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No. 96143-3

**THE SUPREME COURT
FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent,

v.

D.L., Appellant.

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

STATE OF WASHINGTON'S SUPPLEMENTAL BRIEF

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INTRODUCTION

"The purposes underlying the juvenile system and the procedures designed to effect those purposes are significantly different from the purposes and procedures of the adult system." State v. Rice, 98 Wn.2d 384, 392, 655 P.2d 1145 (1982). This Court has accepted review over Respondent D.L.'s and a second juvenile's moot cases to address whether the juvenile courts violated due process when imposing manifest injustice dispositions. See State v. M.S., No. 96894-2. The State of Washington respectfully requests the Court to uphold the discretion delegated to juvenile courts under the Juvenile Justice Act (JJA). Although the United States Supreme Court adopted charging and notice requirements for exceptional sentences for adult offenders, those decisions relied on the Sixth Amendment's guarantee of a jury trial and do not apply here.

Juvenile courts operate in a different realm, emphasizing treatment and rehabilitation as well as accountability. State v. Chavez, 163 Wn.2d 262, 267–68, 180 P.3d 1250 (2008) ("responding to the needs of youthful offenders and hold[ing] juveniles accountable for their offenses"). No one contends that the juvenile system succeeds in all cases. But abandoning its

rehabilitative purposes to adopt adult criminal process will ensure that it fails.

I. THE ISSUES ON REVIEW

The Court granted discretionary review of D.L.'s case to answer "whether due process requires notice before entry of a juvenile guilty plea of the potential aggravating factors that could support a manifest injustice disposition." (4/1/20 Order Granting Review). This question raises two issues for review:

A. "[N]o constitutionally protectable liberty interest is created by the juvenile dispositional guidelines" State v. T.J.S.-M., 193 Wn.2d 450, 462, 441 P.3d 1181 (2019). For adult offenders under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004). Does the due process clause require the same treatment for aggravating factors in juvenile court dispositions?

B. "Whether a plea is voluntary is determined by ascertaining whether the defendant was sufficiently informed of the direct consequences of the plea that existed *at the time* of the plea."

State v. Lamb, 175 Wn.2d 121, 129, 285 P.3d 27 (2012). The juvenile Commissioner told D.L. that the court was not bound by the parties' recommendations, and D.L.'s Statement on Plea of Guilty warned him that the court could impose a manifest injustice disposition. (VRP 129); (Statement on Plea of Guilty, para. 8; CP 108). Was this constitutionally insufficient?

The State's supplemental brief will focus on these two issues. Given the Court's limited grant of review, the State will not address the sufficiency of evidence supporting D.L.'s disposition, separation of powers, or mootness. Should those issues become relevant, the State asks the Court to incorporate the arguments in the State's Response Brief in the Court of Appeals, Answer to Motion for Discretionary Review, and Supplemental Brief on Mootness.

II. STATEMENT OF FACTS

This is a case of child sexual abuse committed by 13-year old D.L. against his five-year old half-brother. (Affidavit of Probable Cause; CP 4-5). The Court of Appeals unpublished decision provides a summary of the facts, and the State's Response Brief and Answer to Motion for Discretionary Review provide a detailed description of D.L.'s offenses. State v. D.L., 77360-7-I, 2018 WL

3120844, at *1 (June 25, 2018); (Response Brief at 4-14); (Answer at 2-12).

Here, the State highlights three facts relevant to D.L.'s guilty plea. First, the juvenile court warned D.L. in person and in writing that a consequence of pleading guilty was the possibility of a manifest injustice disposition. Second, when D.L. failed to qualify for a Special Sex Offender Disposition Alternative (SSODA), he received advance notice that the Probation Department would recommend a disposition above the standard range. Third, the specific evidence of D.L.'s serious, clear danger to society did not arise until he failed the SSODA assessment.

A. D.L. Received Multiple Warnings On The Direct Consequences of Pleading Guilty.

The State charged D.L. with three counts of rape of a child in the first degree and one count of attempt. (Information; CP 1-3). It later amended the information twice, adding alternative charges for child molestation in the first degree. (First Amended Information; CP 47) (Second Amended Information; CP 51). In response, D.L. moved to dismiss all charges, alleging the amendments were made too close to trial. (Motion to Dismiss; CP 77). On May 22, 2017, the first day of trial, Whatcom Superior Court Judge Raquel Montoya-

Lewis heard argument and denied the motion to dismiss. (VRP 114) ("I'm certainly willing to give you a brief continuance").

The parties took a short break and returned with news that they were discussing settlement. (VRP 115) ("the State has made an offer to me that I feel I need to have some time to communicate to my client effectively"). The court postponed trial. Two days later, on May 24, 2017, D.L. returned to court to plead guilty.

At the plea hearing, Whatcom County Commissioner Alfred Heydrich questioned D.L. carefully to ensure he understood the consequences of pleading guilty. As part of the agreement, the State filed a third amended information charging Respondent with one count of attempted child molestation in the first degree. The Commissioner began by making sure D.L. understood the charge.

> Q. Any questions about what the new charge means or what it is about?
>
> A. No.
>
> Q. All right. And do you feel like you've had enough time to fully discuss this situation with Ms. Jones?
>
> A. Yes.
>
> Q. Okay. I'm going to go over your offered Statement on Plea of Guilty. If you have any questions about this, I want you to ask me, or if

> you wish you can take a time out and talk privately with Ms. Jones, okay?
>
> A. Okay.
>
> Q. All right. So I know it's hard for you to sit still and concentrate.
>
> A. Yes, very.
>
> Q. But I need you to do your very best to listen to what I'm saying and actually hear it, okay?
>
> A. Okay.

(VRP 125). At the Hearing, the Commissioner went through each paragraph on D.L.'s Statement on Plea of Guilty. (VRP 122-137). (Statement on Plea of Guilty; CP 107).

Next, the Commissioner discussed D.L.'s rights and the consequences of waiving his ability to go to trial.

> But here's what you need to be clear on. If I accept this plea today and we continue this, and you go through the process, when you come back to be sentenced, you wouldn't be able to say, you know, "I wish I hadn't pled guilty I want to take it back; I want to have a trial now." It would be too late.

(VRP 128). D.L. said he understood. (VRP 128).

Finally, the Commissioner repeatedly warned D.L. that the court did not have to accept the parties' recommended disposition, a Special Sex Offender Disposition Alternative (SSODA).

> Q. We were just talking about a SSODA here, so that's a possible alternative sentence. But you need to understand that even if that is recommended to me, I don't have to follow that, and I have the discretion to send you to JRA if I think that's appropriate whether other people think it is or not; do you understand that?
>
> A. Yes.

(VRP 129); (VRP 129-130) ("only thing you could appeal would be a sentence outside the range"); (VRP 134) ("ultimately, though, I'm the one who has to decide whether you actually get" a SSODA).

D.L.'s Statement on Plea of Guilty also warned him of the consequences from pleading guilty. (Statement on Plea of Guilty; CP 107). In paragraph 8, the Statement describes the judge's authority to enter a disposition outside the standard range.

> RIGHT TO APPEAL SENTENCE: I understand that the 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 manifest injustice. If the judge goes outside the standard range, either the state or I can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

(Statement on Plea of Guilty ¶ 8; CP 108). Paragraph 9 warned him that the maximum disposition could be commitment until he turns 21. (Statement on Plea of Guilty ¶ 9; CP 109).

Finally, the Statement repeated the Commissioner's warning that the court need not follow the recommended disposition.

> Although 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.*

(Statement on Plea of Guilty ¶ 14; CP 111) (emphasis added). As detailed in paragraph 8 above, the maximum allowed included a manifest injustice disposition beyond the standard range.

After an extended discussion with the Commissioner, and ample time to discuss the Statement with his counsel, D.L. pled guilty to one count of attempted child molestation in the first degree. (VRP 137).

B. When D.L. Failed To Qualify For A SSODA, Probation Identified Specific Reasons For A Manifest Injustice Disposition.

To receive a SSODA, D.L. had to complete a number of evaluations, beginning with a polygraph examination. It did not go well. D.L. missed the first appointment, and at the make-up exam, he denied any responsibility for sexual behavior. (8/30/17 Sealed SSODA Report at 9; CP 224). He also failed to cooperate with the Sex Offender Treatment Providers, showing an unwillingness to participate in the program. (Sealed SSODA Report at 1; CP 224).

By the date of D.L.'s disposition hearing, neither party recommended a SSODA. (VRP 243) ("nobody is urging the Court to impose a SSODA").

Under the plea agreement, both the Prosecutor and Respondent's counsel recommended a sentence within the standard range, 15 to 36 months. Whatcom County Probation was concerned this was too little time given the new evidence of D.L.'s sexual predation and failure to accept responsibility. On August 1, 2017, Juvenile Probation Officer Linda Barry filed notice of intent to seek a manifest injustice sentence. (Notice; CP 158). This was four weeks before D.L.'s August 30, 2017 disposition hearing, allowing Respondent's counsel time to file a memorandum in opposition. (Respondent's Disposition Memorandum; CP 194).

To support a longer sentence, Probation filed a sealed Manifest Injustice Report documenting the need for a disposition outside the standard range. (Sealed Manifest Injustice Report; CP 224). The office recommended a disposition of 36-40 weeks. (Respondent's Disposition Memorandum at 2; CP 195).

C. The Commissioner Entered a Manifest Injustice Disposition Based On D.L.'s Dangerous Behavior

After reviewing the parties' submissions, weighing testimony, and considering counsels' arguments, the Commissioner found clear and convincing evidence that D.L.'s behavior posed a serious, clear danger to society. (VRP 242-250). First, D.L.'s victim was particularly vulnerable.

> I believe that the information contained in the reports establishes that not only was the victim, in this case, five years old, but that this child was cognitively delayed...[W]hen you have a victim here who is in the same house, who is related to the defendant, and where there is easy access, and also where this five-year-old has cognitive delays, I think that gets us to particularly vulnerable.

(VRP 247).

Second, D.L. showed a serious risk of reoffending without specialized treatment for two reasons.

> [O]ne would be denial of criminal conduct, which I think has been demonstrated here. And a low amenability to rehabilitation and treatment, which I think has also been demonstrated here.

(VRP 247).

Third, D.L.'s parents and grandparents had little control over his behavior.

> [H]is own parents have...they've basically surrendered their responsibilities here. I'm aware the grandparents

> have stepped in, and I think they've done the best they can. But...I've got some serious questions about the grandparents' ability to control D.L.'s behavior...And I think that's clearly established here when one reviews the record here in terms of the number of reviews we've had to have and the problems that arose while this matter was under pretrial supervision.

(VRP 248).

Fourth, an extended disposition was necessary to provide D.L. the treatment and counseling he needs to address and change his predatory behavior. Citing State v. T.E.H., 91 Wn. App. 908, 960 P.2d 441 (1998), the Commissioner found compelling that "the Court made a finding of serious risk to re-offend in that case and basically felt that an MI outside the range was appropriate because the record established that there was – more time was necessary to, in the Court's words, 'alter the defendant's behavior.'" (VRP 249).

The Commissioner found clear and convincing evidence of manifest injustice, imposing a disposition of 36 to 40 weeks. (VRP 250) (Disposition Order; CP 208). Respondent appealed, and on June 25, 2018, Division I of the Court of Appeals affirmed D.L.'s disposition. Respondent now requests this Court to find his disposition violated his right to due process.

ARGUMENT

III. STANDARD OF REVIEW

The Court reviews D.L's constitutional challenges *de novo.* State v. Bradshaw, 127 Wn.2d 528, 531, 98 P.3d 1190 (2004) ("reviews statutory construction issues and constitutional issues de novo"); State v. B.O.J., 194 Wn.2d 314, 323, 449 P.3d 1006 (2019) ("statutory interpretation is a question of law reviewed de novo").

IV. RESPONDENT'S PLEA DID NOT VIOLATE DUE PROCESS.

A. Manifest Injustice Dispositions Under the JJA Are Not the Same as Exceptional Sentences Under the SRA.

The Court accepted review to answer a question: does due process prohibit a manifest injustice disposition if a juvenile did not have notice of potential aggravating factors before pleading guilty? The lack of notice does not invalidate a standard range disposition after a plea, assuming appropriate written warnings and colloquy with the judge. The question is whether notice is a necessary prerequisite for a manifest injustice disposition.

Under Washington caselaw, the answer is "no".

> [N]otice of a potential punishment is adequate for due process purposes where the punishment is authorized in a relevant statute. The Basic Juvenile Court Act, chapter 13.04, and the Juvenile Justice Act of 1977 (JJA), chapter 13.04 RCW, govern the operation of the juvenile courts. Under the JJA, any offense is subject

> to a disposition above the standard range "[i]f the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice" such that the standard disposition would impose a serious and clear danger to society. The statutes clearly provide notice that a manifest injustice disposition is a possibility in all juvenile sentences. This notice satisfies due process.

State v. J.V., 132 Wn. App. 533, 539–40, 132 P.3d 1116 (2006) (footnotes omitted); State v. Moro, 117 Wn. App. 913, 923, 73 P.3d 1029 (2003) (JJA "does not require express notice to a defendant that the court is considering imposing a manifest injustice sentence").

The same was once true for exceptional sentences under the adult Sentencing Reform Act. Moro, 117 Wn. App. at 920 ("due process does not require that an adult defendant receive notice that the court is considering imposing an exceptional sentence"). In 2004, the United States Supreme Court found these exceptional sentences violated the Sixth Amendment.

> [A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact

> which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

Blakely v. Washington, 542 U.S. 296, 301–02, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004). Respondent D.L. argues that the same should be true for aggravating factors in juvenile dispositions.

This Court should distinguish adult sentences from juvenile dispositions for three reasons. First, the Sixth Amendment rights to juries for adults in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000), do not apply to juveniles.

> 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 non-jury juvenile dispositions.

State v. Tai N., 127 Wn. App. 733, 741, 113 P.3d 19 (2005). The Blakely Court's concern for protecting trial by jury does not translate to juvenile cases.

Second, requiring prior notice of aggravating factors in juvenile cases is unworkable, given the court's adaptive process designed to change, rather than simply punish, the offender. Here, the parties expected D.L. to qualify for a SSODA. That outcome

would have provided him the evaluation, treatment, and supervision necessary to address his sexual behavior. But his refusal to cooperate coupled with his family's denial thwarted the recommended outcome. All of this became vital information on D.L.'s dangerousness and the need for services and treatment. And it arose after D.L.'s plea.

Third, requiring prior notice of aggravating factors would interfere with the court's ability to order meaningful specific treatment. Juvenile court dispositions must satisfy the combined goals of accountability and rehabilitation. Unlike adult sentences, juvenile dispositions involve more than punishment.

> It would be, in effect, telling the juvenile court to ignore the needs of the juvenile until he is convicted of committing an even more serious offense. Such an approach is necessary under the adult system in which punishment is the paramount purpose and where the punishment must fit the crime. But it is inimical to the rehabilitative purpose of the juvenile justice system. It would destroy the flexibility the legislature built into the system to allow the court, in appropriate cases, to fit the disposition to the offender, rather than to the offense.

State v. Rice, 98 Wn.2d 384, 397, 655 P.2d 1145 (1982).

If the State and juvenile courts must identify aggravating factors before a plea, the next step is to require disclosure in the Information, and specific warnings before entering a plea. This

calcifies juvenile pleadings, making them match the formal process for adults. The Legislature in the JJA wanted juvenile courts to treat children as children, not adults. "The Act does not set up a rigidly punitive system, and it is incumbent on the juvenile justice system to help its youthful offenders." State v. B.O.J., 194 Wn.2d 314, 326–27, 449 P.3d 1006 (2019).

The parties and the court believed that D.L.'s dangerous behavior was treatable. When it became apparent that this was incorrect, the court had to revise its disposition to address D.L.'s failure to accept responsibility. With therapeutic courts exercising similar flexibility with adult offenders, it makes no sense to force juvenile proceedings in the opposite direction. Due process does not require this Court to curtail this essential discretion.

B. D.L. Understood The Direct Consequences of Pleading Guilty.

Before accepting a plea, the juvenile court must confirm that an offender waives his or her right to a dispositional hearing knowingly, voluntarily, and intelligently. JuCr 7.6(b); CrR 4.2(d) ("understanding of the nature of the charge and the consequences of the plea"); State v. A.N.J., 168 Wn.2d 91, 113, 225 P.3d 956 (2010) ("direct consequences"). Here, D.L. acknowledged on the

record: (1) that a SSODA was not a given (VRP 129); that the plea agreement was not binding on the court (VRP 134); and that the court could enter a manifest injustice disposition. (VRP 129-30) (Statement on Plea of Guilty ¶ 8; CP 108). He had ample time to speak with counsel and has never attempted to withdraw his plea.

Adding more specific oral and written warnings about possible aggravating factors that might arise if the judge should consider a manifest injustice sentence will do more harm than good. As evidenced in this case, teenagers already have a hard time focusing on the judge's warnings. (VRP 125) (very hard to sit still and concentrate). Advising juvenile respondents in court about contingent or speculative consequences is developmentally inappropriate. The more concrete the better.

For this reason, the right to counsel is far more useful than an additional speculative warning during a plea colloquy. Counsel can explain what a manifest injustice disposition means and when a judge will likely impose one. Notice of potential aggravating factors may be useful for adult defendants, but for juvenile respondents, it is just another paragraph of confusing fine print.

C. The Legislature in the JJA Delegated Essential Discretion to Enter Appropriate Dispositions.

Nothing in the JJA requires formal identification and notice of potential aggravating factors at a plea hearing. Instead, the Legislature created a less formal disposition hearing that allows for the judge to hear all relevant evidence and impose a disposition order that could include treatment, community supervision, and detention. RCW 13.40.150 (hearing); RCW 13.40.160 (order).

Neither of these statutes make manifest injustice dispositions contingent on advance notice to the respondent. Instead, the juvenile court must identify in writing the specific aggravating and mitigating factors justifying the disposition. RCW 13.40.160(2). "At the disposition hearing, the trial court is required to consider statutorily enumerated mitigating and aggravating factors." B.O.J., 194 Wn.2d at 324. The respondent then has a right to appeal the manifest injustice disposition. RCW 13.40.230.

Here, Respondent had 30 days' notice of the Probation Office's intent to seek a disposition above the standard range, and his counsel filed a comprehensive memorandum in opposition. This is more than what due process requires.

CONCLUSION

Juvenile courts must simultaneously hold offenders accountable and provide them an opportunity to change. They "tread an equatorial line somewhere midway between the poles of rehabilitation and retribution." State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145 (1982). Requiring notice of potential aggravating factors before a juvenile pleads guilty will impede the court's flexibility while providing no real benefit to the young offender.

The State of Washington respectfully requests the Court to uphold the juvenile court's discretion to impose manifest injustice dispositions in appropriate cases.

DATED this 1st day of June, 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of State of Washington's Supplemental Brief to:

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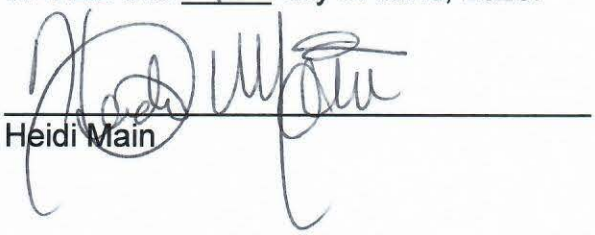
DATED this 1st day of June, 2020.



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