

FILED
Court of Appeals
Division I
State of Washington
12/22/2017 4:07 PM

No. 96143-3

No. 77360-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

D.L.,

Appellant.

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

APPELLANT'S OPENING BRIEF

Kate Benward
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION.....1

B. ASSIGNMENTS OF ERROR.....2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....3

D. STATEMENT OF THE CASE.....5

E. ARGUMENT.....8

1. D.L.’s right to due process was violated because he did not receive notice of probation’s intent to seek a manifest injustice sentence before entering his plea.....8

 a. Juveniles are entitled to equivalent due process procedural protections as adults in criminal proceedings, including at sentencing.....8

 b. Due Process entitles the accused to notice of the aggravating factors the State will seek to prove beyond a reasonable doubt before the court may impose a sentence outside the standard range.....9

 c. The due process concerns of *Apprendi* and *Blakely* must apply with equal force to the court’s imposition of a manifest injustice sentence.....12

 d. D.L. was not given notice of the aggravating factors that would be alleged in support of a manifest injustice sentence prior to entry of his plea; this violation of his due process rights requires reversal of the manifest injustice sentence and remand for sentencing within the standard range.....15

2. It violates the doctrine of separation of powers for the probation department to allege and seek to prove aggravating factors in juvenile felony cases.....	17
a. <u>The doctrine of separation of powers requires the prosecutor to make charging decisions and prove guilt, and the court to confirm guilt and impose the appropriate sentence.....</u>	18
b. <u>The prosecutor alone is authorized to make felony charging decisions in juvenile felony cases; it violates the doctrine of separation of powers for the probation officer, a member of the judicial branch, to allege and seek to prove aggravating factors in support of a manifest injustice sentence.....</u>	20
3. The aggravating factors alleged by the probation officer were not proven beyond a reasonable doubt.....	25
a. <u>There was insufficient evidence that the victim was particularly vulnerable.....</u>	26
b. <u>There was entirely insufficient evidence that D.L. posed a serious risk to reoffend.....</u>	29
4. The trial court denied D.L’s grandmother the right to speak at his sentencing hearing, in further violation of D.L.’s due process rights.....	32
5. The trial court violated the appearance of fairness by fulfilling the role of the prosecutor in conducting direct examination of the probation officer, who requested a manifest injustice sentence in contravention of the terms of D.L’s plea agreement.....	34
F. <u>CONCLUSION</u>.....	37

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994)	19
<i>Guillen v. Pierce County</i> , 144 Wn.2d 696, 31 P.3d 628 (2001)	18, 19
<i>In re Beito</i> , 167 Wn.2d 497, 220 P.3d 489 (2009)	11, 17
<i>In re Echeverria</i> , 141 Wn.2d 323, 6 P.3d 573 (2000)	32
<i>State v. Chavez</i> , 163 Wn.2d 262, 180 P.3d 1250 (2008)	18
<i>State v. Gore</i> , 143 Wn.2d 288, 21 P.3d 262 (2001)	26
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991)	27
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002)	18, 35, 36, 37
<i>State v. Rhodes</i> , 92 Wn.2d 755, 600 P.2d 1264 (1979)	25
<i>State v. Rice</i> , 174 Wn.2d 884, 279 P.3d 849 (2012)	18, 19, 20, 22
<i>State v. Siers</i> , 174 Wn.2d. 269, 274 P.3d 358 (2012)	12
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997)	12
<i>State v. Suleiman</i> , 158 Wn.2d 280, 143 P.3d 795 (2006)	26
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646, 652 (2006)	14

Washington Court of Appeals Decisions

<i>State v. Beard</i> , 39 Wn. App. 601, 694 P.2d 692 (1985)	20, 35
<i>State v. Bilal</i> , 77 Wn. App. 720, 893 P.2d 674 (1995)	35
<i>State v. Gutierrez</i> , 37 Wn. App. 910, 684 P.2d 87 (1984)	25
<i>State v. Kuhlman</i> , 135 Wn. App. 527, 144 P.3d 1214 (2006)	14
<i>State v. Moro</i> , 117 Wn. App. 913, 73 P.3d 1029 (2003)	22

<i>State v. Murphy</i> , 35 Wn. App. 658, 669 P.2d 891 (1983).....	23, 24
<i>State v. Poupart</i> , 54 Wn. App. 440, 773 P.2d 893 (1989)	8, 22
<i>State v. S.H.</i> , 75 Wn. App. 1, 877 P.2d 205 (1994)	27
<i>State v. Scott</i> , 72 Wn. App. 207, 866 P.2d 1258 (1993)	22, 27
<i>State v. T.E.C.</i> , 122 Wn. App. 9, 92 P.3d 263 (2004).....	29
<i>State v. T.E.H.</i> , 91 Wn. App. 908, 960 P.2d 441 (1998).....	28
<i>State v. Tai N.</i> , 127 Wn. App. 733, 113 P.3d 19 (2005)	13, 14, 25, 31
<i>State v. Whittington</i> , 27 Wn. App. 422, 618 P.2d 121 (1980)	8, 9, 20
<i>Tatum v. Rogers</i> , 170 Wn. App. 76, 283 P.3d 583 (2012).....	34, 35

Statutes

RCW 10.64.040	32
RCW 13.04.035	20, 36
RCW 13.04.040 (2).....	21
RCW 13.04.040 (5).....	21
RCW 13.40.020 (19).....	12, 25
RCW 13.40.070 (5) (a)	21
RCW 13.40.090	20
RCW 13.40.130	21
RCW 13.40.130 (5).....	21
RCW 13.40.150 (1).....	21, 22
RCW 13.40.150 (3) (i)	12, 13, 21
RCW 13.40.150 (3) (i) (iii).....	26
RCW 13.40.160 (2).....	23, 25

RCW 9.94A.535 (1).....	13
RCW 9.94A.535 (3) (b)	13, 26
RCW 9.94A.537 (1).....	11, 12

Washington Constitutional Provisions

Const. Art. I § 22.....	2
-------------------------	---

Federal Constitutional Provisions

U.S. Const. amend. VI	3
U.S. Const. amend. XIV	3

United States Supreme Court Decisions

<i>Application of Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)8	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 2355, 147 L. Ed. 2d 435 (2000).....	9, 10, 24
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	10
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	34
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 8, 10	
<i>Jones v. United States</i> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).....	10
<i>Marshall v. Jerrico, Inc.</i> 446 U.S. 238, 100 S. Ct. 1610, 64 L.Ed 182 (1980).....	34
<i>Offutt v. United States</i> , 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954)	35
<i>Schall v. Martin</i> , 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) 14, 35	

Federal Court of Appeals Decisions

Boardman v. Estelle, 957 F.2d 1523 (9th Cir. 1992)..... 32, 33

Other Authorities

Tracy Petznick, *Only Young Once, but A Registered Sex Offender for Life: A Case for Reforming California's Juvenile Sex Offender Registration System Through the Use of Risk Assessments*, 16 Berkeley J. Crim. L. 228 (2011)..... 30

A. INTRODUCTION

Fourteen-year-old D.L. had no prior criminal history when he plead guilty to one count of attempted child molestation in the first degree. The State agreed to request a sentence within the standard range, and D.L. entered his plea based on this agreement. Months later, the probation officer independently filed a notice to seek a manifest injustice sentence, alleging various aggravating factors that were not charged or admitted to in D.L.'s guilty plea.

At D.L.'s disposition hearing, the prosecutor did not elicit testimony from the probation officer, who was independently alleging the aggravating factors in support of a manifest injustice sentence that far exceeded the sentence agreed to by D.L. and the State. The court then conducted direct examination of the probation officer, and imposed the manifest injustice sentence requested by the probation officer.

D.L. seeks reversal of the manifest injustice sentence imposed by the court in violation of his Article I § 22 due process rights and the doctrine of separation of powers.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that a sentence within the standard range would constitute a manifest injustice (Finding of Fact 1.8).

2. D.L.'s due process rights under the Fourteenth Amendment were violated because he was not given notice of probation's intent to seek a manifest injustice sentence prior to D.L. entering his plea.

3. D.L.'s due process rights under Article I § 22 were violated when he was not given notice of probation's intent to seek a manifest injustice sentence prior to D.L. entering his guilty plea. Const. Art. I § 22.

4. The probation officer's allegation of aggravating factors and independent request for a manifest injustice sentence violated the doctrine of separation of powers.

5. Absent sufficient evidence in the record, the trial court erred in finding the aggravating factor that the victim was particularly vulnerable.¹

6. Absent sufficient evidence in the record, the trial court erred in finding that D.L. posed a serious risk to reoffend.²

7. The trial court deprived D.L. of his due process right to have a parent or custodian speak on his behalf when the court denied D.L.'s

¹ The juvenile court did not enter this as a finding of fact, but it is included in Conclusion of Law # 2.4).

² The juvenile court did not enter this as a finding of fact, but it is included in Conclusion of Law # 2.4).

request to have his grandmother speak on his behalf at the disposition hearing.

8. D.L.'s disposition hearing lacked the appearance of fairness, in violation of due process, when the trial court elicited testimony from the probation officer, an administrative appointee of the court, in support of a manifest injustice sentence

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Under article 1, section 22 of the Washington Constitution, “the accused shall have the right ... to demand the nature and cause of the accusation against him.” Juveniles are afforded equivalent due process rights as adults in criminal proceedings, including at sentencing. The statutory maximum is the maximum sentence a judge may impose solely on the basis of the facts pleaded and proved or admitted by the defendant. U.S. Const. amend. VI and XIV. When the court seeks to impose a sentence outside of the standard range, procedural protections are required to avoid imposing such deprivations erroneously. Were D.L.'s rights violated where he was not given notice prior to entry of his plea that the probation officer would allege aggravating factors and request a manifest injustice sentence?

2. The doctrine of separation of powers protects individuals against centralized authority and abuse of power. The division of governmental

authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake. The executive power collects evidence and seeks an adjudication of guilt in a particular case, and the judicial power confirms guilt and imposes an appropriate sentence. Where aggravating factors must be pled and proven beyond a reasonable doubt, and the prosecutor alone is authorized to bring criminal charges in juvenile felony cases, does it usurp the role of the executive branch for the probation officer, a member of the judiciary, to allege these factors and seek to prove them beyond a reasonable doubt?

3. Due process requires proof beyond a reasonable doubt of the alleged aggravating factors before the court can impose a manifest injustice sentence. Where the court imposed a manifest injustice sentence based on the probation officer's entirely unsubstantiated conclusions that the victim was particularly vulnerable and that D.L. posed a high risk to reoffend, and failed to find that these factors were established beyond a reasonable doubt, was there insufficient evidence to support a manifest injustice sentence?

4. The right of allocution and to present mitigating evidence to the court prior to being sentenced is guaranteed by the due process clause of the Constitution. Washington state law extends this right of allocution to the child's guardians or custodians in juvenile dispositions. D.L. lived

with his grandmother, whose outrage at the probation officer's recommendations during the disposition hearing caused the court to exclude her from the courtroom. The court refused D.L.'s later request that his grandmother be allowed to speak for him. Did the court's refusal to allow D.L.'s grandmother speak on his behalf violate his constitutional right to be heard?

5. The Due Process Clause entitles a person to an impartial and disinterested tribunal. A disposition hearing in which a party seeks a manifest injustice sentence is an adversary proceeding. Did the trial court violate the appearance of fairness by undertaking the role of the non-participating prosecutor in eliciting testimony from the probation officer, the sole party advocating a manifest injustice sentence?

D. STATEMENT OF THE CASE

Fourteen-year-old D.L.'s stepfather was a convicted sex offender who had a history of physically abusing D.L. RP 8/30/17; 237. D.L.'s grandfather believed that D.L.'s stepfather had "been on a task to get [D.L.] out of that house because he didn't want him there." RP 8/30/17; 237.

So when D.L.'s stepfather reported that he believed D.L. sexually abused his five-year-old, son, D.L.'s grandfather questioned the State's

reliance on the stepfather's account of events, and did not think the State treated D.L. fairly. RP 8/30/17; 238-239. And D.L.'s grandparents took D.L. into their home after his stepfather made the allegations against him, where D.L. stayed throughout the proceedings. RP 8/30/17; 244.

The State first charged D.L. with three counts of rape of a child in the first degree, and attempted rape of a child in the first degree based on these allegations. CP 1-2. Days before trial, the State filed an amended Information charging D.L. "in the alternative" with three counts of child molestation in the first degree, and one count of attempted child molestation in the first degree. CP 51. Then on the day of trial, the State amended the Information once again, reducing the charges to one count of attempted child molestation in the first degree. CP 100.

D.L. plead guilty to one count of attempted child molestation in the first degree. CP 107. D.L. had no prior offenses and an offender score of "0." CP 108; 195. In exchange for D.L.'s plea to this reduced, single charge, the State agreed to support and recommend a SSODA disposition if D.L. was found eligible for the program. CP 111. D.L.'s guilty plea also memorialized that if D.L. were not eligible for the SSODA, the State

would recommend a “standard range disposition of 15-36 week commitment at JRA.” CP 111.

D.L.’s plea form did not state that the probation officer would or could recommend a manifest injustice sentence. CP 107-112.

Nevertheless, over two months after D.L entered his plea, and after D.L. was found ineligible for the SSODA program, the probation officer filed a “Notice of Intent to Seek Manifest Injustice.” CP 158. The probation officer alleged the following aggravating factors—that the “victim was particularly vulnerable,” and that D.L. “presents a serious risk to reoffend.” CP 227.

The probation officer requested a manifest injustice sentence of a minimum of 36 weeks. CP 230. D.L. objected to the probation officer’s request for a manifest injustice sentence where neither the prosecution nor the defense were soliciting the recommendation, the court had not requested preparation of a disposition report, and probation’s request ran counter to the plea agreement of the parties. RP 8/30/17; 210-211, 214.

The court agreed the State should not call the probation officer as a witness because her request was contrary to the State’s recommendation that D.L. relied on when he entered the plea agreement, and the prosecutor was bound by this recommendation. CP 107-112; RP 8/30/17; 210-211.

The court then conducted the direct examination of the probation officer.

RP 8/30/17; 213.

The court imposed the probation officer's request for a 36-40 week sentence based on the aggravating factors alleged by the probation officer after D.L. had entered his guilty plea. CP 209-210.

E. ARGUMENT

1. D.L.'s right to due process was violated because he did not receive notice of probation's intent to seek a manifest injustice sentence before entering his plea.

- a. Juveniles are entitled to equivalent due process procedural protections as adults in criminal proceedings, including at sentencing.

The Due Process Clause requires that juveniles receive "the essentials of due process and fair treatment." *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Application of Gault*, 387 U.S. 1, 30, 87 S. Ct. 1428, 1445, 18 L. Ed. 2d 527 (1967) (Juvenile hearings "must measure up to the essentials of due process and fair treatment."). It is well established that due process protections accorded adults in criminal proceedings are to be given to children in juvenile court proceedings, with the exception of the right to a jury trial. *State v. Poupart*, 54 Wn. App. 440, 445, 773 P.2d 893 (1989) (citing *Gault*, 387 U.S. 1); *State v. Whittington*, 27 Wn. App. 422, 425, 618 P.2d 121 (1980)

(Juveniles are entitled to the “highest standards of due process” in sentencing by the juvenile court).

Whittington makes clear that a juvenile court’s imposition of a manifest injustice sentence requires the same due process protections “normally required in any criminal trial.” *Whittington*, 27 Wn. App. at 426. Accordingly, before a court imposes a manifest injustice sentence, a juvenile is entitled to the same procedural protections as when the State seeks a finding for aggravating factors in adult sentencing. *See Whittington*, 27 Wn. App. at 426 (Providing *Whittington* with all the procedural safeguards required of criminal trial places no more burden on the State than exists when the State seeks a deadly weapon finding or a habitual offender judgment).

- b. Due Process entitles the accused to notice of the aggravating factors the State will seek to prove beyond a reasonable doubt before the court may impose a sentence outside the standard range.

“Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355, 147 L. Ed. 2d 435 (2000) (citing *Jones v. United*

States, 526 U.S. 227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)). The Fourteenth Amendment requires the same for state charges. *Apprendi*, 530 U.S. at 476.

“The ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge 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). Of course, *Apprendi* does not alter that ability of “judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute.” *Apprendi*, 530 U.S. at 481 (emphasis in original). But where the court seeks to impose a sentence outside of the standard range, *Apprendi* requires “procedural protections in order to provide concrete substance for the presumption of innocence, and to reduce the risk of imposing such deprivations erroneously.” *Apprendi*, 530 U.S. at 484 (citing *Winship*, 397 U.S. at 363) (internal quotations omitted)).

Apprendi concerned the two vital constitutional rights of due process of law under the Fourteenth Amendment, and the Sixth Amendment right to a jury trial: “At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without ‘due process of law,’ Amdt. 14, and the guarantee that

‘in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury’ Amdt. 6.” *Apprendi*, 530 U.S. at 476-477.

Accordingly, *Apprendi* emphasized that a person’s due process right to notice is implicated when the State seeks to prove a sentence above the standard range: “if a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not--at the moment the State is put to proof of those circumstances--be deprived of protections that have, until that point, unquestionably attached.” *Apprendi*, 530 U.S. at 484.

The Washington State Legislature amended the Sentencing Reform Act (SRA) to comport with the requirements of *Apprendi* and *Blakely*. *In re Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009) (citing the “*Blakely*-fix Laws” of 2005, ch. 68, § 4). RCW 9.94A.537 (1) requires that before a court can impose an exceptional sentence, the accused must be provided notice of the State’s intent to seek a sentence outside the standard range “at any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced...” The statute further requires that the

“notice shall state aggravating circumstances upon which the requested sentence will be based.” (emphasis added). RCW 9.94A.537 (1).

Thus, before the court can impose an exceptional sentence, the accused must be notified of the aggravating factor the State will seek to prove beyond a reasonable doubt prior to the defendant’s plea or trial. *Id.*; *State v. Siers*, 174 Wn.2d. 269, 283-284, 274 P.3d 358 (2012). Due process rights are equally important when a juvenile enters a guilty plea. *See State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (“Plea agreements are more than simple common law contracts. Because they concern fundamental rights of the accused, constitutional due process considerations come into play.”).

- c. The due process concerns of *Apprendi* and *Blakely* must apply with equal force to a manifest injustice sentence based on aggravating factors.

A manifest injustice sentence allows the court to sentence a juvenile beyond the standard range based on aggravating factors, and thus involves the same constitutional concerns addressed in *Apprendi* and *Blakely*. *See* RCW 13.40.020 (19) (“Manifest injustice” means a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter). RCW 13.40.150 (3) (i) provides the statutory aggravating factors that the court may consider in imposing a manifest

injustice sentence.³ These statutory aggravating factors are comparable to the statutory aggravating factors in RCW 9.94A.535 (3), and some of the aggravating factors are nearly identical, such as one of the statutory factors at issue in D.L.’s case, “that the victim or victims were particularly vulnerable.”⁴

However, after *Apprendi* and *Blakely*, this Court refused to apply the Sixth Amendment jury trial right to the State’s proof of aggravating factors for juvenile dispositions because of the “well-established precedent of holding that non-jury trials of juvenile offenders are constitutionally sound.” *State v. Tai N.*, 127 Wn. App. 733, 740, 113 P.3d 19 (2005). But in so holding, this Court restated the well-established importance of ensuring that juvenile “proceedings comport with the ‘fundamental fairness’ demanded by the Due Process Clause.” *Tai N.*, 127 Wn. App. at

³ RCW 13.40.150 (3) (i) provides that the court shall:

- (i) Consider whether or not any of the following aggravating factors exist:
 - (i) In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another;
 - (ii) The offense was committed in an especially heinous, cruel, or depraved manner;
 - (iii) The victim or victims were particularly vulnerable;
 - (iv) The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement;
 - (v) The current offense included a finding of sexual motivation pursuant to RCW 13.40.135;
 - (vi) The respondent was the leader of a criminal enterprise involving several persons;
 - (vii) There are other complaints which have resulted in diversion or a finding or plea of guilty but which are not included as criminal history; and
 - (viii) The standard range disposition is clearly too lenient considering the seriousness of the juvenile’s prior adjudications.

⁴ RCW 9.94A.535 (3) (b) “The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.”

738 (citing *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)). And because this Court determined that the Juvenile Code already requires the court to find aggravating factors beyond a reasonable doubt before imposing a manifest injustice sentence as required by *Apprendi* and *Blakely*, the court did not need to decide that issue as a matter of constitutional due process. *Tai N.*, 127 Wn. App. at 742.

Post-*Blakely* and *Apprendi*, the Supreme Court found that even though juveniles do not have a jury trial right, because of the strength of a juvenile's due process rights that accord with adult criminal proceedings, juvenile convictions could be used in calculating an adult offender score.

[T]he Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW, specifically mandates numerous safeguards for juvenile adjudications, such as the right to notice, counsel, discovery, an opportunity to be heard, confrontation of witnesses, and an unbiased fact finder.

State v. Weber, 159 Wn.2d 252, 264, 149 P.3d 646, 652 (2006) (citing RCW 13.40.140); *See also State v. Kuhlman*, 135 Wn. App. 527, 533, 144 P.3d 1214 (2006) (“Moreover, there are substantial procedural rights afforded to juveniles in Washington that help make the results of juvenile proceedings reliable. Because of the constitutionally required procedural safeguards in juvenile proceedings, we hold that juvenile adjudications fall within the prior convictions exception and can be used in setting an adult offender's sentence.”).

Thus *Apprendi* and *Blakely*'s foundational due process requirements, which include notice of the aggravating factors prior to entry of the plea, and proof beyond a reasonable doubt of these factors prior to the court imposing a sentence outside the standard range, must apply in juvenile proceedings.

- d. D.L. was not given notice of the aggravating factors that would be alleged in support of a manifest injustice sentence prior to entry of his plea; this violation of his due process rights requires reversal of the manifest injustice sentence and remand for sentencing within the standard range.

D.L. entered his plea of guilty to one count of attempted child molestation in the first degree. CP 107. The plea form states what D.L. understood the prosecution's recommendation to be if he did not enter or was revoked from the SSODA program, which was the "standard range disposition of 15-36 week commitment at JRA" CP 111. D.L.'s plea form contained no notice that the probation department would be requesting a manifest injustice sentence. CP 107-111. Nor was D.L. informed any time prior to entry of his plea that the probation department would seek a manifest injustice sentence. And the record does not reflect that the court requested a manifest injustice report from the probation officer. RP 8/30/17; 210. It was only months after entry of his plea that the juvenile probation officer Linda Barry filed a "Notice of Intent to seek Manifest Injustice." CP 158.

Though D.L.’s plea form advised him of his right to appeal a manifest injustice sentence, there were no facts admitted in the plea form that would have supported a manifest injustice sentence, or any notice of the aggravating factors that could be relied on for a manifest injustice sentence.⁵ Though D.L.’s plea form stated that he could appeal a manifest injustice sentence, this does not constitute notice that a manifest injustice sentence would be sought. To the contrary, D.L.’s plea form informed him that he would receive a standard range sentence: “the judge may impose any sentence he or she feels is appropriate, up to the maximum allowed by law.” CP 111; *Blakely*, 542 U.S. at 303 (“The ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the...verdict or admitted by the defendant.”).

The statement in D.L.’s plea form that allows the court to “review the probable cause statement to establish a factual basis” does not constitute a stipulation to facts that can then be relied on for the court’s imposition of a manifest injustice sentence. CP 111; *Beito*, 167 Wn.2d at 505 (“it is not enough to stipulate to facts from which the trial court could find additional facts, the existence of which would support finding

⁵ D.L.’s plea form stated that the sentencing judge “must impose a sentence within the standard range, unless the judge finds by clear and convincing evidence that the standard range sentence would amount to a manifest injustice.” CP 110.

the aggravating factor was present and provides support for imposing an exceptional sentence.”). Any such facts would have to be alleged separately and prior to entry of D.L.’s plea because “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” *Weber*, 159 Wn.2d at 259 (citing *Blakely* at 303–04).

The probation officer’s untimely notification of its intent to seek a manifest injustice sentence that directly contravened the terms of D.L.’s plea agreement violated D.L.’s right to constitutionally adequate notice under *Apprendi*, *Blakely*, and *Siers*. Because D.L. was not informed that the court would be asked to impose a manifest injustice sentence and on what grounds, prior to entry of his plea, reversal and remand for resentencing within the standard range is required. *Beito*, 167 Wn.2d at 508.

2. It violates the doctrine of separation of powers for the probation department to charge and seek to prove aggravating factors in juvenile felony cases.

It violates the doctrine of separation of powers for the probation officer to allege and seek to prove aggravating factors, because it invades the province of the prosecution to criminally charge and prove criminal offenses in juvenile felony cases.

- a. The doctrine of separation of powers requires the prosecutor to make charging decisions and prove guilt, and the court to confirm guilt and impose the appropriate sentence.

“The separation of powers doctrine is one of the cardinal and fundamental principles of the American constitutional system and forms the basis of our state government.” *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012) (internal citations omitted).

The state constitution divides the political powers into legislative authority, executive power, and judicial power. *State v. Chavez*, 163 Wn.2d 262, 273, 180 P.3d 1250 (2008); *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002) (“The state constitution divides the ‘political power’ that is ‘inherent in the people,’ article I, section 1, into ‘legislative authority,’ article II, section 1, ‘executive power,’ article III, section 2, and ‘judicial power,’ article IV, section 1. Each branch of government wields only the power it is given.”).

“This constitutional division of government is ‘for the protection of individuals’ against centralized authority and abuses of power.” *Rice*, 174 Wn.2d at 900–01 (citing *Guillen v. Pierce County*, 144 Wn.2d 696, 731, 31 P.3d 628 (2001)). “The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for

numerous checks against corruption, abuses of power, and other injustices.” *Rice*, 174 Wn.2d at 901. And “[s]eparation of powers ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency.” *Id.*

“Although a violation of the separation of powers doctrine accrues directly to the branch invaded, the underlying purpose of the doctrine is the protection of individuals.” *Rice*, 174 Wn.2d at 906 (citing *Carrick v. Locke*, 125 Wn.2d 129, 136, 882 P.2d 173 (1994) and *Guillen*, 144 Wn.2d at 731(internal citations and emphasis omitted)).

“A prosecuting attorney’s most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file.” *Rice*, 174 Wn.2d at 901. And “the legislature cannot interfere with the fundamental and inherent charging discretion of prosecuting attorneys, including discretion over the filing of available special allegations.” *Id.* at 906.

A juvenile disposition hearing in which a finding of manifest injustice is sought is an adversary proceeding because of the possibility that a sentence outside the standard range will be imposed. *State v. Beard*, 39 Wn. App. 601, 607, 694 P.2d 692 (1985) (citing *Whittington*, 27 Wn.

App. at 428-429). During such hearings, it is the judicial power to confirm guilt and to impose an appropriate sentence. *See Rice*, 174 Wn.2d at 901. Probation officers' functions are administered by the superior court. RCW 13.04.035.⁶

- b. The prosecutor alone is authorized to make felony charging decisions in juvenile felony cases; it violates the doctrine of separation of powers for the probation officer, a member of the judicial branch, to allege and seek to prove aggravating factors.

The Legislature sets the parameters for the charging of criminal offense. *Rice*, 174 Wn.2d at 903 (“each charge filed must be authorized by the legislature.”). The Juvenile Justice Act (JJA) requires the prosecutor to “be a party to all juvenile court proceedings involving juvenile offenders or alleged juvenile offenders.” RCW 13.40.090. However, the JJA permits the probation officer to function as a prosecutor in non-felony cases with advance written notice. RCW 13.40.090.⁷ But where the alleged offense is a Class A or B felony, or an attempt to commit a Class A or B felony, such as in D.L.’s case, the prosecutor alone may charge the offense. RCW 13.40.070 (5) (a). Thus, the statutorily defined role of prosecutor with

⁶ “Juvenile probation counselor and detention services shall be administered by the superior court.”

⁷ Whether this legislative delegation of power violates the separation of powers doctrine is beyond the scope of D.L.’s appeal.

authority to charge felony offenses cannot be fulfilled by the probation officer in D.L.'s case.

The JJA specifies that the duties of a probation officer are to “[m]ake recommendations to the court regarding the need for continued detention or shelter care of a child unless otherwise provided in this title;” and “prepare disposition studies as required in RCW 13.40.130, and be present at the disposition hearing to respond to questions regarding the predisposition study.” RCW 13.04.040 (2), (4). Finally, the probation officer supervises “court orders of disposition to ensure that all requirements of the order are met.” RCW 13.04.040 (5).

The trial court, not the probation officer, is required to consider imposing a manifest injustice sentence. “the court shall “[c]onsider whether or not any of the following aggravating factors exist...” RCW 13.40.150 (3) (i) (emphasis added). In the court’s consideration of whether to impose a manifest injustice sentence, all oral and written reports “may be received by the court and may be relied upon to the extent of its probative value...” RCW 13.40.150 (1).

RCW 13.40.130 (5) specifies that the court may request a predisposition report be prepared “*following an adjudicatory hearing.*” There is no statute that authorizes the juvenile probation officer to

independently allege aggravating factors either before or after a juvenile enters a plea of guilty.

The probation officer's written and oral reports must be distinguished from the "recommendations for disposition," which "the prosecutor and counsel for the juvenile may submit." RCW 13.40.150 (1). This statute does not delimit who may submit *evidence*, including oral and written reports, like the probation officer's disposition report, but does specify that the prosecution and the defense are the two parties who may submit *recommendations for disposition*. *Id.*

There is thus no question that a probation officer has a duty "to make studies and recommendations to the court respecting dispositions." *Poupart*, 54 Wn. App. at 447. And these recommendations may be different from the recommendation made the prosecutor. *Id.* But the filing of available special allegations is the role of the prosecutor alone. *Rice*, 174 Wn.2d at 906. This must surely be true when it comes to charging an aggravating factor, because "whether an aggravating factor justifies a departure from the standard range is a question of law." *State v. Moro*, 117 Wn. App. 913, 919, 73 P.3d 1029 (2003) (citing *State v. Scott*, 72 Wn. App. 207, 213, 866 P.2d 1258 (1993)). Whereas, it is sole province of the

court to determine whether the aggravating factor was established by the appropriate standard of proof. RCW 13.40.160 (2).⁸

D.L. objected to the probation officer's motion and legal argument to the court for a manifest injustice sentence.⁹ RP 8/30/17; 211, 214. The court recognized that the probation department was doing much more than simply offering a predisposition report and recommending a sentence, noting, the "probation department is urging the Court to consider a manifest injustice sentence here." RP 8/30/17; 209.

The court overruled the defense's objection to the probation officer's request for a specific legal determination, relying on *State v. Murphy*¹⁰ as authority for the proposition that the probation officer may request a specific legal finding for a manifest injustice sentence from the court. RP 210-212. However, the court's reliance on *Murphy* was misplaced, because in *Murphy*, the record was not developed as to whether

⁸ RCW 13.40.160 (2) provides: "If the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice the court shall impose a disposition outside the standard range, as indicated in option D of RCW 13.40.0357. The court's finding of manifest injustice shall be supported by clear and convincing evidence.

A disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof. When a judge finds a manifest injustice and imposes a sentence of confinement exceeding thirty days, the court shall sentence the juvenile to a maximum term, and the provisions of RCW 13.40.030 (2) shall be used to determine the range. A disposition outside the standard range is appealable under RCW 13.40.230 by the state or the respondent..."

⁹ D.L. contends this issue was adequately raised at the trial level; but even if it were not, a court may review the constitutional issue of separation of powers for the first time on appeal. *State v. Aguirre*, 73 Wn. App. 682, 687, 871 P.2d 616 (1994)

¹⁰ *State v. Murphy*, 35 Wn. App. 658, 669 P.2d 891 (1983).

the probation officer moved the court to impose a manifest injustice sentence by alleging an aggravating factor as in D.L.'s case. 35 Wn. App. at 662 (the "affidavit by Murphy's probation officer attesting to Murphy's notification of her intent to recommend a manifest injustice finding was not part of the record below."). And *Murphy* did not hold that probation officers may charge a juvenile with an aggravating factor; it held only that the "court may consider the recommendations of probation counselors." *Murphy*, 35 Wn. App. at 667. Most importantly, *Murphy* was decided long before *Apprendi*, which requires the State to prove an aggravating factor beyond a reasonable doubt before the court can sentence a defendant above the standard range. *Apprendi*, 530 U.S. at 481. Thus, in juvenile sentencing, it must be the State, not the court's probation staff, that alleges an aggravating factor and seeks to prove it beyond a reasonable doubt.

It violates the doctrine of separation of powers for the juvenile probation officer to independently move the court to find aggravating factors, because it impermissibly usurps the function of the prosecuting attorney to seek criminal charges in felony juvenile case. Reversal of the manifest injustice is required where D.L.'s probation officer alleged and sought to prove the aggravating factors in its request for a manifest injustice sentence, in violation of the doctrine of separation of powers.

3. The aggravating factors alleged by the probation officer were not proven beyond a reasonable doubt.

The trial court imposed a sentence above the standard range based on its conclusion that “the following factors exist:” “The victim was particularly vulnerable,” and that the D.L. “poses a serious risk to reoffend.” CP 223 (Conclusions of Law 2.3). The court did find specifically these factors beyond a reasonable doubt, nor could it have based on the evidence before it; therefore the court’s conclusion that “[a] sentence within the standard range would constitute a manifest injustice” was based on insufficient evidence. CP 209, 223 (Conclusions of Law 2.2).

A “manifest injustice” is defined as a disposition that would “either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter.” RCW 13.40.020 (19).

A disposition harsher than the standard range must be supported by proof beyond a reasonable doubt. *Tai N.*, 127 Wn. App. at 741; *see also State v. Gutierrez*, 37 Wn. App. 910, 914, 684 P.2d 87 (1984) (RCW 13.40.160 (2)’s clear and convincing standard is comparable to the “beyond a reasonable doubt” standard); *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), *overruled on other grounds by State v.*

Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) (“in order to stand on review, the standard range for this offense and this defendant must present, beyond a reasonable doubt, a clear danger to society.”).

- a. There was insufficient evidence that the victim was particularly vulnerable.

The court erroneously determined that the victim in J.L.’s case was “particularly vulnerable,” based on the probation officer’s generic claim that the victim suffered “cognitive delays.” CP 227.

Particular vulnerability of the victim is statutory aggravating factor in both the JJA and SRA. RCW 13.40.150 (3) (i) (iii); RCW 9.94A.535 (3) (b). Under the SRA, in order for the victim’s vulnerability to justify an exceptional sentence, the State must show “(1) that the defendant knew or should have known (2) of the victim’s *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.” *State v. Suleiman*, 158 Wn.2d 280, 291–92, 143 P.3d 795 (2006) (citing *State v. Gore*, 143 Wn.2d 288, 318, 21 P.3d 262 (2001)).

An aggravating factor is legally adequate to justify a sentence outside of the standard range as long as the aggravating factor was not necessarily considered by the Legislature in establishing the standard range, and as long as the asserted aggravating factor is “sufficiently substantial and compelling to distinguish the crime in question from others

in the same category.” *State v. Scott*, 72 Wn. App. 207, 213-214, 866 P.2d 1258 (1993) (quoting *State v. Grewe*, 117 Wn.2d 211, 216, 813 P.2d 1238 (1991)).

Here, the only evidence presented by the probation officer that the victim was “particularly vulnerable,” was the statement of D.L.’s mother, who was not present at D.L.’s disposition and did not testify, but who apparently told the probation officer, Ms. Barry, that the victim suffered “cognitive delays.” CP 227.

As argued by the defense, because attempted child abuse is a strict liability crime, the mental state of the child victim is not at issue—the child is by definition, already vulnerable because of the difference in age (i.e. cognitive ability¹¹). See *State v. S.H.*, 75 Wn. App. 1, 10, 877 P.2d 205 (1994), *abrogated on other grounds by State v. Sledge*, 83 Wn. App. 639, 922 P.2d 832 (1996) (“When age is an element of the crime, it may be used to justify a departure from standard range sentence only ‘if the extreme youth of the victim in fact distinguishes the victim significantly from other victims of the same crime.’”).

Thus, where the offense of attempted child molestation has as an element of the offense, the age difference between perpetrator and victim,

¹¹ “Cognitive” is defined as “of or relating to the mental processes of perception, memory, judgment, and reasoning, as contrasted with emotional and volitional processes.” www.dictionary.com (last accessed 12/20/17).

the victim's specific vulnerability as it relates to cognition is already accounted for in the definition and punishment for the crime, and should not be considered as a statutory aggravating factor. This is especially true where both the perpetrator and victim are children, and there was ample evidence that D.L. was himself a child who suffered significant deficits in every aspect of his social and intellectual life. RP 8/30/17; 237 (Mr. Bruce Loomer: "my grandson, he may be 14 years old, but he doesn't have a normal mental make-up of a 14-year-old, period. It's more of an eight or nine-year-old."); CP 229 (D.L. has been diagnosed with ADHD, ODD, Bi-Polar Disorder, and a Mood Disorder.").

The trial court relied on *State v. T.E.H.* to support its finding of vulnerability. *State v. T.E.H.*, 91 Wn. App. 908, 960 P.2d 441 (1998). RP 8/30/17; 249. But in *T.E.H.*, the court was presented with specific facts about the five-year-old victim, which included evidence about the lack of protection and supervision in the house where the victim lived and was perpetrated against. *State v. T.E.H.* at 917. Such was not the case here, where the father of the victim, D.L.'s stepfather, had already taken steps to limit D.L.'s contact with the child, and, immediately reported his suspicions about D.L. when he found him in the room with the victim. CP 4, 227; RP 8/30/17; 238.

And the probation witnesses provided no more information about this claimed “particular vulnerability” during the hearing that would have enabled the court to find this alleged aggravating factor beyond a reasonable doubt. Thus, the probation officer’s generic, unsupported and undefined statement that the victim suffered “cognitive delays” simply cannot establish, beyond a reasonable doubt, a particular vulnerability that was a substantial factor in the commission of this crime. *Suleiman*, 158 Wn.2d at 291–92.

- b. There was entirely insufficient evidence that D.L. posed a serious risk to reoffend.

The court also relied on the non-statutory aggravating factor of a “high risk to reoffend as basis for finding a manifest injustice sentence.” CP 209; RP 8/30/17; 247. However, this finding was based on nothing more than the conclusions of the probation department, who had no expertise or specific evidence to support this proposed factor.

In *T.E.C.*, the court relied on a doctor’s full evaluation of the child that made a specific assessment about the juvenile’s likelihood to reoffend. *State v. T.E.C.*, 122 Wn. App. 9, 19, 92 P.3d 263 (2004) (“The Court adopted [Dr.] Knoepfler's factors for finding the respondent a moderate to high risk and specifically noted: the respondent lacked self-

control, remorse and empathy, used force to gain victim compliance, abused younger more vulnerable children”).

In D.L.’s case, there was no such expert opinion or evaluation presented to the court. Though D.L. did not participate in the evaluation for the SSODA program, this was not evidence that he presented a serious risk to reoffend. D.L.’s lack of cooperation with the SSODA evaluator is in no way equivalent to a trained expert’s evaluation of D.L. in relation to the facts of his crime. The probation officer simply concluded that because D.L. had not yet acknowledged wrongdoing and had low amenability to treatment, he presented a high risk to reoffend. Manifest Injustice Report at 4. This generic conclusion had no basis in the specific facts of D.L.’s case and is contrary to the research on juvenile sex offending, for which “[s]tudies consistently show that the rate of sexual reoffending is very low, even among juveniles who have not received treatment.” Tracy Petznick, *Only Young Once, but A Registered Sex Offender for Life: A Case for Reforming California's Juvenile Sex Offender Registration System Through the Use of Risk Assessments*, 16 Berkeley J. Crim. L. 228, 242 (2011). The trial court simply had insufficient evidence to conclude that D.L.’s failure to immediately engage with the SSODA evaluators made him more likely to reoffend after serving a standard range sentence

at Echo Glen where he would receive individualized treatment. RP 8/30/17; 218.

Finally, the court's conclusion that D.L.'s grandparents have "done the best they can," but, "I think it's been really, really hard for them..." citing to "problems that arose while this matter was under pretrial supervision" is not sufficient evidence to support a finding that D.L. presents a serious risk to reoffend due to "lack of parental control" as alleged by the probation officer. CP 227; RP 8/30/17; 248.

The court did not specify that it found these alleged aggravating factors beyond a reasonable doubt, stating only that the "aggravating factors exist in this case." CP 223 (#2.3). And there was insufficient evidence to make this finding beyond a reasonable doubt. The court thus imposed a manifest injustice sentence based on a finding of aggravating factors that simply lacked a sufficient evidentiary basis to warrant a sentence outside the standard range. Reversal of the manifest injustice sentence is thus required. *Tai N.*, 127 Wn. App. at 745 (reversal and

remand for entry of a standard range disposition if insufficient evidence for manifest injustice disposition).

4. The trial court denied D.L.’s grandmother the right to speak at his sentencing hearing, in further violation of D.L.’s due process rights.

The right of allocution, or to present mitigating evidence to the court prior to being sentenced, “is a right guaranteed by the due process clause of the Constitution.” *Boardman v. Estelle*, 957 F.2d 1523, 1530 (9th Cir. 1992). If a trial court denies the defendant’s affirmative request to speak before his sentencing, the defendant does not receive due process. *Id.*

Washington provides a right of allocution by statute. *In re Echeverria*, 141 Wn.2d 323, 334, 6 P.3d 573 (2000) (citing RCW 10.64.040). While allocution itself is not a right of constitutional magnitude under the Washington State Constitution, the constitutional “right to be heard in person” includes a right to allocution if the defendant requests it. *State v. Canfield*, 154 Wn.2d 698, 708, 116 P.3d 391 (2005). The right of the accused to make a personal statement at his sentencing statement is vital. *Id.* at 705.

In juvenile proceedings, Washington state law extends this right of allocution to the child’s guardians or custodians in juvenile proceedings. Prior to entry of a disposition order, the could shall “[c]onsult with the

respondent's parent, guardian, or custodian on the appropriateness of dispositional options under consideration and afford the respondent and the respondent's parent, guardian, or custodian an opportunity to speak in the respondent's behalf.” RCW 13.40.150 (3) (d) (emphasis added). The word shall in a statute is mandatory absent legislative intent to the contrary. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Here, D.L.’s due process rights were violated when his grandmother, Betty Loomer, was not permitted to speak on his behalf at sentencing.

Ms. Loomer was present in court at D.L.’s disposition. D.L. lived with her, and she was his primary support and advocate. RP 5/10/17; 102. When she vocalized her outrage at the probation officer’s testimony advocating for a sentence far beyond that which had been agreed to by fourteen-year-old D.L. and the State, the court admonished Ms. Loomer and asked her to leave. RP 5/30/17; 225. After she interjected again, she was ordered to leave the courtroom, which she did. RP 5/30/17; 226.

When it came time for the defense to speak, D.L. asked for Mrs. Loomer to be able to return and offer testimony on behalf of D.L. RP 8/30/17; 239-240. The court refused because her “state of mind today is not particularly calm.” RP 8/30/17; 240.

This constitutional error was not harmless beyond a reasonable doubt. *Estelle*, 957 F.2d at 1530 (“Denial of the right of allocution is an

error in the conduct of the trial, and may be subject to harmless error analysis”); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (constitutional harmless error analysis requires a showing beyond a reasonable doubt that the error at issue did not contribute to the verdict received). D.L. was a fourteen-year-old with limited ability to express his position, as evidenced in the few words he was able to say to the court on his own behalf. RP 8/30/17; 242. The probation officer’s recommendation for a manifest injustice sentence requested that D.L. go to a group home, rather than home with his grandparents, and so Mrs. Loomer’s testimony about the appropriateness of this recommendation was crucial. RP 8/30/17; 224. This denial of his right to have his grandmother speak on his behalf violated D.L.’s right to be heard, providing an independent basis for remand and reversal for resentencing. *Estelle*, 957 F.2d at 1530.

5. The trial court violated the appearance of fairness by fulfilling the role of the prosecutor in questioning the probation officer, who recommended a sentence not advocated by either the parties.

The Due Process Clause entitles a person to an impartial and disinterested tribunal. *Tatum v. Rogers*, 170 Wn. App. 76, 90, 283 P.3d 583 (2012) (citing *Marshall v. Jerrico, Inc.* 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L.Ed 182 (1980)). “Where a trial judge’s decisions are tainted by

even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Rogers*, 170 Wn. App. at 95.

"Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Moreno*, 147 Wn.2d at 507 (citing *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927)) (internal quotations omitted). This may be true even if a judge has no actual bias and "would do their very best to weigh the scales of justice equally between contending parties." *Id.* "But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Moreno*, 147 Wn.2d at 507 (citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954)).

Juvenile disposition hearings are adversary proceedings because of the possibility that a sentence outside the standard range will be imposed. *Beard*, 39 Wn. App. at 607. Thus, "it may be unfair to a litigant for a judge to don executive and judicial hats at the same time." *Moreno*, 147

Wn.2d at 507. And “due process forbids a judge from acting as a prosecutor.” *Id.* at 510. The following activities, undertaken in addition to calling witnesses and asking neutral questions, may turn a neutral judge into the state’s advocate: choosing witnesses to call, developing the state’s case by redirect examination and rebuttal witnesses, and undermining the defense by cross-examination. *Id.* In *Moreno*, where there was no prosecutor present in traffic court, but the traffic court judge heard from the State’s witnesses who were present at Moreno’s request, and the court only invited the state’s witnesses to say “what happened,” “without more,” there was no violation of the due process, or the appearance of fairness. *Moreno*, 147 Wn.2d at 511–12.

But in D.L.’s case, where the State declined to elicit testimony from the probation officer, it violated the appearance of fairness for the trial court to call the two probation employees as witnesses to provide testimony in support for a manifest injustice sentence. RP 8/30/17; 214-218; 219-230. This is especially true when the probation officers’ functions are administered by the superior court, and thus do not operate independent from the judiciary. RCW 13.04.035. And unlike in *Moreno*, J.L. objected to this witness being called. RP 8/30/17; 211.

Because the State did not participate in eliciting the evidence in support of a manifest injustice sentence from the probation witnesses, the

trial court simply filled in for the State by calling and questioning the witnesses. The court's elicitation of testimony from the probation employees in the absence of the State's participation in calling witnesses adverse to D.L. meant that the court fulfilled the role of the prosecution, violating the appearance of fairness. *Moreno*, 147 Wn.2d at 507. This due process violation requires reversal and remand for sentencing within the standard range.

F. CONCLUSION

After *Blakely* and *Apprendi*, the State is required to charge and prove the aggravating factors beyond a reasonable doubt prior to the court imposing a sentence outside the standard range. D.L.'s due process rights were violated where he did not receive notice of the aggravating factors that would be alleged in support of a manifest injustice sentence prior to entry of his plea. And the doctrine of separation of powers was violated when the probation officer alleged the aggravating factors absent statutory authority to make charging decisions in juvenile felony cases. D.L.'s due process rights were further violated by the court's imposition of a manifest injustice sentence absent sufficient evidence to support the aggravating factors, by the court's summary denial of his grandmother's request to

speak at his sentencing, and the court's elicitation of testimony from the probation officer in lieu of the State;

Reversal and remand for the court to impose a sentence within the standard range is thus required.

DATED this 22nd day of December, 2017.

Respectfully submitted,

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
E-mail: katebenward@washapp.org

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 77360-7-I
)	
D.L.,)	
)	
JUVENILE APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF DECEMBER, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|------|--|--------------------------|---|
| [X] | MELISSA STONE
WHATCOM COUNTY PROSECUTOR'S OFFICE
[Appellate_Division@co.whatcom.wa.us]
311 GRAND AVENUE
BELLINGHAM, WA 98225 | ()
()
(X)
() | U.S. MAIL
HAND DELIVERY
E-SERVICE
VIA PORTAL |
| [X] | D.L.
ECHO GLENN CHILDREN'S CENTER
33010 SE 99TH ST
SNOQUALMIE, WA 98065 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF DECEMBER, 2017.

X _____ 

WASHINGTON APPELLATE PROJECT

December 22, 2017 - 4:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 77360-7
Appellate Court Case Title: State of Washington, Respondent v. Dakota Loomer, Appellant
Superior Court Case Number: 16-8-00165-1

The following documents have been uploaded:

- 773607_Briefs_20171222160553D1623739_7917.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.org_20171222_154669.pdf

A copy of the uploaded files will be sent to:

- Appellate_Division@co.whatcom.wa.us
- mstone@co.whatcom.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20171222160553D1623739