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Division I
State of Washington

73198-0

NO. 73198-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

A.B. (DOB 10-14-98),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY, JUVENILE DEPARTMENT

APPELLANT'S OPENING BRIEF

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I. Introduction

In this opening brief, A.B. requests this Court reverse the disposition imposed on January 9, 2015 by the Juvenile Department of the Superior Court of Washington for King County, and remand for resentencing. A Motion for Accelerated Review, pursuant to RCW 13.40.230 and RAP 18.8, 18.12, 18.13, is filed under separate cover.

II. Assignments of Error

1. The juvenile court applied the wrong legal standard for determining whether two of A.B.'s prior offenses constituted the "same course of conduct."
2. The juvenile court erred in calculating A.B.'s offender score and the corresponding standard range.
3. The juvenile court erred in categorically refusing to consider A.B.'s request for a manifest injustice downward departure.

III. Issues Pertaining To Assignments of Error

1. For a juvenile previously "convicted of two or more charges arising out of the same course of conduct," only the highest charge is counted toward the offender score. RCW 13.40.020(8)(a). The Juvenile Justice Act (JJA) does not define the phrase "same course of conduct." Was it error for the trial court to import the definition of "same *criminal* course of conduct" contained in the adult sentencing scheme when

deciding whether two of A.B.'s prior convictions constituted "same course of conduct" under RCW 13.40.020(8)(a)? Was it error for the trial court to find that both charges had to count as priors because it concluded they did not "involve the same victim," as set out in RCW 9.94A.589(1)(a), the sentencing statute applicable to adults?

2. A categorical refusal to consider an exceptional sentence is reversible error; a juvenile court must consider mitigating factors cited by defense counsel. The juvenile court found that the record "clearly show[ed]" that A.B. suffered from "cognitive mental health challenges, as well as a history of substance abuse." The court characterized A.B.'s personal and family circumstances as "horribly unfortunate" and "extremely challenging." Defense counsel presented an expert evaluation explaining A.B.'s mental condition and asked that the court impose a manifest injustice downward disposition. The trial court refused, stating that "virtually every" child in juvenile court was equally as damaged as Antonio. Was this error?

IV. Statement of Facts

With a father in prison, and a homeless drug-addicted mother, A.B. never had a chance. CP 44-47. ("Declaration of [A.B.] for his Disposition.") Alone and unsupported, he turned to drugs and alcohol to cope with life on the streets. When arrested, he had been surviving on his

own for close to a year and a half. CP 54-55. Inevitable run-ins with the law – the instant case included – followed. CP 41-42, 44-47, 51-52.

A.B. admitted that he had been drinking large quantities of vodka, whiskey, and smoking marijuana when his crimes happened. CP 44-45. He described the intoxication affecting his ability to process: “I was not thinking things over, I just reacted... It was like I was dizzy at a carnival... I did not really understand what was going on.” CP 45. A.B. played a role in two strong-arm robberies, where a group of youths took a cell phone and an iPad from others. CP 5-8, 11-14. He pled guilty to one count of attempted robbery in the first degree and two counts of robbery in the second degree. RP 44-45; CP 27-33.

Months later, in preparing for his disposition hearing, A.B. wrote that nothing he did was planned, and that if he had he been sober, he would not have done what he did. CP 44-45. A.B. was appropriately diagnosed as alcohol and cannabis dependent. CP 48.

The evidence presented to the juvenile court included a neuropsychological evaluation, which showed vulnerabilities overlaid with the family-of-origin trauma and substance abuse. The evaluator documented that the child’s IQ is in the lowest 12th percentile of the population. CP 52. A.B. has a number of cognitive impairments, including mildly impaired executive functioning. CP 52-53.

A.B. recognized his life fell to pieces when his father went to prison and his mother moved to Seattle. CP 46. He had sporadic contact with his paternal grandmother, but there was no father figure in his life, and no structure. His mother struggled too. CP 46. She turned to drugs. CP 46. When A.B. was temporarily in inpatient treatment, his mother became homeless herself. CP 46, 51. A.B. briefly went back to his paternal grandmother, but then he was “on the run” and promptly relapsed. CP 46. His contact with his mother was sporadic; she was in a shelter. CP 46-47.

By the time of the disposition hearing, A.B. had been in detention for ten months. RP 40. His mother, Melissa Joiner, was doing much better. She came to court to support her son. She let the judge know she was in recovery, and able and willing to do more than before. RP 40. She worried that locking-up her son further would “institutionalize him,” and that he needed “to be rehabilitated.” RP 40. A.B.’s maternal grandmother, Rose Ayres echoed the need for A.B. to receive mental health treatment and get back to school. RP 41.

Defense counsel emphasized that A.B. needed “a meaningful course of treatment” and had secured a bed for A.B. at a long-term inpatient facility. RP 35. This proposed placement was in line with what the examining neuropsychologist had suggested. RP 35. However, A.B.’s charges made him statutorily ineligible for “Option B” (suspended

disposition alternative) and “Option C” (chemical dependency disposition alternative) sentencing alternatives under RCW 13.40.0357. RP 35, 37.

Defense counsel argued that at the time of the offenses, A.B. “was suffering from a mental [] condition that significantly reduced his [] culpability for the offense though failing to establish a defense.” RCW 13.40.150(h)(iii). Defense counsel encouraged the court to “construct its own alternative” and asked for a manifest injustice downward departure. RP 36. Defense counsel expressed concerns that A.B. would receive less treatment, and less adequate treatment, if incarcerated. RP 36.

The State did not challenge defense counsel’s assertions regarding A.B.’s personal history or treatment needs. RP 37-39. The State argued that protecting the community and exacting punishment called for a standard range sentence. RP 37-39. However, the State had doled out lighter punishment to the other actors involved in the melee that led to A.B.’s arrest and charges. CP 55. For example, K.B. pled guilty to assault in the second degree and a theft first degree charge, receiving a year in jail. CP 55. Reductions afforded to M.G. allowed her to go to drug court. CP 56. R.A. received reductions to non-violent offenses and obtained a deferred disposition. CP 56.

Defense counsel established that A.B. is alcohol and cannabis dependent, that he has impaired cognitive functioning, learning

disabilities, and potential mental health disorders, and has been without a stable home. CP 48-49. Defense counsel argued he “was an untreated alcohol and drug abuser, homeless and without any meaningful adult supervision when the offenses occurred.” CP 49. Defense counsel asked for the manifest injustice down sentence on the basis that A.B.’s culpability for the offense was significantly impacted by his cognitive, mental health, and substance abuse issues. RP 32. Defense counsel appropriately pointed out that A.B. is “vulnerable” and was influenced by others. RP 32-33.

The juvenile court said that defense counsel had done

a very thorough and commendable job in establishing the record here and the challenges that Antonio has faced, not just personally, but also his family. And I think that **the record does clearly show cognitive mental health challenges, as well as a history of substance abuse.** And on that basis, the respondent requests a manifest injustice down.

The Court does believe that it does have some discretion in this area. Sadly, I have to say that virtually every youth that walks through that door has cognitive mental health and/or substance abuse challenges. It’s just how they end up here. **And I looked closely at the issues that Antonio faces, and they simply – they’re horribly unfortunate, they’re extremely challenging, but they’re not exceptional. They are what this Court deals with every day.**

RP 48-49. (Emphasis added.)

The court agreed that A.B.’s treatment needs were substantial and implied that the risk A.B. posed to the community could be managed with

an alternative sentence: “Option C may have been a very viable alternative, if he had been [statutorily] eligible.” RP 49. The court said that A.B. remained “a risk to the community until he receives some modicum of services,” but did not say how much of a risk, or what services were needed. RP 49.

The court rejected the request for a manifest injustice because as compared to other equally damaged juveniles, A.B. did not appear “exceptional.” RP 48-49. The standard range sentence was a 52 to 65 weeks of confinement on each of the three counts. RP 50.

The applicable offender score was in dispute. On December 13, 2012, A.B. was arrested with a backpack. CP 63-64, 86. Inside it was an oxycodone pill and a stolen computer. RP 17-18. A.B. pled guilty to illegally possessing the contents of the bag he was caught holding.¹ The oxycodone for which he had no prescription led to a VUCSA felony conviction, and the laptop that was not his led to a misdemeanor possession of stolen property (PSP) in the third degree. RP 17-18; CP 41.

The parties agreed that the VUCSA felony counted as a full point toward A.B.’s offender score. RP 19. But, defense argued that the PSP charge should not count because it, and the VUCSA, arose “out of the

¹ A.B. submitted a declaration that the bag was not his and that he did not know about the pills. CP 63-64.

same course of conduct” under RCW 13.40.020(8)(a). CP 59-64; RP 17. If the trial court had accepted defense counsel’s argument, A.B.’s offender score would drop from “two” to “one” points and the corresponding range would drop down to 15 to 36 weeks. CP 62; RP 19.

The prosecution argued that because the adult sentencing statute² restricts a finding of “same criminal course of conduct” to offenses involving the same victim, place, and time, both of A.B.’s prior possessory offenses had to count. RP 19-20. Defense counsel identified differences between the two statutory provisions. RP 24-25.

Relying on State v. Contreras, 124 Wn.2d 741, 880 P.2d 1000 (1994), the juvenile court ruled that the test for “‘same course of conduct’ [as] used in the Juvenile Justice Act is identical to the test for ‘same criminal conduct,’ as used in the [adult] sentencing format” and that “all the elements under 9.94A.589 must be met.” RP 31. The juvenile court ruled that the victims were different and counted both the felony VUCSA and misdemeanor possession of stolen property against A.B.’s offender score. RP 31.

² RCW 9.94A.589(1)(a).

V. Argument

A. The Juvenile Court Miscalculated A.B.'s Offender Score.

1. State v. Contreras Did Not Hold The Adult Sentencing Act Definition Of "Same Criminal Course of Conduct" Restricts Interpretation Of The Phrase "Same Course of Conduct" In The Juvenile Justice Act.

At a juvenile disposition, not every prior criminal adjudication automatically counts as “criminal history.” RCW 13.40.020(8)(a) states that when dealing with a prior incident of criminal wrongdoing, “[i]f a respondent is convicted of two or more charges arising out of the same course of conduct, only the highest charge from among these shall count as an offense for the purposes of this chapter.” RCW 13.40.020(8)(a). (Emphasis added.) The Juvenile Justice Act does not define the phrase “same course of conduct.” State v. Calloway, 42 Wn.App. 420, 423, 711 P.2d 382 (1985). A handful of cases address the phrase.

In Calloway, Division II of this Court held that a juvenile who burglarized two separate homes, within a period of one hour, and ostensibly to obtain money to buy drugs, should have both criminal acts counted in his offender score. The Calloway opinion rejected the notion that the offender’s subjective intent drives the ‘same course of conduct’ analysis: “The single subjective purpose of obtaining funds to buy drugs

does not operate to convert the two courses of conduct into one.” Id., at 424. Accord State v. Huff, 45 Wn.App. 474, 476, 726 P.2d 41 (1986); See also State v. Adcock, 36 Wn.App. 699, 676 P.2d 1040 (1984) (No ‘same course of conduct’ where juvenile’s offenses involved a random series of events, occurring at different locations and at different times of the day.)

The Supreme Court mentioned the “same course of conduct” provision in State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1988). Dunaway dealt with adult sentencing and includes a discussion of why treating crimes committed against several individuals advances the adult sentencing purpose of “ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public.” Id. at 215. Dunaway noted that victimizing “more than one person clearly constitutes more serious conduct” and more incarceration in multiple-victim cases “will better protect the public by increasing the deterrence of the commission of these crimes.” Id.

Later, in State v. Haddock, 141 Wn.2d 103, 112, 3 P.3d 733 (2000), the Supreme Court held that an adult defendant’s possession of stolen property – and possession of stolen firearms encompassed “the same criminal conduct” when “taken from the same victim, and were possessed at the same time and at the same place.” The Court was “satisfied that Haddock’s criminal intent remained constant.” Id. The

Court shifted away from “the furtherance test,” indicating that “its application to crimes occurring literally at the same time is limited.” Id., at 114, citing to State v. Vike, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). (“Requiring convictions to further each other would logically bar treating Haddock’s multiple, simultaneous convictions of the same crime as ‘same criminal conduct.’”)³

On December 13 of 2012, A.B. came into possession of a backpack, and with it, illegal possession of a controlled substance and illegal possession of someone else’s property. CP 63-64, 86. His lawyer’s argument below that this criminal transgression constituted the “same course of conduct” was rejected. The trial court specifically agreed with the State that under State v. Contreras, 124 Wn.2d 741, 880 P.2d 1000 (1994), the test for “‘same course of conduct’ [as] used in the Juvenile Justice Act is identical to the test for ‘same criminal conduct,’ as used in the [adult] sentencing format” and that “all the elements under 9.94A.589 must be met.” RP 31. The trial court decided that the public was the victim of VUCSA possession and that the property owner was the victim of the possession of stolen property charge, and counted both offenses against

³ Haddock did hold that for the purpose of the SRA, the victim of the offense of possession of stolen property is the property's owner. State v. McReynolds, 117 Wn.App. 309, 340, 71 P.3d 663 (2003).

A.B. RP 31. The scoring error is reviewable de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

The primary error is the juvenile court's decision to use the adult test for "same criminal course of conduct," but even the application of that test may have been erroneous. Undersigned counsel has found authority for the proposition that "the public" is treated as the victim of the offense of possession of a controlled substance with the intent to deliver, but not for the proposition that "the public" is "the victim" in a simple possession case. E.g. State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993) (Identifying the "public at large" as the "victim" of the crime of possession of a controlled substance with the intent to deliver.) To the extent that every criminal offense is a violation of public laws, the public at large was likewise "victimized" by A.B.'s illegal possession of someone else's property. In fact, in her Haddock concurrence, writing for herself and two other justices, J. Madsen argued that "the victim of a crime involving possession of stolen property, including firearms, is society and not the owner of any particular item." Haddock, 141 Wn.2d at 117. (J. Madsen, concurring.)

More importantly, a close reading of Contreras shows that the case involved a different issue, and does not control A.B.'s argument that JJA

language of "same course of conduct" is different and broader than the SRA phrase "same criminal conduct." RCW 9.94A.589.

The statutory provision at issue in Contreras was RCW 13.40.180(1), not RCW 13.40.020(8)(a). RCW 13.40.180(1) limits how long a sentence a youth will serve for committing multiple offenses "through a single act or omission." The rule provides that in those situations, "the aggregate of all the terms shall not exceed one hundred fifty percent of the term imposed for the most serious offense." RCW 13.40.180. This 150% rule tempers the presumption that for a juvenile sentenced for "two or more offenses, the terms shall run consecutively." RCW 13.40.180. In contrast, in the adult sentencing scheme, the presumption is that sentences on current offenses will be served concurrently. RCW 9.94A.589(1)(a). In other words, with respect to current charges, the juvenile disposition scheme appears harsher than the adult sentencing scheme.

Contreras dealt with calculating punishment for multiple *current* offenses, not with reviewing *past* crimes to calculate an offender score. Contreras pled guilty to three charges: "custodial assault, unlawful imprisonment, and first degree escape." Id. at 742-43. He wanted to take advantage of the 150% rule of RCW 13.40.180(1), but the trial court and

Court of Appeals rejected his arguments that what happened constituted “a single act within the meaning of the statute.” Id. at 743.

The Supreme Court reversed. The Contreras court used the "same course of conduct" in the RCW 13.34 and "same criminal conduct" in RCW 9.94A to highlight how the State's desired reading of the 150% rule would lead to "strained results." Id. at 747-48. Specifically, the State's proposed limitation of when the 150% rule applied would lead to outcomes where a juvenile may be earning a single point toward his or her offender scoring, but would simultaneously be falling outside the 150% rule. That result was declared illogical and unwanted. To the extent the Contreras court compared the JJA phrase "same course of conduct" with the phrase "same criminal conduct" used in the SRA, it only did so to make a point about the 150% rule. Id. at 748. (Holding that the objective intent of the defendant applies to the analysis of the “single act or omission” phrase, just as it applies to the analysis of “same course of conduct.”)

The sentence in Contreras that "the tests for determining whether the phrases ‘same course of conduct’ used in the juvenile justice act and “same criminal conduct” used in the SRA are essentially the same," is dicta, and does not foreclose A.B.’s argument. “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the

case constitute obiter dictum, and need not be followed.” State v. Potter, 68 Wn.App. 134, 150, 842 P.2d 481 (1992) (citation omitted).

By its plain language, the juvenile statute is different from, and broader than, the SRA. “The statutory language defining the phrase ‘same criminal conduct’ was added by Laws of 1987, ch. 456, § 5.” State v. Adame, 56 Wn.App. 803, at 810, n.6, 785 P.2d 1144 (1990). The Legislature never amended the Juvenile Justice Act to include this restriction regarding same time, place, and victim, the way it changed the adult SRA. Importing into the JJA what is not there, the court erred.

The error is apparent upon reflection on the fact that unlike the adult sentencing scheme, the overarching purpose of the Juvenile Justice Act is rehabilitation. State v. Schaaf, 109 Wn.2d 1, 4, 743 P.2d 240 (1987) (juvenile justice system is rehabilitative in nature while the criminal system is punitive); State v. Meade, 129 Wn.App. 918, 925, ¶ 15, 120 P.3d 975 (2005) (Juvenile Justice Act remains focused on rehabilitation); State v. K.E., 97 Wn.App. 273, 982 P.2d 1212 (1999) (a court may impose a downward disposition if it finds that the standard range disposition would be an excessive penalty because less time is needed for rehabilitation.)

2. Because One Of A.B.'s Priors Should Not Have Counted Against Him, A Resentencing Is Required.

A.B.'s challenge to his offender score was well-taken. “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” State v. Wilson, 170 Wn.2d 682, 688-89, 244 P.3d 950 (2010) (quoting In re Personal Restraint of Goodwin, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002)).

A.B. was handed a backpack containing contraband and a stolen item. CP 63-64, 82, 86-87. (Describing how another youth J.O. was identified as the suspect of a burglary and that J.O. had given the bag to A.B.) A.B. was not engaged in any multi-step crime spree, like the juveniles in Calloway or Adcock. Objectively speaking, this was one criminal act, and it was the “same course of conduct.” The court’s erroneous interpretation of Contreras deprived A.B.’s counsel of the opportunity to argue this point. Only the felony VUCSA should have counted against A.B.; the possession of stolen property misdemeanor should have been excluded from the calculation of his offender score.

A reversal and a re-sentencing with a properly calculated sentencing range is necessary.

B. The Juvenile Court Abused Its Discretion In Failing To Consider The Defense Request for a Manifest Injustice Downward Disposition.

1. The Juvenile Court Must Consider Mitigating Circumstances Put Forward By Defense At A Disposition Hearing.

“Before entering a dispositional order as to a respondent found to have committed an offense, the court shall hold a disposition hearing,” and

- (a) Consider the facts supporting the allegations of criminal conduct by the respondent;
- (b) Consider information and arguments offered by parties and their counsel;
- (c) Consider any predisposition reports;
- (d) Consult 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).

Pursuant to the Juvenile Justice Act (“Act”), a juvenile court may impose a disposition outside the standard range upon finding that the standard range would effectuate a manifest injustice. State v. Moro, 117 Wn.App. 913, 918-19, 73 P.3d 1029 (2003) (citing RCW 13.40.0357) RCW 13.40.160(2). A manifest injustice exists when a disposition either imposes an excessive penalty or creates serious and clear danger to society. State v. M.L., 134 Wn.2d 657, 660, 952 P.2d 187 (1998). When considering whether a manifest injustice exists, the court must consider potential aggravating factors. State v.

Payne, 58 Wn.App. 215, 218-19, 795 P.2d 134 (1990). Aggravating factors are listed in RCW 13.40.150.

The juvenile court then must balance the aggravating factors against any mitigating factors raised by the juvenile. See Payne, 58 Wn. App. at 218-19; State v. Strong, 23 Wn.App. 789, 793, 599 P.2d 20 (1979). Failure to do so requires reversal. See State v. N.E., 70 Wn.App. 602, 607, 854 P.2d 672 (1993). Mitigating factors include:

- 1) Whether the accused's conduct failed to cause or threaten serious bodily injury, or the accused did not contemplate that his conduct would do so;
- 2) Whether the accused reacted to strong and immediate provocation;
- 3) Whether the accused suffered from a mental or physical condition that significantly reduced his or her culpability for the offense through failing to establish a defense;
- 4) Whether the accused compensated or made a good faith effort to compensate the victim for the injury or loss sustained prior to his detention, and
- 5) Whether a year has passed between the accused's current offense and any prior criminal offenses.

RCW 13.40.150 (3)(h)(i)-(v). (Emphasis added.)

“A juvenile court is granted broader sentencing discretion for alternative confinement than adult courts.” State v. Bailey, 179 Wn.App. 433, 440-41, 335 P.3d 942, 945 (2014). Specifically, “a juvenile court may enter a manifest injustice finding and impose a downward exceptional disposition where the juvenile court finds that a standard range disposition is not needed to rehabilitate the juvenile offender or protect the public

from criminal behavior.” State v. K. E., 97 Wn.App. 273, 282-83, 982 P.2d 1212 (1999), as amended on reconsideration (Nov. 22, 1999). (Also holding that “the voluntary use of drugs or alcohol is not a valid mitigating factor under the Juvenile Justice Act.”) Id. at 284.

2. Because The Juvenile Court Categorically Refused To Consider The Imposition Of A Manifest Injustice, A Resentencing Is Required.

The manifest injustice provision of the Juvenile Justice Act vests the juvenile court with broad discretion in determining the appropriate sentence to impose. State v. Beaver, 148 Wn.2d 338, 345, 60 P.3d 586, 589 (2002) (Internal citations omitted.) Even though A.B. was statutorily ineligible for Option B or C, the juvenile court could have fashioned its own alternative sentence as requested by defense counsel. RP 36.

A trial court only exercises its discretion when it engages in actual reflection or deliberation, and the failure to exercise discretion is in itself an abuse of discretion. In the context of an appeal from the denial of a request for an exceptional sentence down, review may be had “where the court has refused to exercise discretion at all.” State v. Garcia-Martinez, 88 Wn.App. 322, 330, 944 P.2d 1104 (1997).

Garcia-Martinez held that “[a] court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence

below the standard range under any circumstances.” Id. Our Supreme Court reached the same conclusion in an appeal from a denial of a request for a Drug Offender Sentencing Alternative. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). “Where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” Id.

As in Garcia-Martinez or Grayson, the juvenile court failed to engage in any meaningful deliberation of whether A.B. is entitled to a manifest injustice downward departure. The juvenile court threw up its hands and ignored A.B.’s valid pleas for a downward departure because all children who appear in juvenile court are horribly damaged. Tragically, the court’s assessment may very well be true. Legally, this was error.

A.B. is a child of an incarcerated father. He is also a child of a drug abusing mother. The explanation for his response – of life on the streets that includes alcohol and drug abuse, as well as group criminal behavior – is that he is a trauma victim, not a bad actor. As a current Department of Justice request for proposals⁴ puts it:

⁴Federal grant funded through Second Chance Act “Strengthening Families and Children of Incarcerated Parents” (Last accessed May 22, 2015 at <http://www.ojjdp.gov/grants/solicitations/FY2015/SCACOIP.pdf>)

Parental incarceration is recognized as an “adverse childhood experience” (ACE), a measure of childhood trauma that the Centers for Disease Control and Prevention developed. Exposure to multiple ACEs significantly increases the likelihood of long-term negative mental and physical health outcomes (e.g., obesity, heart disease, diabetes, tobacco use, alcohol use, and asthma), and the stigma associated with parental incarceration can damage children’s self-esteem, cause alienation, and distort children’s sense of social-connectedness. Children with an incarcerated parent are often at a greater risk for other overlapping risk factors, such as parental substance abuse, mental health issues, inadequate education, poverty, and household instability.

See gen. Creasie Finney Hairston, “Prisoners and Their Families: Parenting Issues During Incarceration,” in *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families and Communities*, edited by Jeremy Travis and Michelle Waul (Washington, D.C.: The Urban Institute Press, 2003), 260-282.

The law requires that the trial court grant manifest injustice sentences when appropriate. The law explicitly allows for an incomplete mental defense to serve as a mitigating factor. RCW 13.40.150(3)(h). If it is the case that “virtually every youth that walk through [the courtroom] door” presents with this mitigating factor, each of them should receive a downward departure. RP 48-49. Certainly the statutory inquiry is on the individual; the law does not require a juvenile to show that he is somehow the most broken among the broken. RCW 13.40.150. It was error for the juvenile court to categorically ignore consideration of a manifest injustice

sentence for A.B. because, to the juvenile court, he did not appear “exceptional.”

Appellate courts must reverse the lower court when it fails to consider the mitigating factors raised by the defense. See State v. N.E., 70 Wn.App. 603, 607, 854 P.2d 672 (1993). Accordingly, this court should reverse and remand for full consideration of the mitigating factors.

VI. Conclusion

As set-out in the accompanying Motion for Accelerated Review, this case should be heard without delay because A.B. is a juvenile who received a disposition to confinement that is based on reversible error, including a miscalculated offender score and a categorical refusal to consider mitigating circumstances.

On review, the disposition should be reversed and case remanded for resentencing. In the event A.B. does not prevail, he asks this Court to deny any requests for costs.

Respectfully submitted this 22nd day of May 2015

/s/ Mick Woynarowski

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Attorneys for Appellant A.B.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73198-0-I
v.)	
)	
A.B.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF MAY, 2015, 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:

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KING COUNTY COURTHOUSE		VIA COA PORTAL
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SEATTLE, WA 98104		
[X] A.B. (APPELLANT)	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF MAY, 2015.

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