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STATE OF WASHINGTON

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NO. 849498

IN THE SUPREME COURT OF WASHINGTON STATE

STATE OF WASHINGTON,

Respondent,

v.

JORGE ARIEL SAENZ,

Petitioner.

AMENDED SUPPLEMENTAL BRIEF OF PETITIONER

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I. IDENTITY OF PETITIONER

Petitioner, Jorge Ariel Saenz (Mr. Saenz), submits this amended supplemental brief in accordance with Rule of Appellate Procedure 13.7(d).

II. ISSUE PRESENTED FOR REVIEW

Whether a court is allowed to accept a prior conviction that originated in juvenile court as a strike under the Persistent Offender Accountability Act (POAA) without the juvenile court's written findings about how and why the juvenile court declined jurisdiction and with only mere assertions by defense counsel that a juvenile was fully informed of all rights being waived before he signed a stipulation and agreed order to decline juvenile jurisdiction?

III. STATEMENT OF THE CASE

In 2008, Mr. Saenz was convicted of two counts first degree assault and one count unlawful possession of a firearm. CP at 277-279; CP at 275-276. At sentencing, the State moved the trial court to sentence Mr. Saenz as a persistent offender under POAA, commonly known as the "three strikes and you're out law". The State argued that Mr. Saenz's latest conviction qualified as the third strike.

In 2003, Mr. Saenz was convicted of two counts second degree assault with a deadly weapon. And in 2001, at 15 years old, Mr. Saenz was charged with three counts second degree assault in Lewis County Juvenile Court. CP at 49-57; CP at 40-48.

In an effort to prove the 2001 second degree assault conviction qualified as a serious offense, the State presented an agreed stipulation, signed by Mr. Saenz, that declined juvenile jurisdiction and that waived the declination hearing. CP at 363. A juvenile court commissioner approved the stipulation and transfer but failed to make any

written findings regarding why the juvenile court declined jurisdiction. CP at 363.

Because there were no written findings as to why the juvenile court declined jurisdiction and because there was not an express waiver to prove Mr. Saenz was fully informed of rights waived before he signed the stipulation and agreed order, the trial court found the 2001 second degree assault juvenile conviction did not qualify as a strike. CP at 23-25. The trial court denied the State's motion for POAA and sentenced Mr. Saenz to 47 years in prison. Mr. Saenz appealed the first degree assault conviction. CP at 49-57; CP at 69-73. And the State appealed the trial court's POAA finding. CP 6-18.

The Court of Appeals affirmed the first degree assault and the unlawful firearm possession convictions, but reversed the trial court's persistent offender decision and remanded the case for re-sentencing under POAA. State v. Saenz, 156 Wash.App. 866, 234 P.3d 336 (2010). It found the juvenile court did not err when it failed to enter findings regarding the declination hearing because Mr. Saenz waived the hearing. State v. Saenz, 156 Wash.App. at 879. The Court of Appeals also found a checked box on a plea agreement that claimed Mr. Saenz's lawyer read to him the entire guilty plea and that he understood it in full was sufficient to prove Mr. Saenz's waiver was both knowing and intelligent. Id. This Court granted review.

IV. ARGUMENT

THE COURT OF APPEALS' COMPLETELY REDEFINED THE STATUTORY REQUIREMENTS NECESSARY TO SUPPORT A PRIOR SERIOUS OFFENSE CONVICTION THAT ORIGINATED IN JUVENILE COURT WHEN IT CONSIDERED A PRIOR CONVICTION AS A STRIKE UNDER THE PERSISTENT OFFENDER ACCOUNTABILITY ACT (POAA) WITHOUT THE JUVENILE COURT'S WRITTEN FINDINGS REGARDING THE DECLINATION HEARING AND WITH LITTLE EVIDENCE TO SHOW THE JUVENILE WAS FULLY INFORMED OF ALL RIGHTS BEING WAIVED BEFORE HE SIGNED A STIPULATION AND AGREED ORDER TO DECLINE JUVENILE JURISDICTION.

1. The Court of Appeals misinterpreted statutory requirements to support a prior serious offense conviction that originated in juvenile court. Statutory interpretation is a question of law, which this Court reviews *de novo*. RCW 9.94A.010 et seq., 9.94A.570; Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc., 159 Wash.2d 298, 149 P.3d 666 (2006).

Courts must assume the legislature means exactly what it says. State v. Keller, 143 Wash.2d 267, 19 P.3d 1030 (2001); Western Telepage, Inc. v. City of Tacoma Department of Financing, 140 Wash.2d 609, 998 P.2d 884 (2000) (citing State v. McCraw, 127 Wash.2d 288, 898 P.2d 838 (1995) (quoting Sidis v. Brodie/Dohrmann, Inc. 117 Wash.2d 329, 815 P.2d 781 (1991))); State v. Smith, 117 Wash.2d 271, 814 P.2d 652 (1991). Plain words in a statute do not require construction. Id. Construction is only necessary when a statute is unclear or ambiguous. A statute that is clear need not be construed. State v. J.P., 149 Wash.2d 444, 69 P.3d 318 (2003). A statute must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." Whatcom County v. City of Bellingham, 128 Wash.2d 537, 909 P.2d 1303 (1996).

As evidenced by Chapter 13 of the Juvenile Justice Act of 1977, the legislature established a system capable of having primary responsibility for, being accountable for, and responding to the needs of youthful offenders and their victims. The legislature also provided clear policy that determines the jurisdictional limitations of the courts in dealing with juvenile offenders. RCW 13.40.010(j).

For example, the legislature grants juvenile courts exclusive original jurisdiction over all proceedings involving juveniles, persons younger than 18 years of age, unless an exception applies. RCW 13.04.030(1). One exception is if the juvenile court transfers jurisdiction of a particular juvenile to adult criminal court pursuant to RCW 13.40.110. Either party or the court can request a transfer to adult court. But unless the declination hearing is waived, a juvenile is entitled to a hearing, to access to counsel, and to a statement of reasons supporting the court's decisions before juvenile court jurisdiction is declined. RCW 13.40.110; State v. Holland, 30 Wash.App. 366, 635 P.2d 142 (1981) review granted, affirmed 98 Wash.2d 507, 656 P.2d 1056 (1983).

In State v. Knippling, 166 Wash.2d 102, 206 P.3d 332 (2009), this Court reinforced what the legislature mandates under RCW 13.40.110. In that case, the issue was whether a 1999 conviction in superior court, evidenced solely by a judgment and sentence that indicated the defendant was a juvenile and that did not contain an explanation of why the superior court had jurisdiction over the juvenile defendant, counts as a strike under POAA. State v. Knippling, 163 Wash.2d 1039, 187 P.3d 271 (2008). This Court determined that only written findings disclose how or why the case was before the superior court instead of the juvenile court. And therefore, only written findings can provide a sufficient factual basis in the record to support a conviction that originated in

juvenile court as a strike under POAA. State v. Ford, 137 Wash.2d 481, 973 P.2d 452 (1999), review denied, 11 P.3d 824 (2000) (quoting State v. Bresolin, 13 Wash.App. 396, 534 P.2d 1394 (1975).

Both RCW 13.40.110 and this Court's Knippling decision are clear and unambiguous. The juvenile court, here, was not obliged to decide whether or not to enter written findings; it was required to do so. The reason being, as argued in part 2 below, there was neither a valid express waiver of juvenile court jurisdiction by Mr. Saenz nor any express findings by the court regarding waiver of juvenile court jurisdiction.

Without sufficient proof Mr. Saenz knowingly and intelligently waived juvenile jurisdiction and without written findings regarding why the juvenile court declined jurisdiction in 2001, Mr. Saenz could not have been convicted as an offender under POAA. "A juvenile defendant is only potentially a POAA "offender" if the superior court has jurisdiction over the juvenile by means of an automatic decline, based on the nature of the crime, or as a result of a declination hearing, the juvenile court waives its jurisdiction. In re Pers. Restraint of Dalluge, 152 Wash.2d 780, 100 P.3d 279 (2004). Given that, the Court of Appeals erred when it found that Mr. Saenz's 2001 conviction qualified as a strike.

2. The Court of Appeals restructured how a juvenile court determines whether a juvenile defendant knowingly and intelligently waived juvenile jurisdiction. In order to determine whether a juvenile has knowingly waived his right to a declination hearing, a court must consider the totality of the circumstances. See North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); State v. Luoma, 88 Wash.2d 28, 558 P.2d 756 (1977); State v. Prater, 77 Wash.2d 526, 463 P.2d 640 (1970). The totality

approach mandates courts to inquire into all the circumstances surrounding the waiver. State v. Dutil, 93 Wash.2d 84, 89, 606 P.2d 269 (1980). This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, and the consequences of waiving those rights. See North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); State v. Dutil, 93 Wash.2d at 89.

In fact, a juvenile court's exercise of discretion in a juvenile declination hearing is uniquely limited. State v. Foltz, 27 Wash.App. 554, 619 P.2d 702 (1980). For example, the court must consider the following eight criteria as promulgated in Kent v. United States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 1060, 16 L.Ed.2d 84 (1966):

(1) the seriousness of the alleged offense to the community 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 against property, greater weight being given to offenses against persons especially if personal injury resulted; (4) the prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney); (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 who will be charged with a crime in the U.S. District Court for the District of Columbia; (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 the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, 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. Foltz 27, Wash.App. at 704.

Here, there was nothing in the record to show that the juvenile court considered the Kent factors or even inquired into the circumstances surrounding the waiver. But, the Court of Appeals maintained that mere assertions by defense counsel that s/he had extrajudicial conversations with Mr. Saenz and that s/he believed Mr. Saenz understood the implications to decline juvenile jurisdiction were enough to demonstrate Mr. Saenz was fully informed of all rights being waived before he signed the agreed order.

The problem with the Court of Appeals' reliance on extrajudicial conversations between Mr. Saenz and his attorney is the exact nature of those conversations were not in the record to provide a sufficient basis to determine whether Mr. Saenz had been fully informed of the rights he was waiving. The legislature mandates that "[w]aiver of any right a juvenile has under RCW 13.40.140(9) must be an express waiver intelligently made by the juvenile after the juvenile has been fully informed of the right being waived." RCW 13.40.140(9). When RCW 13.40.140 is read as a whole, it becomes clear that the "express waiver" language contained in subsection 9 does not apply to extrajudicial statements. State v. Blair, 56 Wash.App. 213, 783 P.2d 102 (1989). Moreover, the determination of whether a knowing and intelligent waiver has been made is the responsibility of the juvenile judge, who is presumably experienced in handling juvenile cases and who has the child and other witnesses before him, as well as the facts pertaining to the child's age, intelligence, education and experience. Dutil v. State, 93 Wash.2d 84, 606 P.2d 269 (1980).

The Court of Appeals also relied upon a checked box on a plea agreement that claimed Mr. Saenz's lawyer read to him the entire guilty plea and that he understood it in full. State v. Saenz, 156 Wash.App. 879, 234 P.3d 336 (2010). The waiver of rights at

issue concern those rights associated with waving juvenile court jurisdiction, while the guilty plea form focuses on waiver of a defendant's constitutional rights associated with trial and the consequences of the guilty plea. Dutil v. State, 93 Wash.2d 84, 606 P.2d 269 (1980). These are separate and distinct.

Besides, what the Court of Appeals relied upon to determine Mr. Saenz knowingly and intelligently waived juvenile jurisdiction is inconsistent with the substantial factual support it relied upon in State v. Ramos, 152 Wash.App. 684, 217 P.3d 384, (2009). In that case, the defendant agreed to waive juvenile court jurisdiction and to plead guilty in superior court. His counsel presented a waiver form to the judge and explained the efforts made to prepare for the declination hearing. Counsel also told the court how the defendant had been consulted at each step of the process. The defendant even discussed the proposed plea agreement with his mother. And his family sought a "second opinion" about the offer-presumably from another attorney. State v. Ramos, 152 Wash.App. at 688-689.

The juvenile court considered the waiver and questioned the defendant about the waiver at some length. At which time, the defendant confirmed that he had worked with his attorney and had consulted his mother on the decision. The juvenile court reviewed then the stipulation and even considered the factors set forth in Kent v. United States, 383 U.S. 541, 86 S.Ct.1045 (1966), before it accepted the waiver and declined jurisdiction to the superior court. State v. Ramos, 152 Wash.App. at 688.

The Court of Appeals found the juvenile court was permitted to decline jurisdiction of the case. The defendant had the authority to waive his right to a declination hearing. And the trial court did not err by transferring the case to the adult court at the

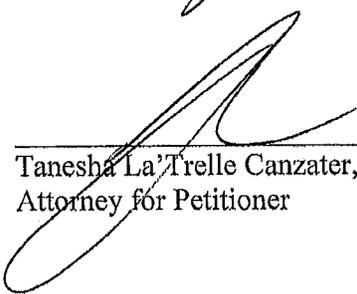
joint request of the parties. State v. Ramos, 152 Wash.App. at 693. But within a year later, the Court of Appeals decided State v. Saenz, 156 Wash.App. 866, 234 P.3d 336 (2010) and ultimately created disparity for what a juvenile court record must contain in order to prove a juvenile was fully informed of all rights waived before he waived a declination hearing.

Courts must repeatedly deal with issues of waiver with regard to a broad variety of constitutional rights. There is no reason to assume that such courts especially juvenile courts, with their special expertise in this area will be unable to apply the totality of the circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. State v. Dutil, 93 Wash.2d 89, 606 P.2d 269 (1980).

V. CONCLUSION

For the reasons set forth above, Mr. Saenz respectfully asks this Court to reverse the Court of Appeals' decision and to reinstate the trial court's sentence.

Respectfully submitted this 13th day of June, 2011.



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DECLARATION OF SERVICE

January 13, 2011

Supreme Court Case No. 849498

Case Name: *State of Washington v. Jorge Ariel Saenz*

I declare under penalty and perjury of the laws of the State of Washington that on **Thursday, January 13, 2011** I filed via email an AMENDED SUPPLEMENTAL BRIEF OF THE PETITIONER with the Supreme Court at the address listed below and served a copy of the same by depositing in the United States of America mails an addressed postage paid envelope to the following counsel of record and/or other interested parties:

WASHINGTON STATE SUPREME COURT

Email address: Supreme@courts.wa.gov

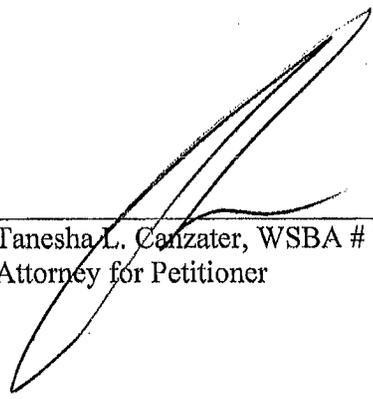
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