor. BOR at 26-27. *Blakely* specifically addresses the unfairness of being sentenced well beyond the standard range, as in F.B.T.’s case, based on “facts extracted after trial from a

report compiled by a probation officer who the judge thinks more likely got it right than got it wrong.” *Blakely*, 542 U.S. at 311-12.

Because F.B.T. was not given notice of the alleged aggravating factors prior to trial, reversal for remand for entry of a standard range sentence is required.

3. There was insufficient proof the statutory aggravating factors.

The State fails to establish evidence sufficient to support the aggravating factors of particularly vulnerable victim and that F.B.T. violated a diversion agreement.

a. There was insufficient evidence the victims were particularly vulnerable in relation to F.B.T.

The State cites to *State v. Ogden*, which requires that the victim be more vulnerable to the offense than other victims, and that the “defendant knew of that vulnerability.” BOR at 30 (citing *State v. Ogden*, 102 Wn. App. 357, 366, 7 P.3d 839 (2000)). This aggravating factors requires the defendant know of the vulnerability and to prey on that victim because of it. The State is simply wrong to then claim that “F.B.T.’s deficits are irrelevant” to this analysis. BOR at 30. It is highly relevant that F.B.T. is a child who functions as a child much younger than his actual age, because it makes it far less probable he that acted based on knowledge of the victim’s vulnerability. If F.B.T. did not have the capacity to understand

the particular vulnerability of his victims in light of his diminished cognition, there is insufficient evidence of this aggravator when it is based on the victim's youth.

F.B.T. asks this Court to accept the State's concession that R.M.'s sleep status is not a valid aggravating factor for the charge of indecent liberties. BOR at 33. The only conviction regarding R.M. was for Indecent Liberties. CP 30. It is unclear why the State still argues that R.M. being asleep makes her a particularly vulnerable victim (BOR at 31) but then concedes that cannot be an aggravating factor for F.B.T.'s conviction of indecent liberties. BOR at 33-34. This Court should disregard the State's argument to the extent that it goes against its concession that R.M.'s sleep status cannot be used as an aggravator for F.B.T.'s offense of indecent liberties. BOR at 33 (citing *State v. Puapuaga*, 54 Wn. App. 857, 860-61, 776 P.2d 170 (1989)).

b. The court lacked evidence of a valid diversion agreement and criminal history.

The State simply does not address the problem that F.B.T. was found to be incompetent at the time the probation officer claimed he entered the binding contract of a diversion agreement. BOR at 34-35; BOA at 37-40. The State cites to RCW 13.40.150, which allows for the admissibility of oral and written reports if probative, but here, there was

not evidence establishing the constitutional validity of the diversion agreement. CP 23-29. The probation officer's citation to criminal allegations and diversion agreements with an incompetent child cannot be a constitutionally valid basis for increasing a defendant's sentence above the standard range. *See State v. Quiroz*, 107 Wn.2d 791, 794, 733 P.2d 963 (1987) ("The Supreme Court has promulgated a number of rules to control the procedure which the diversion unit and the juvenile must follow in order to enter into a diversion agreement. These rules are designed to protect the juvenile's constitutional and statutory rights while at the same time ensuring that the system functions efficiently and without the delays associated with formal hearings.").

4. The court imposed a manifest injustice sentence based on prohibited nonstatutory aggravating factors.

a. The legislature has not provided the court authority to impose a manifest injustice sentence based on any factors it chooses.

The State relies on case law allowing a court to impose a manifest injustice sentence based on any factors it chooses, despite the JJA providing an exclusive list of aggravating factors. RCW 13.40.150(3)(i). Because the JJA provides an exclusive list of aggravating factors, a court should not be able to consider other factors not provided by the legislature. *See State v. Bacon*, 190 Wn.2d 458, 463, 415 P.3d 207 (2018) (juvenile courts did not possess authority to grant a suspended disposition where it

was not explicitly authorized by the JJA). The State does not address this issue of statutory interpretation. AOB at 45-47; BOR at 35-39.

b. RCW 13.40.150(5) prohibits a court from incarcerating a 13-year-old for the entirety of his childhood due to a need for services that cannot be provided in the community.

The State misconstrues the issue raised by F.B.T. BOR at 39. Even if the court found valid aggravating factors required a manifest injustice sentence, RCW 13.40.150(5) prohibits incarcerating a child because of a lack of treatment resources in the community. Here, the court incarcerated F.B.T. for the remainder of his childhood based on his need for services. RP 228, 231. Because the court ordered F.B.T.'s sentence based on his need for treatment, incarceration in order to obtain the desired treatment is prohibited under RCW 13.40.150(5).

5. If the court treats the modification of F.B.T.'s sentence as a nullity, F.B.T. will be sentenced to serve an illegal sentence.

Rather than conceding that F.B.T. is entitled to reversal and remand based on the trial court amending F.B.T.'s sentence in violation of RAP 7.2(e), the State argues that the erroneously entered change should be treated as a "nullity." BOR at 41. However, the trial court sought to modify an illegal sentence, in which F.B.T. was ordered to serve a 206-232 month concurrent sentence in violation of RCW 13.40.180. CP 33. Should this court consider the impermissible revision a nullity, the illegal

sentence would remain in place. CP 33. This Court should reverse and remand for resentencing as provided for in *Moro*. 117 Wn. App. at 925.

B. CONCLUSION

When police took 13-year-old F.B.T. from his home at 8:00 at night and drove him to the police station to question him, he had not before been given legal decision making authority, as the law generally presumes he possess neither physical autonomy nor the ability to make any legal decisions until he turns 18 years old. Yet, alone in a police station, confronted by two police officers, this special education student with a borderline IQ who had previously been found incompetent by a court, was not only expected to understand his Fifth Amendment rights, but be able to meaningfully waive them. Based on this “waiver,” police obtained statements from F.B.t. that subjected him to the possibility of confinement for the remainder of his childhood. The State simply cannot meet its burden to show F.B.T. knowingly, intelligently, and voluntarily waived his *Miranda* rights when considering F.B.T.’s age, experience, education, background and intelligence.

Washington courts have given constitutional force to the simple principle that “children are different” to redress the harm of treating children as miniature adults in the criminal justice system. This Court should interpret this principle to apply when police interrogate children.

F.B.T.'s confession is involuntary under both standards, and suppression of his statement is required.

Alternatively, F.B.T. is entitled to reversal of his manifest injustice sentence for lack of notice prior to trial and insufficient proof of the aggravating factors, in addition to the court's failure to comply with the statutory limits of the JJA and RAP 7.2(e).

DATED this 16th day of September, 2019.

Respectfully submitted,

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