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Supreme Court No. 96143-3

(COA No. 77360-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.L.,

Petitioner.

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

MOTION FOR DISCRETIONARY REVIEW

PETITION FOR REVIEW

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TABLE OF CONTENTS

A.	IDENTITY OF PETITIONER.....	1
B.	COURT OF APPEALS DECISION.....	1
C.	ISSUES PRESENTED FOR REVIEW	1
D.	STATEMENT OF THE CASE	2
E.	ARGUMENT	5
	1. Review by this Court is needed to address an important constitutional question that is fundamental to the fairness of juvenile proceedings and which has not yet been decided this Court: Is a juvenile entitled to notice of the aggravating factors that a court will rely on to impose a substantially harsher sentence prior to the juvenile entering a guilty plea?	5
	a. Juveniles are entitled to equivalent due process procedural protections as adults in criminal proceedings, including at sentencing.	6
	b. Due Process requires notice, prior to entry of a guilty plea, 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.	7
	c. The due process concerns of <i>Apprendi</i> and <i>Blakely</i> must apply with equal force to imposition of a manifest injustice sentence because its determinate sentencing scheme mirrors the Sentencing Reform Act.	9
	d. D.L. was not given notice prior to entry of his plea of the aggravating factors that would be used to substantially increase his sentence.	13
	e. The Court of Appeals wrongly treated the constitutional issue raised by D.L. as a policy concern rather than a constitutional violation.....	14
	2. D.L.'s case raises the constitutional question of whether it violates the doctrine of separation of powers for a court employee to charge and seek to prove aggravating factors in juvenile felony cases.....	16

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..... 16

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..... 18

F. CONCLUSION 20

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

Guillen v. Pierce County, 144 Wn.2d 696, 31 P.3d 628 (2001)..... 16

In re Beito, 167 Wn.2d 497, 220 P.3d 489 (2009)..... 9, 14

State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012)..... 16, 17, 18, 19

State v. Weber, 159 Wn.2d 252, 149 P.3d 646, 652 (2006) 12, 14

Washington Court of Appeals Decisions

State v. Beard, 39 Wn. App. 601, 694 P.2d 692 (1985) 17

State v. Kuhlman, 135 Wn. App. 527, 144 P.3d 1214 (2006) 12

State v. Moro, 117 Wn. App. 913, 73 P.3d 1029 (2003)..... 19

State v. Poupart, 54 Wn. App. 440, 445, 773 P.2d 893 (1989)..... 6, 19

State v. Scott, 72 Wn. App. 207, 866 P.2d 1258 (1993)..... 20

State v. Tai N., 127 Wn. App. 733, 113 P.3d 19 (2005)..... 11

State v. Tai N., 127 Wn. App. 733, 742, 113 P.3d 19 (2005)..... 10

State v. Whittington, 27 Wn. App. 422, 618 P.2d 121 (1980)..... 7, 17

United States Supreme Court Decisions

Application of Gault, 387 U.S. 1, 30, 87 S. Ct. 1428, 18 L. Ed. 2d 527
(1967)..... 6, 7

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 2355, 147 L. Ed.
2d 435 (2000)..... 7, 8, 9, 12

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403
(2004)..... 8, 14

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).. 6, 8

<i>Jones v. United States</i> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).....	7
<i>Schall v. Martin</i> , 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984).	11

Federal Constitutional Provisions

U.S. Const. Amend VI.....	1, 6
U.S. Const. Amend XIV	1, 6

Washington Constitutional Provisions

Const. Article 1, section 22.....	1, 6
-----------------------------------	------

Statutes

RCW 13.04.035	17
RCW 13.04.040(2).....	18
RCW 13.04.040(5).....	18
RCW 13.40.070(5)(a)	18
RCW 13.40.130	18
RCW 13.40.130 (5).....	19
RCW 13.40.150(1).....	19
RCW 13.40.150(3)(i).....	10, 19
RCW 13.40.150(1).....	19
RCW 9.94A.535(3)(b).....	11
RCW 9.94A.535(3).....	10
RCW 9.94A.537(1).....	9

Rules

RAP 3.4.....	1
--------------	---

RAP 13.3..... 1
RAP 13.4(b)(3) 1, 5, 16, 20
RAP 13.4(b)(4).....1, 5, 16, 20

A. IDENTITY OF PETITIONER

D.L.,¹ petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4(b)(3),(4).

B. COURT OF APPEALS DECISION

D.L. seeks review of the Court of Appeals decision dated June 25, 2018, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Notice is a foundational due process right that is guaranteed in both juvenile and adult criminal proceedings. U.S. Const. Amend XIV; Const. Article 1, § 22. U.S. Const. Amend VI (the accused shall be informed “of the nature and cause of the accusation.”).

In the interest of ensuring proportionality and parity at sentencing, the Washington legislature enacted a standard sentencing scheme for both adults and juveniles, which requires proof of aggravating factors before a judge can depart from a standard range sentence. Under the Sentencing Reform Act, due process requires the accused be given notice of the aggravating factors that will be alleged in support of an exceptional sentence prior to trial or entry of a plea.

¹ The Court of Appeals used 14-year old D.L.’s full name in the opinion. D.L. believes a juvenile is entitled to privacy as recognized by this Court in RAP 3.4, and request his initials be used in all further pleadings.

Where courts recognize that children are entitled to equivalent due process protections in juvenile court, does due process require that a juvenile be given notice of the aggravating factors that will be alleged in support of a manifest injustice sentence prior to adjudication or entry of a guilty plea, just as is required before the court imposes an exceptional sentence under the Sentencing Reform Act?

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. 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?

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. D.L.'s grandparents took D.L. into their home after his stepfather made the allegations against him, where D.L. stayed throughout the juvenile 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. On the day of trial, the State reduced 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.

The court imposed the probation officer’s request for a 36-40 week manifest injustice sentence over D.L.’s objection, where neither the prosecution nor the defense were soliciting the recommendation. RP 8/30/17; 210-211, 214; CP 209-210.

Relying primarily on inapposite Division I cases, the Court of Appeals affirmed the trial court’s imposition of the manifest injustice sentence which D.L. did not have notice of until after waiving his constitutional right and entering his guilty plea. Slip Op. at 4-6

The Court of Appeals recognized the unfairness of D.L. not being given notice of the allegations made in support of a harsher sentence then

what he agreed to in his guilty plea, noting “strong public concerns about fairness in the juvenile justice system, including the appearance of fairness that underlies [D.L.’s] argument” Slip Op. at 6. But rather than address the constitutional infirmities that made this procedure so unfair, the Court of Appeals simply noted the justice system would be “better served” if a juvenile had “explicit notice prior to any plea agreement” that a probation officer would seek an exceptional sentence. Slip op. at 6. The Court of Appeals also rejected D.L.’s contention that a court employee such as the probation officer may not allege and seek to prove aggravating factors in support of a manifest injustice sentence because it violates the doctrine of separation of powers. Slip op. at 6-7.

D.L. seeks review by this Court to decide these two important constitutional questions that are of significant public interest. RAP 13.4(b)(3), (4).

E. ARGUMENT

- 1. Review by this Court is needed to address an important constitutional question that is fundamental to the fairness of juvenile proceedings and which has not yet been decided this Court: Is a juvenile entitled to notice of the aggravating factors that a court will rely on to impose a substantially harsher sentence prior to the juvenile entering a guilty plea?**

D.L. seeks review under RAP 13.4(b)(3) and (4) of an important constitutional question that has not yet been decided by this Court and

which the Court of Appeals recognized is of “strong public concern: Does due process require that a juvenile be given notice of the aggravating factors alleged in support of a manifest justice sentence *prior* to entry of a guilty plea or verdict when the court relies on these factors to impose a harsher sentence than what the juvenile agreed to in his or her guilty 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.”); U.S. Const. Amend XIV; Const. Article 1, section 22 (“the accused shall have the right ... to demand the nature and cause of the accusation against him”); see also U.S. Const. Amend VI (the accused shall be informed “of the nature and cause of the accusation.”).

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). Indeed, *Winship*’s foundational due process requirements arose in a juvenile adjudication in which the Court required the “essentials of due process and fair treatment.” *Winship*, 397 U.S. at 359.

- b. Due Process requires notice, prior to entry of a guilty plea, 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 Sentencing Reform Act, the accused is entitled to notice of the aggravating factors that will be alleged in support of an exceptional sentence prior to trial or entry of the plea.

“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). 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 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).

- c. The due process concerns of *Apprendi* and *Blakely* must apply with equal force to imposition of a manifest injustice sentence because its determinate sentencing scheme mirrors the Sentencing Reform Act.

Like the Sentencing Reform Act, the Juvenile Justice Act also uses a standard sentencing range. RCW 13.40.357. This limits the discretion of

a trial court to exceed the standard sentencing range unless there is proof, beyond a reasonable doubt, that aggravating factors justify a departure from the standard range. *State v. Tai N.*, 127 Wn. App. 733, 742, 113 P.3d 19 (2005). Insofar as a manifest injustice sentence allows the court to sentence a juvenile beyond the standard range based on additional facts outside the verdict, it involves the same constitutional concerns addressed in *Apprendi* and *Blakely*.

RCW 13.40.150(3)(i) provides the statutory aggravating factors that the court may consider in imposing a manifest injustice sentence.² These statutory aggravating factors are comparable to the statutory aggravating factors in RCW 9.94A.535(3), and some of the aggravating

² 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.

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."³

However, after *Apprendi* and *Blakely*, Division I 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." *Tai N.*, 127 Wn. App. at 740. But in so holding, the 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 738 (citing *Schall v. Martin*, 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)). And because *Tai N.* 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*, this Court found that even though juveniles do not have a jury trial right, because of the strength of a

³ 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."

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 (2006) (citing RCW 13.40.140); *See also State v. Kuhlman*, 135 Wn. App. 527, 533, 144 P.3d 1214 (2006) (“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.”).

The fact that a juvenile is tried by a judge, not a jury cannot be used to deny a juvenile due process protections in juvenile proceedings, especially in light of the fact that *Apprendi*'s holding flowed from *Winship*, which applied due process protections to juvenile adjudications. *Apprendi*, 530 U.S. at 476 (citing to *Winship* in defining the central due process protections that support the Court's ruling).

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 prior to entry of his plea of the aggravating factors that would be used to substantially increase his sentence.

D.L. entered his plea of guilty to one count of attempted child molestation in the first degree. CP 107. 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.⁴ Though D.L.'s plea form stated that he could appeal a manifest

⁴ 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.

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. 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).

e. The Court of Appeals wrongly treated the constitutional issue raised by D.L. as a policy concern rather than a constitutional violation.

The Court of Appeals found due process was satisfied in D.L.'s case because he had adequate time to respond to the probation officer's

allegation of the aggravating factors alleged in support of the manifest injustice sentence. Slip. op. at 6. This failed to address the constitutional issue raised by D.L., which is that notice must be given prior to entry of the guilty verdict.

The Court of Appeals recognized the unfairness of D.L. being sentenced based on facts alleged after entry of his guilty plea, noting a preference for notice of these factors prior to the juvenile entering a guilty plea:

We are mindful of the strong public concerns about fairness in the juvenile justice system, including the appearance of fairness that underlies [D.L.'s] argument. The juvenile, the rehabilitative process, and the public perception of the justice system would be better served if the juvenile has actual explicit notice prior to any plea agreement that the probation department has independent authority to challenge the sentence recommendation in the plea and to seek a manifest injustice sentence.

Slip Op. at 6.

However, depriving a juvenile of notice of the aggravating factors prior to entry of his plea is not just unfair, it is unconstitutional. This is an issue that has been squarely addressed in the adult sentencing context by *Apprendi*, *Blakely*, and Washington State Court decisions that have applied these constitutional requirements to the Sentencing Reform Act. The same constitutional question arises under the Juvenile Justice Act. D.L. asks for review by this Court to decide the scope of a juvenile's due

process rights when the court imposes a sentence above the standard range.

2. D.L.’s case raises the constitutional question of whether it violates the doctrine of separation of powers for a court employee to charge and seek to prove aggravating factors in juvenile felony cases.

D.L. also seeks review of by this Court of the undecided, important constitutional question of whether a probation officer’s allegation of the aggravating factors in support of the manifest injustice sentence violates the doctrine of separation of powers. RAP 13.4(b)(3),(4).

- 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). “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.*

“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 impose an appropriate sentence. *See Rice*, 174 Wn.2d at 901.

Probation officers' functions are administered by the superior court. RCW

13.04.035.⁵

- 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.

It violates the doctrine of separation of powers for a court employee to perform the statutorily defined role of prosecutor, who has sole authority to charge felony offenses.

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.”). Under the Juvenile Justice Act (JJA), 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).

The Juvenile Justice Act 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

⁵ “Juvenile probation counselor and detention services shall be administered by the superior court.”

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 the existence of aggravating factors: “the court shall” “[c]onsider whether or not any of the following aggravating factors exist...” RCW 13.40.150(3)(i) (emphasis added). The court’s consideration of whether to impose a manifest injustice sentence may include all oral and written reports. 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.

RCW 13.40.150(1) does not delimit who may submit *evidence*, including oral and written reports, like the probation officer’s disposition report, but it 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. The Court of Appeals failed to properly distinguish between sentencing recommendations by a probation officer, and “recommendations on disposition,” in determining it did not violate the doctrine of separation of powers for the probation officer to allege and seek to prove aggravating factors in support of a manifest injustice sentence. Slip op. at 7-8.

D.L. requests review by this Court to determine the important constitutional question of whether it violates the doctrine of separation of powers for the juvenile probation officer to independently allege and seek to prove aggravating factors in a juvenile felony case.

F. CONCLUSION

D.L. respectfully asks this Court to grant review of these constitutional questions that are of significant public interest because they so fundamentally affect the fairness of juvenile proceedings. RAP 13.4 (b)(3) and (4).

DATED this 24th day of July, 2018.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion.....1

2018 JUN 25 AM 9:09

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 77360-7-1
Respondent,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
DAKODA T. LOOMER,)	
)	
Appellant.)	FILED: June 25, 2018

APPELWICK, C.J. — Loomer pleaded guilty to attempted child molestation in the first degree, and received a manifest injustice sentence. He argues that he was denied due process, because he did not receive notice at the time of his plea that the probation department would recommend a manifest injustice sentence. He also argues that the recommendation violated separation of powers, that the evidence was insufficient, that the trial court erred by excluding his guardian from the courtroom, and that the trial court violated the appearance of fairness. We affirm.

FACTS

Dakoda Loomer, a juvenile, was charged with one count of attempted child molestation in the first degree for acts against his five year old half-brother. On May 24, 2017, Loomer pleaded guilty. As part of the plea agreement, the State agreed to recommend a Special Sex Offender Dispositional Alternative (SSODA) if Loomer was eligible. If not eligible, the State agreed to recommend a standard

range sentence. In his statement of guilty plea, Loomer acknowledged that “[a]lthough the judge will consider recommendations of the prosecuting attorney and the probation officer, the judge may impose any sentence he or she feels is appropriate, up to the maximum allowed by law.”

On July 31, 2017, SSODA treatment providers notified the probation office that Loomer was not amenable to treatment and participation in the SSODA program. The SSODA evaluation cited Loomer’s denial of responsibility for the actions to which he pleaded guilty, inability to keep appointment commitments, and inability or unwillingness to commit to the program.

Following this evaluation, on August 1, 2017, the juvenile probation officer gave notice to the court and the parties that it would ask the court to impose a manifest injustice sentence. Loomer opposed this.

The trial court held a dispositional hearing on August 30, 2017. It adopted the probation officer’s recommendation, and sentenced Loomer to a manifest injustice sentence of 36 to 40 weeks. It based this sentence on two aggravating factors: a serious risk to reoffend and that the five year old victim was particularly vulnerable.

Loomer appeals.

DISCUSSION

Loomer makes five arguments. First, he argues that he was denied due process, because he did not have notice that the probation officer would seek a manifest injustice sentence prior to entering a guilty plea. Second, he argues that it violates separation of powers for a probation officers to request and prove

aggravating factors in a juvenile felony case. Third, he argues that the evidence was insufficient to prove those aggravating factors. Fourth, he argues that the trial court abused its discretion in excluding a family member who interrupted the sentencing proceeding, thereby barring her from speaking on his behalf. Finally, he argues that the trial court violated the appearance of fairness doctrine by sua sponte examining the probation officer regarding the manifest injustice sentence.

I. Due Process

Loomer first argues that he was denied due process, because, prior to entering his plea, he did not have notice of the probation department's intent to seek a manifest injustice sentence.

Juveniles are entitled to 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). Due process requires that a defendant must receive notice prior to the proceeding that the State seeks to prove circumstances warranting a manifest injustice sentence.¹ See State v. Siers, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). However, here the

¹ Under Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), a fact that increases the penalty beyond a standard range sentence, such as an aggravating factor, must be proven beyond a reasonable doubt. Apprendi and Blakely go to the proof required for a manifest injustice sentence. They do not relate to the due process requirements for notice of intent to seek a manifest injustice sentence. But, Loomer cites them due to their emphasis on due process protections in the context of exceptional sentences, and urges the court to apply that emphasis to juvenile proceedings.

State did not seek to prove a manifest injustice sentence.² Instead, the probation department did.

State v. J.V., 132 Wn. App. 533, 132 P.3d 1116 (2006) is substantially similar to this distinctive scenario. There, J.V. was charged with assault and taking a motor vehicle without permission. Id. at 537. He was permitted to enter a treatment court program, and stipulated that if he was terminated from treatment court, he would be tried on the facts in the police report alone. Id. J.V. was terminated from the program, and the trial court found him guilty on both charges. Id. at 537-38. The probation counselor recommended a standard range sentence for the assault charge, but also recommended a manifest injustice sentence for the taking of a motor vehicle charge. Id. at 538. The trial court accepted the recommendation. Id. On appeal, J.V. argued that his due process rights were violated, because he did not receive notice that the probation officer would recommend a manifest injustice sentence. Id. This court disagreed:

The contract did not expressly advise J.V. that a manifest injustice disposition was a possibility, but notice of a potential punishment is adequate for due process purposes where the punishment is authorized in a relevant statute. . . . The statutes clearly provide notice that a manifest injustice disposition is a possibility in all juvenile sentences. This notice satisfies due process.

Id. at 539-40.

We acknowledge that J.V. is slightly different, because here the SSODA results partially informed probation's decision. And, Loomer's SSODA failure

² The trial court agreed with Loomer that the State was not entitled to conduct direct examination of the probation officers, because the State did not seek a manifest injustice sentence.

arose after he had pleaded guilty, whereas J.V.'s treatment court termination occurred before his trial. Id. at 537-38. However, like in J.V., although Loomer did not receive notice that probation would recommend a manifest injustice sentence, the Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW, specifically RCW 13.40.160 should have alerted him to that possibility. And, the trial court and plea agreement both explicitly informed Loomer prior to his plea that it need not follow the State's recommendation. Because the State's recommendation was the standard range, this necessarily informed Loomer that a sentence outside the standard range was a possibility.

Moreover, a trial court may impose a manifest injustice sentence even when neither the State nor the probation department seeks one. See State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003). In Moro, there was no such notice. The trial court alone was considering and ultimately imposed a manifest injustice sentence sua sponte. Id. Moro did not receive any specific notice of this. Id. On appeal, this court held that the sentence did not violate due process. Id. It reasoned that the court adequately informed the defendant of the possibility by stating, upon his plea, that it " 'doesn't have to follow anybody's recommendations.'

³ Id.

³ Loomer argues that Moro should not bear on this case, because it was decided prior to Apprendi and Blakely. But, Moro's general holding, that the trial court adequately notified Moro of the potential for a sentence different from any recommendation, does not conflict with the Apprendi and Blakely holdings. Indeed, opinions of this court have observed the challenge in applying those cases to juvenile dispositions: "Without a right of jury trial in juvenile cases, it is conceptually awkward to try to extract the due process component from Apprendi and Blakely and graft it onto nonjury juvenile dispositions." State v. Tai N., 127 Wn. App. 733, 741, 113 P.3d 19 (2005).

In accord with J.V., we find that due process was satisfied here. When Loomer pleaded guilty, the parties believed that he would be participating in the SSODA program. Loomer did not participate in the SSODA evaluation, and thus was deemed ineligible for the program. When Loomer was deemed ineligible for the SSODA program, the matter moved to sentencing. After reviewing Loomer's failure to cooperate in the evaluation for the SSODA program, the probation department decided to recommend a manifest injustice sentence. Loomer was given notice of the recommendation adequate to prepare to respond at sentencing. We hold that Loomer was not denied his due process rights.

However, we are mindful of the strong public concerns about fairness in the juvenile justice system, including the appearance of fairness that underlies Loomer's argument. The juvenile, the rehabilitative process, and the public perception of the justice system would be better served if the juvenile has actual explicit notice prior to any plea agreement that the probation department has independent authority to challenge the sentence recommendation in the plea and to seek a manifest injustice sentence.

II. Separation of Powers

Loomer next argues that it violates separation of powers for a probation officer to allege and seek to prove aggravating factors.⁴ Specifically, he argues

⁴ Loomer did not raise the specific separation of powers argument below. But, Washington courts have previously exercised their discretion to review separation of powers arguments not raised below. See State v. Aguirre, 73 Wn. App. 682, 687-88, 871 P.2d 616 (1994). The Aguirre court reviewed such an argument to satisfy its obligation to correct manifest constitutional error. Id. In accord with Aguirre, we review the argument about separation of powers raised for the first time on appeal.

that this invades the province of the prosecution to criminally charge and prove criminal offenses in juvenile felony cases. This court reviews constitutional challenges de novo. State v. Bradshaw, 152 Wn.2d 530, 531, 98 P.3d 1190 (2004).

Prosecutors are members of the executive branch, and have "fundamental and inherent charging discretion." See State v. Rice, 174 Wn.2d 884, 900, 905-06, 279 P.3d 849 (2012). Here, the manifest injustice sentence was recommended by a juvenile court assistant administrator, who is both part of the juvenile probation department, and a member of the judicial branch.⁵ See RCW 13.04.035(1) (the juvenile court assistant administrator also serves in a capacity as a probation counselor). Therefore, Loomer argues that the judicial branch encroached on the prosecuting attorney's executive branch powers.

But, as the State points out, charging a person with an offense is distinct from recommending an exceptional sentence. This court has explicitly stated in a case involving a juvenile defendant that "[c]ounselors may recommend exceptional sentences even when their recommendations conflict with those of those prosecution." State v. Merz, 54 Wn. App. 23, 26-27, 771 P.2d 1178 (1989).

Loomer's reply argues that recommendations based on prepared reports may be acceptable, but recommendations for disposition involve a legal question, which is the sole province of the prosecutor. However, Loomer fails to present any authority suggesting that the juvenile probation department's recommendation on

⁵ Juvenile courts are administered by the superior court, and thus are part of the judicial branch. RCW 13.04.035.

aggravating factors is the equivalent of a charging decision. And, Merz explicitly allows probation officers to make recommendations that differ from the prosecution. 54 Wn. App. at 26. The probation officer's recommendation did not violate the separation of powers.

III. Sufficiency of Evidence of Aggravating Factors

Loomer next argues that the evidence was insufficient to prove the aggravating factors: that the victim was particularly vulnerable and that Loomer posed a serious risk to reoffend.

Appellate courts use the same standard of review for the sufficiency of evidence of an aggravating factor as they do for the sufficiency of evidence of the elements of a crime. See State v. Yarbrough, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009). Under this standard, the court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. State v. Zigan, 166 Wn. App. 597, 601-02, 270 P.3d 625 (2012).

A. Particular Vulnerability of the Victim

The JJA identifies the particular vulnerability of the victim as an aggravating factor. RCW 13.40.135(3)(i)(iii). When analyzing particular vulnerability, the focus is on the victim. State v. Ogden, 102 Wn. App. 357, 366, 7 P.3d 839 (2000). The court determines if the victim is more vulnerable to the offense than other victims and if the defendant knew of that vulnerability. State v. Bedker, 74 Wn. App. 87, 94, 871 P.2d 673 (1994). The type of vulnerability contemplated by the

aggravating factors listed in the JJA is extreme youth, advanced age, or physical or mental infirmity. Ogden, 102 Wn. App. at 366.

Here, the manifest injustice report identified the victim as Loomer's five year old half-brother. It also stated that the victim suffered from cognitive delays due to a lack of oxygen at birth. Case law establishes that a five year old is particularly vulnerable due to age. See State v. Fisher, 108 Wn.2d 419, 425, 739 P.2d 683 (1987) (five and one-half-year old victim found to be particularly vulnerable), overruled in part on other grounds by State v. Hughes, 154 Wn.2d 118, 140, 110 P.3d 192 (2005), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 216, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); State v. J.S., 70 Wn. App. 659, 667, 855 P.2d 280 (1993) (four year old "particularly vulnerable" due to age.); State v. T.E.H., 91 Wn. App. 908, 917, 960 P.2d 441 (1998) (finding that a victim was particularly vulnerable, because "the 5-year-old child was subject to the transgressions of an 11-year-old child, physically bigger and who had little or no supervision.").

Loomer argues that the author of the manifest injustice report, a probation officer, did not have sufficient knowledge of the specific cognitive delays that the victim suffers from. But, case law dictates that a five year old, even without cognitive delays, may be considered particularly vulnerable. See T.E.H., 91 Wn. App. at 917. The evidence was sufficient to support this aggravating factor.

B. Serious Risk to Reoffend

Loomer also argues that the evidence was insufficient to prove that he posed a serious risk to reoffend. He argues that the trial court's decision was

based on nothing more than conclusions of the probation department, and that the probation department had no specific expertise or evidence to rely on in making the recommendation.

Although it is not a statutorily enumerated aggravating factor, "A high risk that a juvenile will reoffend is a valid ground for a manifest injustice disposition." T.E.H., 91 Wn. App. at 917-18; see also RCW 13.40.150(3)(h)(v)(i). Loomer argues that the lack of any expert opinion, or evaluation of Loomer's actual likelihood to reoffend, renders the evidence insufficient to establish this factor.

Case law says otherwise. For example, in State v. Jacobsen, 95 Wn. App. 967, 982, 977 P.2d 1250 (1999), this court reasoned that "[a] juvenile offender's denial of his or her criminal acts is a relevant factor for the court to consider when deciding whether a juvenile poses a high risk to reoffend." Moreover, in T.E.H., the court found a serious risk of reoffending. 91 Wn. App. at 917-18. It relied on "evidence of the prior criminal referrals that demonstrates increasingly aggressive behavior. Further, the probation counselor's report foreshadowed TH's action." Id. at 918.

Here, the evidence tracks the considerations in T.E.H. and Jacobsen. Loomer has no criminal history. But, the manifest injustice report presented to the trial court stated that Loomer had repeatedly violated the court's orders of pretrial supervision. It noted that this behavior became worse as Loomer's case progressed. The manifest injustice report also stated that, although Loomer pleaded guilty, Loomer told a counselor that " 'I admitted to [the crime] just to get out of there and get the stupid court thing done with and get all of this over with.' "

He also answered " 'no' " to polygraph questions concerning the charges. The trial court was presented with sufficient evidence to find that Loomer had a serious likelihood of reoffending.

IV. Exclusion of Guardian from Courtroom

Loomer argues that the trial court erred in excluding his grandmother from the courtroom, and thereby prevented her from speaking on his behalf prior to sentencing. He argues that this violated his due process rights, because Washington defendants have a right to allocution if they request it, and that extends to guardians of juveniles.

Loomer's grandmother—who was also his guardian—was present at the dispositional hearing. While the trial court was examining the probation officer on why she sought the longer sentence, the following exchange occurred:

THE WITNESS: So there are many more beds in the community, and all of the group homes that do serve that population have contracts with certified sex offender treatment providers. And I think a 30 to 40 week sentence would increase the likelihood --

MRS. LOOMER: I knew it.

THE WITNESS: That if Cody behaved himself, and followed treatment, engaged in treatment --

MRS. LOOMER: I knew it.

THE WITNESS: -- did all of those things, that he would be eligible to potentially transfer to a group home and participate in those services. Versus a standard range he releases at 15 weeks, okay, he's out in 15 weeks with 15 weeks of --

MRS. LOOMER: I knew you bastards would do this.

THE COURT: Hang on a second.

Ma'am, please. I need you to not interject here, or I'm going to have to ask you to leave the room, okay? I've got to have a record here that everybody can follow and understand. And if you're going to keep speaking out like this, I'm going to have to ask you to leave, okay? So you're welcome to stay, but I can't have you interrupting this. So, please, be quiet.

Go ahead.

THE WITNESS: So with that established date between the range, JRA [(Juvenile Rehabilitation Administration)] is clearly able to set that release date anywhere within the range. They do what are called client behavioral assessments; I believe it's about every 90 days. They can bump those up quicker, and the only way that that release date would be set past the minimum --

MRS. LOOMER: (Indecipherable.)

THE WITNESS: -- would be through a client behavioral assessment, and then they'd set a new date further out.

THE COURT: Stop. We're going to take a recess; I need you to leave. When I come back out here, I need you out of this room. If you don't leave, I'll have a deputy remove you because I can't have you interrupting this.

MRS. LOOMER: I won't say another word.

(A break was had off the record.)

THE COURT: Well, I think the record should reflect that the Court felt compelled to ask Dakota's grandmother to leave the room because she was disrupting the proceedings verbally with outbursts. I asked her to be quiet; I told her if she did -- if she interrupted again I would have to ask her to leave. We resumed testimony, and she immediately interrupted again, so I asked her to leave or if she refused to leave informed her that I would have a deputy remove her. I took a recess.

I see that she's gone, I see the deputy's here, I don't know if she actually had to be removed. I hope that's not the case, but at any rate that's where we're at now and I thought it was important to make a record of that. It's regrettable. I rarely kick someone out of a courtroom, but I felt I had to do it today and I'm sorry it came to that.

Anyway, please, continue.

When it came time for Loomer's guardians to speak, Loomer's grandfather spoke. Loomer then requested that Loomer's grandmother be allowed to return so that she could also give a statement. The trial court did not allow it.

A trial court has broad discretion in decisions over management and security of the courtroom. State v. Dye, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). An appellate court will only overturn such a decision if it is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. at 548. Our Supreme Court has described the trial court's power in excluding spectators as follows:

In addition to its inherent authority, the trial court, under RCW 2.28.010, has the power to preserve and enforce order in the courtroom and to provide for the orderly conduct of its proceedings. The power to control the proceedings must include the power to remove distracting spectators, or else it would be meaningless. Any other rule would leave a trial court judge unable to keep the order necessary for a fair proceeding.

State v. Lormor, 172 Wn.2d 85, 93-94, 257 P.3d 624 (2011) (footnote omitted).

But, RCW 13.40.150(3)(d) instructs that, before entering a dispositional order, the court shall "afford the respondent and the respondent's parent, guardian, or custodian an opportunity to speak in the respondent's behalf." Loomer stresses that the term "shall" in this statute indicates that it is mandatory.

It appears that no published Washington case has addressed a similar scenario where a family member of a juvenile was prevented from speaking on the juveniles behalf due to disruptive behavior. But, while RCW 13.40.150(3)(d) speaks in mandatory terms, nothing suggests that this is an absolute that can

never cede to other interests. Other courtroom rights cede to interests in courtroom decorum. For example, a criminal defendant may forfeit his right to be present at a criminal trial upon disruptive behavior. See, e.g., State v. DeWeese, 117 Wn.2d 369, 381, 816 P.2d 1 (1991). The same should hold true for the right to have a guardian speak on a defendant's behalf.

And, on these facts, the trial court acted within its discretion. The grandmother spoke out of turn. She insulted the witness during the witness's testimony. The trial court warned her. She again spoke out of turn and disrupted the same witness's testimony. And, although the grandmother did not speak, the grandfather did. The trial court did not abuse its discretion.

V. Appearance of Fairness

Finally, Loomer argues that the trial court violated the appearance of fairness by asking the probation counselors questions sua sponte. The court asked its own questions of two probation officers. Loomer does not take issue with the specifics of the questioning. Rather, he contends that the mere fact that the court pursued the questioning on its own violated the appearance of fairness, because doing so fulfilled the role of prosecutor.

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing. State v. Gamble, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Id. Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will

succeed. Id. at 187-88. This court presumes that a trial court performed its functions regularly and properly without bias or prejudice. Hickok-Knight v. Wal-Mart Stores, Inc., 170 Wn. App. 279, 318, 284 P.3d 749 (2012).

Here, the trial court did not advocate for a party. The line of questioning reflects an effort to determine why the probation officers were seeking a sentence longer than that recommended by the prosecutor. For example, one of the court's questions to the probation officer was, "So tell me if you can, please, what are the pros and cons here for Dakota as you see it on the 15 to 36 weeks on the one hand, and the 36 to 40 weeks on the other? What are the benefits, if any, to either of these, please?" The court also asked, "So the general idea is the more time imposed the, perhaps, greater opportunity to go to a group home and then get to engage in more offense specific sexual deviancy type of treatment?" The remainder of the questioning tracked this theme. The questions reflect an impartial effort by the trial court to apprise itself of as much information as it could to make a sound and informed decision. The trial court did not violate the appearance of fairness.

We affirm.

WE CONCUR:

Speasman, J.

Cappelwick, CJ

Dewey, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77360-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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