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STATE OF WASHINGTON
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No. 94393-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVAN BACON,

Petitioner.

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

SUPPLEMENTAL BRIEF OF PETITIONER EVAN BACON

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES ON REVIEW 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 6

The decision in *Houston-Sconiers* afforded juvenile courts complete discretion in crafting dispositions. 6

1. *Youth is a mitigating factor that must be considered at sentencing.* 6

2. *Houston-Sconiers' holding that courts must have complete discretion at sentencing must apply equally in juvenile court as it does for juveniles treated as adults.* 9

3. *Houston-Sconiers is consistent with this Court's prior jurisprudence.* 14

4. *The decision of the Court of Appeals in Crabtree is consistent with prior decisions of this Court.* 16

5. *The disposition imposed here was a proper exercise of the juvenile courts "complete discretion."* 17

E. CONCLUSION 20

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 12

U.S. Const. amend. VIII 12, 13

U.S. Const. amend. XIV 12

FEDERAL CASES

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) 7, 8, 13

J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) 12

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) ..... passim

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 13

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) 7, 8, 13

WASHINGTON CASES

State v. Bacon, 197 Wn.App. 772, 391 P.3d 556, *review granted*, 189 Wn.2d 1008 (2017) 1, 6, 11, 18

State v. Beaver, 148 Wn.2d 338, 60 P.3d 586 (2002) 18

State v. Crabtree, 116 Wn.App. 536, 66 P.3d 695 (2003) ..... i, 2, 17

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) .... passim

State v. J.S., 70 Wn.App. 659, 855 P.2d 280 (1993) 9

State v. M.L., 134 Wn.2d 657, 952 P.2d 187 (1998) 18

State v. Maynard, 183 Wn.2d 253, 351 P.3d 159 (2015) 15

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015)..... 7, 8, 13

State v. Posey, 161 Wn.2d 638, 167 P.3d 560 (2007) 14, 15

State v. Posey, 174 Wn.2d 131, 272 P.3d 840 (2012) 14

State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017)..... 8, 9

State v. Rice, 98 Wn.2d 384, 655 P.2d 1145 (1982)..... 10

State v. Tauala, 54 Wn.App. 81, 771 P.2d 1188, *review denied*, 113 Wn.2d 1007 (1989) 18

STATUTES

RCW 13.40.010 11

RCW 13.40.0357 18

RCW 13.40.160 18

OTHER AUTHORITIES

Claudia Rowe, *'We can't just keep doing what we've been doing': King County tries risky alternative to youth jail*, Seattle Times, (originally published October 23, 2017)..... 11

Nicole Sussman and Terry Lee, *How Just is Manifest Injustice*, American Academy of Child and Adolescent Psychiatry 12

A. INTRODUCTION

When Evan Bacon committed a new offense, the juvenile court refused to find him irredeemable. In order to improve 15 year-old Evan's rehabilitative potential, the court crafted a disposition in conjunction with his care providers, his probation counselor and his mother following his guilty plea. The court imposed the standard range in custody but suspended that sentence on the condition that Evan continue to engage in the rehabilitative services provided to him in order to become a productive citizen. But the State appealed, claiming the juvenile courts lack authority to create a disposition tailored to the juvenile's needs.

Evan is asking this Court to find that the decision in *State v. Houston-Sconiers*[1] authorized this sentence and, thus affirm the disposition of the juvenile court.

B. ISSUES ON REVIEW

1. This Court has recognized that children have tremendous capacity for rehabilitation between childhood and adulthood. The differences require juvenile courts to be able to craft dispositions that are effective in addressing the needs of the community and the child.

[1] 188 Wn.2d 1, 391 P.3d 409 (2017).

This Court's decision in *State v. Houston-Sconiers* authorized this discretion for juveniles who are charged in adult court. Does *Houston-Sconiers* apply equally in juvenile court authorizing the suspended disposition in this case?

2. Decisions of this Court and the Courts of Appeal have concluded that once a court determines a manifest injustice disposition is appropriate, the court has wide-ranging discretion in crafting the appropriate disposition. Is Division Three of the Court of Appeals' decision in *State v. Crabtree*[2] correctly decided and consistent with this Court's decision in *Houston-Sconiers* supporting Evan's suspended disposition?

C. STATEMENT OF THE CASE

Evan pleaded guilty to one count of second degree robbery. CP 31-39. Evan admitted he grabbed a woman's purse, and then struggled with the woman when she tried to keep it. CP 36; 10/14/2015RP 12-20.

At the disposition hearing, the probation counselor described Evan for the court:

> [Evan] is a great kid. He just is really, has struggled with his behavior. [Evan] is smart. He's funny. He's engaging. He has the qualities to be successful. He just needs the tools. He attempted to get the tools from the

[2] 116 Wn.App. 536, 66 P.3d 695 (2003).

> community and that didn't work. When he went to JRA, even though it was for a short time, he got his minimum, which is another plus. He got his minimum, not his maximum. It just wasn't long enough to give him all the tools that he needs, as well as time to practice those tools.
>
> This is a young man who's 15 years old, that his behavioral habits have been going on for a long time. You're not going to fix them in 15 weeks; less than 15 weeks. But I did want you to know that I think he's a great kid and that he can do this. He was insightful when I first went down to talk to him in looking at the silver lining, if you will, regarding this, that he could go about, he could get his GED at JRA. He acknowledged that he did need more skills that are decision-making skills, the ability to say no to others, and some aggression, anger management. So he's fairly insightful about what his needs are.

10/14/2015RP 24.[3]

Counsel for Evan noted that Evan has started to learn and apply some of things he had been taught in the programs which had been put in place as a result of a prior disposition. 10/14/2015RP 25.

> [Evan] has services set up in the community. He is involved in SeaMar Community Health Centers. He has an individual counselor, CJ Elsworth, who he sees regularly. Ms. Ellsworth also provides individual counseling to [Evan's mother], and family counseling to both of them. He attends Boys and Girls Club after school and [his mother] has regular work hours so she is

[3] In her conclusion as to the appropriate disposition, the counselor did recommend a standard range which included a JRA commitment. 10/14/2015RP 24-25.

> able to be home with [Evan] when he is not in school or attending other activities.
>
> [Evan] continues to work with David Humeryager of Team Child to address his specific school concerns. Last year the Bellevue School District agreed to do a comprehensive evaluation of [Evan's] needs. Based on this, [Evan] has been placed at Bellevue High School to address his academic, emotional, and behavioral concerns. Until he was taken into custody for this charge, [Evan] attended school and did not have any behavioral sanctions. This is a significant improvement over last year when [Evan] reports he only attended 3 days.
> . . .
> [A]llowing [Evan] to remain in the community will allow him to continue to implement the skills he has learned with the assistance of services that are already in place . . . Community supervision will provide structure to the court's conditions and will hold [Evan] accountable.

CP 13-14.

Attached to Evan's sentencing memorandum was a report from TeamChild addressing the issues facing Evan and the community programs that had been put into place to help him. CP 17-21. Finally, Evan's mother strongly urged a manifest injustice disposition below the standard range, noting that her and Evan's relationship had improved significantly since the programs had been implemented. CP 79.

The State urged the court to impose a standard range disposition of 52-65 weeks of detention for Evan. CP 10; 10/14/2015RP 20-23.

The court wrestled with the appropriate disposition, noting that there were substantial risks to the community and to Evan. 10/14/2015RP 45. Ultimately, the court imposed a manifest injustice disposition below the standard range, finding that Evan did not cause, nor contemplate that his actions would cause, serious bodily injury. CP 23, 79.

> One of the things that may be different is that school is now an anchor for [Evan]. And I know that that can truly turn around youth. [Evan] is bright. [Evan] is charming. [Evan] has some real skills. And [Evan] is also a threat to the community. And we need to address it long term.
>
> I looked at the file and my concern was that [Evan's] just going to continue to do the same thing over and over unless we address it now. He did well at Echo Glen. On the other hand, I think our system has a preference, if possible, to keep youth in the community. He will still end up at Echo Glen if he messes up, but I will grant a manifest injustice.
>
> I'm imposing 52 to 65 weeks at JRA, and I am suspending that for a period of 12 months. And I will empower [Evan] to stay out of JRA. Any criminal offense whatsoever will result in revocation. Even if it's an MIP or a theft 3, it's getting revoked. I need [Evan] to attend at school. I need you to stay at home. You can't run. You can't be gone. So that is going to be the disposition of the court.

10/14/2015RP 45-46. The court concluded that "[s]uspending the time allows the respondent to utilize the community services that are currently in place." CP 80.

The State appealed the manifest injustice disposition. CP 69. In its decision reversing the suspended disposition, the Court of Appeals ruled that the juvenile court was statutorily barred from suspending the disposition. *State v. Bacon*, 197 Wn.App. 772, 777-78, 391 P.3d 556, *review granted*, 189 Wn.2d 1008 (2017).

On March 2, 2017, this Court issued its decision in *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017). On that same date, Evan filed a motion asking the Court of Appeals to reconsider its decision in light of the *Houston-Sconiers* decision. After calling for a response from the State, the Court of Appeals refused to reconsider its decision and denied Evan's motion.

D. ARGUMENT

The decision in *Houston-Sconiers* afforded juvenile courts complete discretion in crafting dispositions.

1. *Youth is a mitigating factor that must be considered at sentencing.*

The United States Supreme Court and this Court have come to the realization that children are different from adults and must be treated differently within the criminal justice system. *See Miller v. Alabama*, 567 U.S. 460, 480, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 68-74, 130 S.Ct. 2011, 176 L.Ed.2d

825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569-75, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Houston-Sconiers*, 188 Wn.2d 18-26.

Children lack maturity and have "an underdeveloped sense of responsibility" resulting "in impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569. In addition, the personality traits of juveniles are more transitory than adults and less fixed. *Id* at 570.

In *Miller* and *Graham*, the United States Supreme Court further explained that juveniles' "transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Miller*, 567 U.S. at 472, *quoting Graham*, 560 U.S. at 68.

The thread joining *Roper*, *Graham*, and *Miller* is a recognition it must abandon or alter prior holdings when needed to serve their underlying rationale: a willingness informed by advancing neurological and psychological knowledge, as well as ascending standards of decency when sentencing children.

This Court extended the reasoning of *Miller* in *State v. O'Dell* when it held that a defendant's youth supports departure from an adult standard sentencing range. 183 Wn.2d 680, 690, 358 P.3d 359 (2015).

The Court noted the scientific studies underlying *Miller*, *Roper*, and *Graham* establish a "clear connection between youth and decreased moral culpability for criminal conduct." *O'Dell*, 183 Wn.2d at 695. Accordingly, youth was likely to diminish a defendant's culpability and could amount to a substantial and compelling factor that justified a below-standard-range sentence. *O'Dell*, 183 Wn.2d at 695-96.

Further, in *State v. Ramos*, this Court embraced *Miller*'s reasoning that "children are different" and noted that *Miller* requires, at the very least, consideration of a juvenile defendant's "'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.'" 187 Wn.2d 420, 443, 387 P.3d 650 (2017), *quoting Miller*, 567 U.S. at 477. *Ramos* also noted that the sentencing court must consider "the juvenile's 'family and home environment,'" "the circumstances of the homicide offense'" including participation and the effect of any familial or peer pressures, and "'incompetencies associated with youth.'" *Ramos*, 187 Wn.2d at 443-44, *quoting Miller*, 567 U.S. 477.

2. *Houston-Sconiers' holding that courts must have complete discretion at sentencing must apply equally in juvenile court as it does for juveniles treated as adults.*

In *Houston-Sconiers*, this Court followed up its decision in *Ramos* and ruled that, in sentencing juveniles declined to adult court, courts "must have *complete discretion* to consider mitigating circumstances associated with the youth of any juvenile defendant." 188 Wn.2d at 21 (emphasis added). Most importantly for the case at bar, this Court held:

> To the extent our state statutes have been interpreted to bar such discretion, with regards to juveniles, they are overruled. *Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements*.

Id. (footnotes omitted) (emphasis added).

The goals of the juvenile sentencing system differ from those of the adult criminal system, but the same policy reasons underlying the decision in *Houston-Sconiers* apply with more force in juvenile matters, as a more rehabilitative system. *See State v. J.S.*, 70 Wn.App. 659, 664, 855 P.2d 280 (1993) ("'because the juvenile system focuses on twin goals of punishment and rehabilitation of juvenile offenders, it differs materially from the adult sentencing system in which

punishment is the primary purpose'"), *quoting State v. Rice*, 98 Wn.2d 384, 392-93, 655 P.2d 1145 (1982).

Houston-Sconiers anticipates that this holding also applies in juvenile courts:

> In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the *youth of any juvenile defendant, even in the adult criminal justice system*, regardless of whether the juvenile is there following a decline hearing or not.

188 Wn.2d at 21 (emphasis added).

The Court looked to the decision in *Miller* and noted when the juvenile court makes decisions regarding dispositions as here:

> *Miller* requires such discretion and provides the guidance on how to use it. It holds that in exercising full discretion in juvenile sentencing, the court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S.Ct. at 2468. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated.

Houston-Sconiers, 188 Wn.2d at 23.

The Court of Appeals here ruled that the juvenile court was barred from considering just what *Houston-Sconiers* and *Miller* demanded. *See Bacon*, 197 Wn.App. at 775-76. But this Court has been clear that juvenile courts must be able to impose individualized dispositions that further the goals of the Juvenile Justice Act, which includes rehabilitation and treatment as well as accountability. RCW 13.40.010(2)(d), (f), (g).

The benefit of giving the juvenile courts the discretion they require in order to craft individual dispositions for juvenile offenders was driven home in a recent news article in the Seattle Times. Claudia Rowe, *'We can't just keep doing what we've been doing': King County tries risky alternative to youth jail*, Seattle Times, (originally published October 23, 2017). [4.] The article focused on an innovative program for treating juvenile offenders while acknowledging the current system is "woefully inadequate" for helping juvenile offenders gain the necessary skills to succeed and not reoffend.

Following *Houston-Sconiers* and providing complete discretion to the juvenile courts will not bankrupt the system or cause an overwhelming number of cases in the courts seeking such a disposition.

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[4] https://www.seattletimes.com/education-lab/we-cant-just-keep-doing-what-weve-been-doing-king-county-tries-risky-alternative-to-youth-jail/.

Cases, such as Evan's, involving a manifest injustice disposition below the standard range account for under 10% of the juvenile dispositions compared to almost 30% for manifest injustice dispositions above the standard range.

How many youth are being sentenced using MI?		
Sentence Type	#	%
MI Down	46	9.6
MI Up	**63**	**13.2**
MI In	**79**	**16.6**
Standard	221	46.3
Adult	51	10.7

See Nicole Sussman and Terry Lee, *How Just is Manifest Injustice*, American Academy of Child and Adolescent Psychiatry. [5]

Recognition of special protections for children has not been limited to the Eighth Amendment in the United State Supreme Court. The Supreme Court applied the same factors to hold in *J.D.B. v. North Carolina* that children are entitled to special protections when they are interrogated by the police. 564 U.S. 261, 277, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). *J.D.B.* is grounded in the Fifth and Fourteenth Amendments and holds that a juvenile's age must be taken into account

[5]https://www.aacap.org/App_Themes/AACAP/docs/clinical_practice_center/systems_of_care/2016_posters/nsussman.pdf.

in determining whether a child was in custody for *Miranda*[6] purposes. *Id*.

This Court has also applied the principles of *Miller* and its progeny beyond the Eighth Amendment. In *O'Dell*, this Court reasoned that the same characteristics of youth, based on the same scientific findings relied on by *Miller*, *Roper*, and *Graham*, mean that a defendant's youth can justify an exceptional sentence below the standard range under the SRA, even when the defendant was over 18 when he or she committed the offense. *O'Dell*, 183 Wn.2d at 689, 691-92, 695. *O'Dell* is not an Eighth Amendment case. O'Dell was sentenced to a standard range sentence but because O'Dell's youth was not considered, this Court remanded for a new sentencing hearing to consider whether his youth diminished his culpability. *O'Dell*, 183 Wn.2d at 697.

Applying *Houston-Sconiers* to the juvenile courts allows juvenile courts to craft dispositions that take into account the variables of youth that both the United State Supreme Court and this Court have found to be critical to creating remedies that account for the individualities of youth.

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

3. *Houston-Sconiers is consistent with this Court's prior jurisprudence.*

Beyond *Houston-Sconiers*, this Court has crafted remedies in the past necessary to ensure the individual characteristics of youth are accounted for in criminal proceedings. Application of that jurisprudence to this case is also entirely consistent with those decisions.

In *State v. Posey*, the defendant was charged with an automatic decline offense and three non-automatic decline offenses and was convicted of only the nonautomatic decline offenses. 161 Wn.2d 638, 641, 167 P.3d 560 (2007) (Posey I). This Court held that the case should have been remanded to the juvenile court for a decline hearing for sentencing once Posey was acquitted of the automatic decline offense. *Id.* at 647. It remanded to the juvenile court for a decline hearing. *Id.* at 649. Posey received a hearing on remand, where he argued that the juvenile court had no authority over him, since by that point he was 21 years old. *State v. Posey*, 174 Wn.2d 131, 134, 272 P.3d 840 (2012) (*Posey* II).

On remand, the trial court agreed, and sentenced him as if he were in adult criminal court to a standard range sentence under the JJA. *Id.* at 134-35. On appeal, Posey argued that no court had authority to

sentence him, because he was acquitted of the automatic decline offense and because he was over 21, the juvenile court no longer had authority over him. *Id.* at 140. The Supreme Court rejected this notion, holding that the superior court properly sentenced Posey. *Id.* at 140-41. Most importantly, this Court upheld the defendant's standard range juvenile sentence. *Id.* at 133.

Later, in *Maynard*, this Court held that the defendant received ineffective assistance of counsel when his attorney failed to notice that the defendant was about to turn 18. *State v. Maynard*, 183 Wn.2d 253, 260-61, 351 P.3d 159 (2015). As a result of this failure, the juvenile court dismissed the charges against Maynard when he turned 18, and the State filed charges in superior court. *Id.* at 257-58. The Supreme Court remanded for further proceedings consistent with the JJA, noting that this would put Maynard in the same position he was in before the time to extend juvenile jurisdiction lapsed. *Id.* at 264. Again, importantly, this Court stated that if Maynard was convicted, the trial court may still impose a juvenile sentence. *Id.*

The decision in *Houston-Sconiers* is a logical extension of *Posey* and *Maynard* and a further recognition that youth must be considered when deciding the appropriate disposition in juvenile court.

4. *The decision of the Court of Appeals in Crabtree is consistent with prior decisions of this Court.*

According to Division Three's decision in *State v. Crabtree*, the court here was authorized to impose the disposition it did. 116 Wn.App. 536, 66 P.3d 695 (2003). The juvenile court in *Crabtree* imposed a manifest injustice disposition which included a Chemical Dependency Disposition Alternative (CDDA) for which the juvenile was not otherwise eligible. *Id.* at 545. The juvenile court had entered detailed findings regarding its reasons for the manifest injustice disposition. *Id.* at 541-42. The Court of Appeals affirmed in language that presaged *Houston-Sconiers*:

> Once a manifest injustice is declared, and the court elects to depart from the standard range, the sentencing scheme of the juvenile justice act no longer applies. The court is vested with "broad discretion" to craft a disposition that will meet the needs both of the juvenile and of the community.

Crabtree, 116 Wn.App. at 545.

Crabtree is consistent with this Court's decisions. This Court has held that once a juvenile court has concluded that a disposition within the standard range would effectuate a manifest injustice, the court is vested with broad discretion in determining the appropriate sentence to impose. *State v. Beaver*, 148 Wn.2d 338, 345, 60 P.3d 586

(2002); *State v. M.L.*, 134 Wn.2d 657, 660, 952 P.2d 187 (1998), *citing among other cases State v. Tauala*, 54 Wn.App. 81, 86, 771 P.2d 1188 ("Once the court concludes that a disposition within the standard range would effectuate a manifest injustice, the determinate sentencing scheme of the Juvenile Justice Act of 1977 is no longer applicable and the court is vested with broad discretion in determining what sentence to impose"), *review denied*, 113 Wn.2d 1007 (1989).

These decisions demonstrate the juvenile court had complete discretion when it crafted an appropriate disposition to meet the punitive and rehabilitative needs of a particular juvenile.

5. *The disposition imposed here was a proper exercise of the juvenile courts "complete discretion."*

The Court here imposed a standard range disposition of 52-65 weeks, then suspended it as part of a manifest injustice below the standard range. RCW 13.40.160(2); RCW 13.40.0351 (option D). Under a strict construction of 13.40.160(10), the juvenile court could only suspend a disposition in limited circumstances; "Manifest injustice dispositions, described in RCW 13.40.160(2) and RCW 13.40.0357 (option D), are not on the list of exceptions." *Bacon*, 197 Wn.App. at 778.

But, where the juvenile court has complete discretion to consider the mitigating circumstances of youth, as the court did here, the court's suspension of the disposition was a proper exercise of discretion and should be affirmed.

> [T]he court must consider mitigating circumstances related to the defendant's youth—including age and its "hallmark features," such as the juvenile's "immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller*, 132 S.Ct. at 2468. It must also consider factors like the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, and "the way familial and peer pressures may have affected him [or her]." *Id.* And it must consider how youth impacted any legal defense, along with any factors suggesting that the child might be successfully rehabilitated. *Id.*

Houston-Sconiers, 188 Wn.2d at 23.

The juvenile court here based part of its findings on its previous experience with Evan. 10/14/2015RP 5. In addition, the court noted that numerous and substantial supportive services had been put into place in the community to support Evan including Functional Family Parole and Functional Family Therapy. CP 78 (Finding of Fact 8).

The juvenile court incorporated TeamChild's report as well as Evan's school records into the record before it. 10/14/2015RP 51. TeamChild noted that Evan is receiving special education through

Bellevue High School, and based on a new independent evaluation obtained by Evan's mother, new insights into Evan's behavioral problems have been gained and a new plan put into place to deal with those issues. 10/14/2015RP 41-42. The court also continued Evan's mental health treatment through SeaMar. *Id.* at 51.

The court emphasized it wanted Evan to have the opportunity to continue to build on the skills he gained from the various programs in the community. CP 78 (Finding of Fact 6). Suspending the sentence, the court concluded, "allows [Evan] to utilize the community services that are currently in place." CP 80 (Conclusion of Law 7).

Finally, counsel for Evan provided substantial information about the various services that had been provided, or would be provided and Evan's progress in utilizing those services. CP 13-21.

The court noted why it chose to suspend Evan's sentence:

> The fact that those services are now set up in the community, That [Evan] has had the benefit of some treatment and programming at JRA, and that he has the strong support of his mother, and that he has an extraordinarily long JRA sentence hanging over his head and will be highly motivated to engage in treatment because if he does not, he'll go to JRA. That's the purpose of the suspended sentence.

11/3/2015RP 96.

It is evident the court's findings were amply supported by the record and clear and convincing evidence supports the court's manifest injustice determination. *See T.E.C.*, 122 Wn.App. at 20-21. The manifest injustice disposition was appropriately imposed.

E. CONCLUSION

Evan asks this Court to reverse the Court of Appeals decision and rule that juvenile courts must possess the manifest discretion to craft an appropriate disposition that takes into account the mitigating qualities of youth.

DATED this 3rd day of November 2016.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EVAN BACON, Petitioner.	)))))))))	NO. 94393-1

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