

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/7/2018 3:56 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 95542-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

B.O.J.,

Appellant.

---

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

---

PETITIONER'S SUPPLEMENTAL BRIEF

---

TRAVIS STEARNS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

A. INTRODUCTION..... 1

B. ISSUES PRESENTED ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT ..... 5

    1. Children who commit minor crimes should not be imprisoned. .... 5

    2. The reasons for imposing a manifest injustice sentence were not clearly and convincingly supported by the record..... 10

    3. The sentence imposed by the court was clearly excessive considering the seriousness of the offense and the sentences imposed on others for similar or more serious offenses. .... 14

    4. The government breached its plea agreement with B.O.J. without proving she had violated her agreement. .... 16

    5. The increasing number of cases that involve courts sending children to a juvenile institute for a minor crime is an issue of substantial public interest. .... 18

E. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

### **Cases**

<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) .....	5, 18
<i>In re Levias</i> , 83 Wn.2d 253, 517 P.2d 588 (1973).....	11
<i>In re Pers. Restraint of James</i> , 96 Wn.2d 847, 640 P.2d 18 (1982)..... .....	7, 16, 17
<i>In re Silva</i> , 166 Wn.2d 133, 206 P.3d 1240 (2009) .....	18, 19
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) .....	5, 18
<i>Montgomery v. Louisiana</i> , ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016) .....	5, 18
<i>State v. Bacon</i> , 190 Wn.2d 458, 415 P.3d 207 (2018).....	14
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	10
<i>State v. Bassett</i> , ___ Wn.2d ___, 428 P.3d 343, 2018 WL 5077710 (2018) .....	5, 18
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	5
<i>State v. Duncan</i> , 90 Wn. App. 808, 960 P.2d 941 (1998).....	14, 16
<i>State v. F.T.</i> , ___ Wn. App.3d ___, 426 P.3d 753 (Wash. Ct. App. 2018).... .....	5
<i>State v. Fisher</i> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	12
<i>State v. Houston-Sconiers</i> , 188 Wn.2d 1, 391 P.3d 409 (2017) .....	6, 18
<i>State v. Linssen</i> , 131 Wn. App. 292, 126 P.3d 1287 (2006).....	19
<i>State v. M.L.</i> , 134 Wn.2d 657, 952 P.2d 187 (1998).....	5, 16
<i>State v. McCarter</i> , 91 Wn.2d 249, 588 P.2d 745 (1978) .....	11

<i>State v. Melton</i> , 63 Wn. App. 63, 817 P.2d 413 (1991).....	12
<i>State v. Rhodes</i> , 92 Wn.2d 755, 600 P.2d 1264 (1979) .....	10
<i>State v. Rice</i> , 98 Wn.2d 384, 655 P.2d 1145 (1982).....	2, 5
<i>State v. Schaupp</i> , 111 Wn.2d 34, 757 P.2d 970 (1988) .....	18
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997) .....	17

**Statutes**

RCW 13.04.030 .....	18
RCW 13.40.020 .....	14
RCW 13.40.0357 .....	2, 11
RCW 13.40.150 .....	13, 14
SB 6160 (2018).....	18

**Other Authorities**

Beck, Allen, <i>Sexual Victimization in Juvenile Facilities Reported by Youth, 2012</i> , U.S. Department of Justice (2013).....	9
Caseload Forecast Council, <i>Statistical Summary of Adult Felony Sentencing (2015)</i> .....	15
Center on Juvenile and Criminal Justice, <i>Study: Long-term Juvenile Incarceration Fails to Decrease Reoffending Rates (2012)</i> .....	8
City of Seattle, Resolution 31614, Legislation Details (With Text) (2015) . .....	9
Crenshaw, Kimberlé, et. al., <i>Black Girls Matter: Pushed Out, Overpoliced and Underprotected</i> , Center for Intersectionality and Social Policy Studies at Columbia Law School and the African American Policy Forum (2015).....	6
Dishion, Thomas, et. al., <i>When Interventions Harm: Peer Groups and Problem Behavior (1999)</i> .....	8

Doyle, Joseph, <i>Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-assigned Judges</i> (2015) .....	8
Justice Policy Institute, <i>The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities</i> (2011).....	8, 19
Juvenile Rehabilitation Administration, <i>Average Residential Stay (In Days)</i> (2016).....	15
Juvenile Rehabilitation Administration, <i>Demographic Snapshot on 1/11/2016</i> (2016).....	15
King County Office of the Executive, <i>Juvenile Justice in King County</i> (Oct. 2017) .....	6
Moore, Holbrook, AP: <i>13K Claims of Abuse in Juvenile Detention Since '04</i> (2008).....	9
Office of Juvenile Justice and Delinquency Programs, <i>Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders</i> (2010) .....	8
Ryan, Joseph, et. al., <i>Juvenile Delinquency in Child Welfare: Investigating Group Home Effects</i> , Children and Youth Services Journal (2008) .....	7
Saar, Malika Saada, et. al., <i>The Sexual Abuse to Prison Pipeline</i> , Human Rights Projects for Girls, Georgetown Center on Poverty and Inequality, and the Ms. Foundation for Women (2015).....	6
Snyder, James, et. al., <i>Peer Deviancy Training and Peer Coercion: Dual Processes Associated with Early-Onset Conduct Problems</i> , Child Development (March 2008) .....	8
TeamChild, <i>Legal Services for Youth</i> .....	13
The Mockingbird Society, <i>Youth Program</i> .....	13
Wisdom, Cathy S. and Michael G. Maxfield, <i>An Update on the Cycle of Violence</i> , Research in Brief, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2001).....	7

Yi, Youngmin and Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, The Future of Children (Spring 2018)..... 7

Zahn, Margaret, et. al., U.S. Dep't of Justice, *Girls Study Group: Understanding Girls' Delinquency* (Oct. 2008)..... 6

## A. INTRODUCTION

B.O.J. should never have been imprisoned. The state failed her when she was in foster care. It never found her a safe place to live or a community-based treatment suited to her needs. And while the judge may have incarcerated B.O.J. to rehabilitate her, the data demonstrates that imprisoning a girl from foster care almost guarantees future incarceration.

When sentencing a youth, juvenile courts must consider the hallmark features of youth, the nature of the juvenile's surrounding environment, the nature of the crime, the impact of familial pressure, and how youth impacts any possible legal defenses. A manifest injustice sentence can only be imposed where authorized by the limited reasons provided by the legislature and where supported by clear and convincing evidence. A court may not consider improper factors, including whether B.O.J. was a dependent child or whether there were sufficient treatment facilities available for her in the community. Because the court lacked a legal basis for a manifest injustice sentence and considered improper factors, B.O.J.'s sentence must be vacated.

## B. ISSUES PRESENTED

1. Is vacation of a manifest injustice sentence required where the sentence increases the likelihood a dependent child, who committed a minor crime, will join the prison pipeline, when the sentence was not

supported by clear and convincing evidence, was based on improper factors, and was clearly excessive?

2. Does the prosecutor's breach of the plea agreement require vacation of B.O.J.'s sentence?

### C. STATEMENT OF THE CASE

Seventeen-year-old B.O.J. became dependent on the state when her grandmother died. CP 40. The state shifted her among group homes, where she never felt safe. *Id.* B.O.J. suffered from traumatic disorders, leading to a fear of strangers. *Id.* This trauma caused her to run from group homes or other environments where she did not feel safe. *Id.* B.O.J. was never placed in a successful foster home. *Id.*

B.O.J. was accused of stealing alcohol in April 2016. CP 6. Five months later, she was accused of taking diapers and Rice Krispy Treats. *Id.* She was charged with two counts of theft in the third degree. *Id.* at 6-7. Based on her offender score, B.O.J. faced local sanctions. RP 8; RCW 13.40.0357. B.O.J. pled guilty. CP 15. For her sentence, the prosecutor recommended six months of community supervision, eight hours of community service, and time served. RP 13.

Probation proposed a manifest injustice sentence of fifty-two weeks. CP 40. Probation asserted this sentence was appropriate because of B.O.J.'s criminal history, treatment needs, and overall addiction to a "life



of crime.” Probation Report 3. Probation believed B.O.J. was not amenable to community-based treatment and that her treatment needs were best served through incarceration. *Id.* at 2, 11.

B.O.J. used marijuana as a means of coping and relieving stress. GAIN-I Recommendation and Referral Summary 2. The state authorities responsible for her care recognized she would benefit from drug treatment but never found her an appropriate program. Probation Report 4. The only attempt at placement was in 2015, when B.O.J.’s counselor tried to put her in a program in Spokane. *Id.* at 4, 9. B.O.J. did not remain in this program because of her fear of stranger assault. CP 40. The government did not find another program that worked for B.O.J. Probation Report 4.

After pleading guilty, the court B.O.J. released on the condition she complete a needs assessment, continue treatment, submit to drug testing, follow a curfew, and reside in her foster care placement. RP 21. B.O.J. did not return to court the next day as directed, but she completed the needs assessment before her next hearing and did not commit any new crimes. RP 24.

When B.O.J. was brought back to court, the prosecutor argued she violated the plea agreement by running away from foster care. 11/30/16 RP 4. B.O.J. denied the allegation. *Id.* The prosecutor never presented evidence that B.O.J. breached the plea agreement. *Id.* The prosecutor

nevertheless argued that B.O.J.'s actions voided the plea agreement. RP 21. The prosecutor then recommended a manifest injustice sentence of twenty-seven to thirty-six weeks because this sentence would allow B.O.J. "ample" time to access and complete drug and alcohol treatment. RP 20. The prosecutor also argued that incarceration would "function as a housing option for B.O.J." RP 20.

B.O.J., who was months away from turning eighteen, knew a year of imprisonment would not help her. RP 28. B.O.J. wanted help in the community. *Id.* B.O.J. hoped to obtain her G.E.D. and get a job. *Id.* She recommended a sentence of sixty days, four months of probation, and placement in a local treatment program. CP 22. B.O.J. reiterated that institutionalization was counterproductive for her and that she needed community-based change. RP 28; 37.

The court imposed a sentence of forty-two to fifty-two weeks of incarceration, following neither party's recommendation. RP 34. The court stated that incarceration would provide B.O.J. with the "stable" environment necessary for rehabilitation and that local sanctions were too lenient. *Id.* The court justified the sentence based on non-statutory aggravating factors, including B.O.J.'s previous non-compliance with the conditions of community supervision, her uncharged criminal conduct, the seriousness of her criminal history, and her treatment needs. CP 40-41.

## D. ARGUMENT

### 1. **Children who commit minor crimes should not be imprisoned.**

Punishing children who commit crimes rests on fundamentally different principles than adults. When juveniles commit crimes meriting lengthy prison sentences, courts must focus on the circumstances of their youth when crafting an appropriate sentence. *State v. Bassett*, \_\_\_ Wn.2d \_\_\_, 428 P.3d 343, \_\_\_, 2018 WL 5077710, at \*8 (2018). This Court has examined lengthy sentences for serious offenders, but it has not addressed whether a court may imprison a juvenile for a minor crime since the super-predator myth era. *See State v. Rice*, 98 Wn.2d 384, 386, 655 P.2d 1145 (1982), *disagreed with on other grounds*, *State v. Coria*, 120 Wn.2d 156, 170, 839 P.2d 890 (1992); *State v. M.L.*, 134 Wn.2d 657, 660-61, 952 P.2d 187 (1998). And while the Court of Appeals recently upheld a manifest injustice sentence for a minor offender, that case is pending for review with this Court. *State v. F.T.*, \_\_\_ Wn. App.2d \_\_\_, 426 P.3d 753, 757 (Wash. Ct. App. 2018).

Incarcerating children has a negative and counterproductive impact. *Graham v. Florida*, 560 U.S. 48, 71-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 472, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Montgomery v. Louisiana*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 718, 724, 193 L. Ed. 2d 599 (2016). This Court should now hold that

the dangers of lengthy incarceration for children who commit minor offenses is unjustified and does not serve the purposes of the Juvenile Justice Act. *See e.g., State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017).

The leading cause of arrest for girls is minor offenses. Margaret Zahn, et. al., U.S. Dep't of Justice, *Girls Study Group: Understanding Girls' Delinquency*, 3 (Oct. 2008).<sup>1</sup> Girls who are sent into the juvenile justice system are increasingly children of color. Kimberlé Crenshaw, et. al., *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, Center for Intersectionality and Social Policy Studies at Columbia Law School and the African American Policy Forum, 6 (2015)<sup>2</sup>; *see also* King County Office of the Executive, *Juvenile Justice in King County* (Oct. 2017).<sup>3</sup> Over forty percent identify as LGBTQ. Malika Saada Saar, et. al., *The Sexual Abuse to Prison Pipeline*, Human Rights Projects for Girls, Georgetown Center on Poverty and Inequality, and the Ms. Foundation for Women, 7 (2015).<sup>4</sup> These girls have typically experienced overwhelmingly high rates of sexual violence. Zahn, at 3. A majority

---

<sup>1</sup> <https://www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf>

<sup>2</sup> [https://www.law.columbia.edu/sites/default/files/legacy/files/public\\_affairs/2015/february\\_2015/black\\_girls\\_matter\\_report\\_2.4.15.pdf](https://www.law.columbia.edu/sites/default/files/legacy/files/public_affairs/2015/february_2015/black_girls_matter_report_2.4.15.pdf)

<sup>3</sup> <https://www.kingcounty.gov/depts/executive/performance-strategy-budget/performance-strategy%20/criminal-justice-strategy-policy/youth-justice.aspx>

<sup>4</sup> [https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015\\_COP\\_sexual-abuse\\_layout\\_web-1.pdf](https://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf)

suffer from trauma and other mental health disorders. Cathy S. Wisdom and Michael G. Maxfield, *An Update on the Cycle of Violence*, Research in Brief, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 6 (2001).<sup>5</sup>

Children who grow up in the foster care system are also more likely to find themselves incarcerated than other youth. Foster children placed in group homes are two and half times more likely to get involved in the criminal justice system. Joseph Ryan, et. al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, Children and Youth Services Journal, 8 (2008).<sup>6</sup> Ninety percent of youth with five or more placements will enter the juvenile justice system. *Id.* Experts describe this phenomenon as the foster care-to-prison pipeline. Youngmin Yi and Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, The Future of Children, 39 (Spring 2018).<sup>7</sup>

Incarcerating children for minor crimes leads to increased delinquency and other negative consequences. *See* James Snyder, et. al., *Peer Deviancy Training and Peer Coercion: Dual Processes Associated*

---

<sup>5</sup><https://www.ncjrs.gov/pdffiles1/nij/184894.pdf>

<sup>6</sup>[https://s3.amazonaws.com/academia.edu.documents/31715243/grouphomeeffects.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1541371362&Signature=iMqUtZW1h9IZUZNOxdlcXNVGUf4%3D&response-content-disposition=inline%3B%20filename%3DJuvenile\\_delinquency\\_in\\_child\\_welfare\\_In.pdf](https://s3.amazonaws.com/academia.edu.documents/31715243/grouphomeeffects.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1541371362&Signature=iMqUtZW1h9IZUZNOxdlcXNVGUf4%3D&response-content-disposition=inline%3B%20filename%3DJuvenile_delinquency_in_child_welfare_In.pdf)

<sup>7</sup><https://files.eric.ed.gov/fulltext/EJ1179175.pdf>

*with Early-Onset Conduct Problems*, *Child Development*, 252 (March 2008). They experience higher levels of substance abuse, difficulty in school, violence, and difficulty adjusting throughout adulthood. Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, 6 (2011)<sup>8</sup> (citing Thomas J. Dishion, et. al., *When Interventions Harm: Peer Groups and Problem Behavior* (1999)).<sup>9</sup> Incarceration continues into adulthood and leads to increased recidivism. Joseph Doyle, et. al., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-assigned Judges*, 1 (2015);<sup>10</sup> Office of Juvenile Justice and Delinquency Programs, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, 2 (2010).<sup>11</sup> This is especially true for youth like B.O.J., as evidence shows that long-term incarceration of youth who commit low-level crimes makes it more likely they will re-offend. *Id.*; see also Center on Juvenile and Criminal Justice, *Study: Long-term Juvenile Incarceration Fails to Decrease Reoffending Rates* (2012).<sup>12</sup>

---

<sup>8</sup>[http://www.justicepolicy.org/images/upload/06-11\\_rep\\_dangersofdetention\\_jj.pdf](http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf)

<sup>9</sup>[https://www.researchgate.net/publication/12789140\\_When\\_Interventions\\_Harm\\_Peer\\_Groups\\_and\\_Problem\\_Behavior](https://www.researchgate.net/publication/12789140_When_Interventions_Harm_Peer_Groups_and_Problem_Behavior)

<sup>10</sup>[http://www.mit.edu/~jjdoyle/aizer\\_doyle\\_juvenile\\_incarceration\\_january2015.pdf](http://www.mit.edu/~jjdoyle/aizer_doyle_juvenile_incarceration_january2015.pdf)

<sup>11</sup><http://www.pathwaysstudy.pitt.edu/documents/Highlights%20from%20the%20Pathways%20to%20Desistance%20Study.pdf>

<sup>12</sup><http://www.cjcj.org/news/5476>

Incarceration exposes youth to sexual abuse. Nearly ten percent of youth in state facilities report at least one incident of sexual victimization in the past twelve months or since admission. Allen Beck, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2012*, U.S. Department of Justice, 9 (2013).<sup>13</sup> Of those who reported being victims of staff misconduct, eighty-six percent reported more than one incident, while twenty percent reported more than ten. *Id.* at 24.

Incarcerated youth are also subject to physical abuse. Approximately 13,000 claims of abuse were reported from 2004 through 2007 in state-run juvenile facilities. Holbrook Moore, *AP: 13K Claims of Abuse in Juvenile Detention Since '04* (2008).<sup>14</sup> An estimated forty-five percent of youth confined in secure correctional facilities and camp programs report staff use unnecessary force, while thirty percent of those youth report that staff uses solitary confinement as a discipline tool. *Id.*

Finally, long-term incarceration exacerbates problems the youths may already be suffering. A majority suffer from mental health issues and substance abuse. City of Seattle, Resolution 31614, Legislation Details (With Text), 4 (2015).<sup>15</sup> Ninety percent of incarcerated girls have been

---

<sup>13</sup> <https://www.bjs.gov/content/pub/pdf/svjfry12.pdf>

<sup>14</sup> [https://usatoday30.usatoday.com/news/nation/2008-03-02-juvenile-detention\\_N.htm](https://usatoday30.usatoday.com/news/nation/2008-03-02-juvenile-detention_N.htm)

<sup>15</sup> <https://seattle.legistar.com/View.ashx?M=F&ID=4019767&GUID=7C099120-9DED-4455-B5F9-81F0AA0D25E5>

physically, sexually or emotionally abused. *Id.* Imprisoning these girls only exacerbates their problems.

B.O.J.'s circumstances mirror those of other youth in crisis. Imprisoning her greatly diminishes her likelihood of future success.

**2. The reasons for imposing a manifest injustice sentence were not clearly and convincingly supported by the record.**

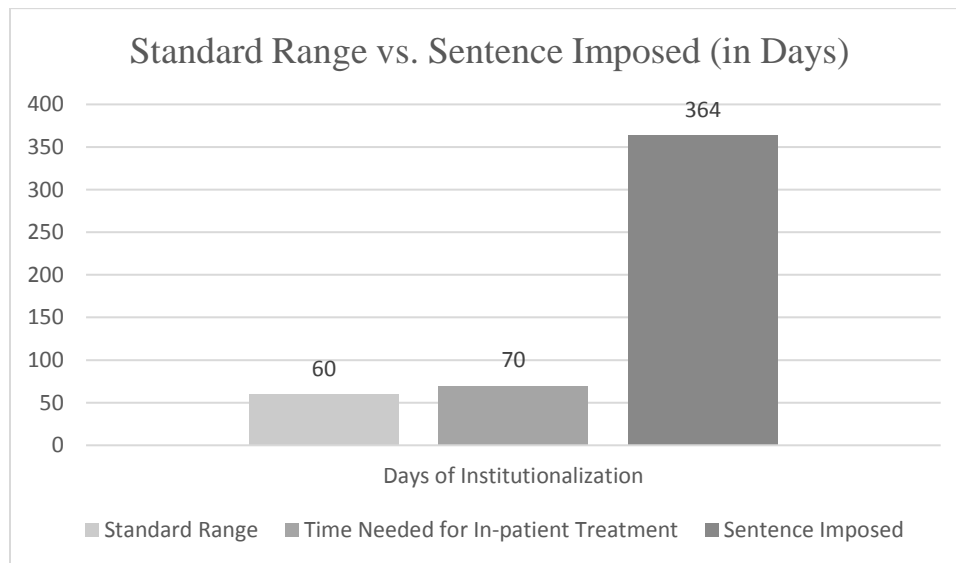
B.O.J.'s case exemplifies the misuse of the Juvenile Justice Act to impose a manifest injustice sentence. A well-meaning judge blamed a child for having an unstable, dysfunctional, and impoverished childhood while under the state's care. RP 34. The stability that the court provided to B.O.J. by imprisoning her was false and unsupported by the record. B.O.J. did not commit a crime that warranted a year of incarceration. With the overwhelming evidence that demonstrates that removing B.O.J. from her community would cause her harm, this sentence should be vacated.

A courts may only impose manifest injustice sentences in those cases where extraordinary factors not already contemplated and addressed by the legislature within the standard sentencing scheme exist. *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), overruled on other grounds by *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). The "clear and convincing" standard is the civil counterpart to "beyond a



reasonable doubt”. *Id.* (citing *In re Levias*, 83 Wn.2d 253, 517 P.2d 588 (1973); *State v. McCarter*, 91 Wn.2d 249, 588 P.2d 745 (1978)).

B.O.J. faced up to sixty days under the standard range guidelines. RCW 13.40.0357. CP 22. Recognizing her addiction issues, the prosecutor stated B.O.J. required drug treatment, which could be accomplished in ten weeks. CP 41. Instead, the court imposed a sentence of forty-two to fifty-two weeks. RP 36.



The court based the manifest injustice sentence on the following findings: B.O.J.’s substance abuse and treatment needs, her significant criminal history and recidivism, her failure to comply with court orders, and the leniency of the standard range. CP 41-42. The court appears to have intended to provide B.O.J. with a “stable” environment to help her access the required treatment through the manifest injustice sentence. RP

30-31; CP 40. However, the court's reference to B.O.J.'s lack of success in her treatment placements did not acknowledge that the government failed to provide placements that addressed her underlying needs. CP 40. This failure does not justify imposing a manifest injustice sentence.

And while the probation report cited B.O.J.'s "life of crime," her criminal history suggested otherwise. Probation Report 3. B.O.J. was only seventeen. CP 40. She had no felony convictions. *Id.* Her criminal history consisted solely of property crimes, false statements, and a misdemeanor assault. *Id.* B.O.J.'s previous convictions were low-level offenses committed in times of desperation and survival. *Id.* A result of deprivation and poverty, B.O.J.'s history does not support imprisonment.

Additionally, the court improperly considered uncharged criminal conduct as an aggravating factor. CP 40 (Finding of Fact 12). The use of uncharged conduct is improper, as it is a violation of the presumption of innocence. *State v. Melton*, 63 Wn. App. 63, 71–72, 817 P.2d 413 (1991). Without other substantial and compelling reasons to justify the sentence, especially where the court places considerable weight on this factor, remand for resentencing is appropriate. *State v. Fisher*, 108 Wn.2d 419, 429, 739 P.2d 683 (1987).

The court further erroneously considered the fact that B.O.J. was a dependent. RP 34. A juvenile court cannot consider a youth's economic

circumstances or factors indicating that the child is dependent when determining her sentence. RCW 13.40.150(4)(d) and (e). However, the sentencing court characterized incarceration to provide B.O.J. with stability after the prosecutor admitted he saw it as “a housing option.” RP 34, 20. B.O.J.’s lack of economic and familial resources should never weigh in favor of a manifest injustice sentence.

The court also imprisoned B.O.J. because it found there were no services in the community suitable for her. RP 34. However, a court cannot impose incarceration based on the lack of facilities in the community. RCW 13.40.150(5). In fact, it is likely community-based resources could have been found for B.O.J. had the court inquired. King County juvenile court works with TeamChild, who provides help youth like B.O.J. who have unmet medical needs and housing instability. TeamChild, *Legal Services for Youth*.<sup>16</sup> TeamChild has helped over 10,000 children in Washington since its inception. *Id.* Likewise, the Mockingbird Society provides support and helps find services for children like B.O.J. The Mockingbird Society, *Youth Programs*.<sup>17</sup> The Mockingbird Society focuses specifically on youth in dependency and at

---

<sup>16</sup> <https://teamchild.org/legal-services/>

<sup>17</sup> <https://mockingbirdsociety.org/youth-programs>

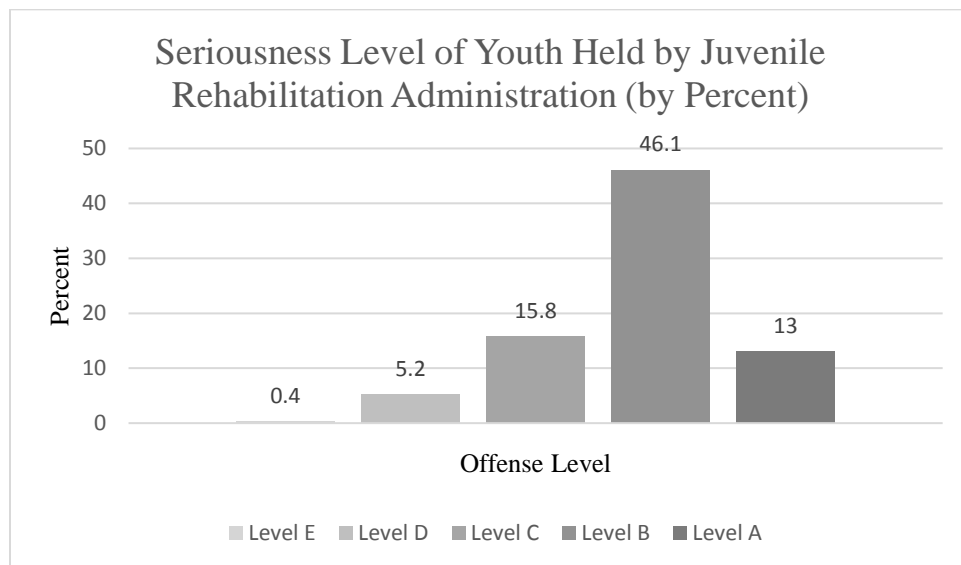
risk of homelessness. *Id.* There is no evidence that the court made any kind of referral to either of these organizations.

Manifest injustice sentences should rarely be imposed and only when expressly authorized by the Juvenile Justice Act. *State v. Bacon*, 190 Wn.2d 458, 463, 415 P.3d 207 (2018). RCW 13.40.150(3)(i) identifies eight specific aggravating factors. It does not contain a catchall phrase permitting consideration of other factors the court may deem appropriate. RCW 13.40.150(3)(i). And here, the reasons given by the juvenile court were either improper or unsupported by evidence. RCW 13.40.150(3)(i). The juvenile court relied on improper factors and life circumstances without ever weighing the harmful effects of a lengthy sentence on a young person. The court's reasons for imposing a manifest injustice sentence were not clearly and convincingly supported by the record. *State v. Duncan*, 90 Wn. App. 808, 812, 960 P.2d 941 (1998); RCW 13.40.020(19). This Court should hold the reasons given for imposing such a lengthy detention are not justified legally or factually.

**3. The sentence imposed by the court was clearly excessive considering the seriousness of the offense and the sentences imposed on others for similar or more serious offenses.**

B.O.J.'s sentence of one year for a minor property offense is clearly excessive. B.O.J. received an extraordinarily high sentence for her crime. Washington imprisons less than a half a percent of all youth

convicted of low-level offenses. Juvenile Rehabilitation Administration, *Demographic Snapshot on 1/11/2016*, 5 (2016).<sup>18</sup> The average imprisonment of all juveniles removed from the community is 143 days, less than half B.O.J.’s sentence. Juvenile Rehabilitation Administration, *Average Residential Stay (In Days)* (2016).<sup>19</sup> The average adult who is convicted of felony property offense serves three months. Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing 1* (2015).<sup>20</sup> B.O.J.’s convictions are for level E offenses. Her sentence is a statistical anomaly.



<sup>18</sup><https://www.dshs.wa.gov/sites/default/files/JJRA/jr/documents/Reports/2016DemographicsOn1-11-16.pdf>

<sup>19</sup><https://www.dshs.wa.gov/sites/default/files/JJRA/jr/documents/Reports/2016AverageLOS-FY15.pdf>

<sup>20</sup>[http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult\\_Stat\\_Sum\\_FY2015.pdf](http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2015.pdf)

Incarcerating B.O.J. for such a long time was unnecessary, not supported by any reasonable view of the evidence, and did not “foster the goals of the Juvenile Justice Act.” *M.L.*, 134 Wn.2d at 661. The prosecutor argued for a 36-week sentence, which was ample time for treatment, even if placing B.O.J. into treatment was delayed. RP 20. The treatment itself was only 10 weeks. CP 41. There was no evidence that it took a long time to begin treatment once B.O.J. was at the institute. This sentence was clearly excessive. *Duncan*, 90 Wn. App. at 812.

**4. The government breached its plea agreement with B.O.J. without proving she had violated her agreement.**

An evidentiary hearing is required where there is a genuine factual dispute over a plea agreement has been violated. *In re Pers. Restraint of James*, 96 Wn.2d 847, 850, 640 P.2d 18 (1982). Because B.O.J. disputed the government’s facts, an evidentiary hearing was required before the government could breach its agreement. This Court should hold that where the government voids a plea agreement without holding an evidentiary hearing on the disputed facts, the sentence must be vacated.

B.O.J. was released after pleading guilty on the condition that she comply with various conditions including complete a needs assessment, submit a urinalysis, and comply with Department placements. When she returned to court, the government accused B.O.J. of violating a condition

of their stipulated agreement by running away from her placement. B.O.J. denied that the violation occurred. 11/30/16 RP 4.

There was no evidence presented to show B.O.J. ran from a placement, other than a probation report submitted to the court. RP 24. B.O.J. objected to the court using the report as the basis of finding a manifest injustice sentence on due process grounds. RP 25. Despite its failure to prove B.O.J. violated the plea agreement, the prosecution recommended that the court impose a manifest injustice sentence. RP 21.

To vacate a guilty plea based on a defendant's breach of the stipulated agreement, the government must establish that the breach occurred in an evidentiary hearing. *James*, 96 Wn.2d at 850. Plea agreements inherently implicate fundamental due process rights; therefore, the prosecution must adhere to bargained-for terms until breach of the agreement is proven by a preponderance of the evidence. *Id.* An evidentiary hearing which complies with due process must be held. *Id.* This requires affording the defendant the opportunity to call witnesses. *Id.* Merely accusing a defendant of misconduct or of a violation does not relieve the State of its bargained-for duty. *Id.*; *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997).

The remedy for a prosecutor's breach is either specific enforcement of the original agreement or withdrawal of the plea. *State v.*

*Schaupp*, 111 Wn.2d 34, 41, 757 P.2d 970 (1988). The prosecution relieved itself of its commitments, without proving by a preponderance of the evidence that B.O.J. violated the agreement. This was improper. This Court should hold that B.O.J. is entitled to specific enforcement of the original plea agreement or withdrawal of her plea. CP 15.

**5. The increasing number of cases that involve courts sending children to a juvenile institute for a minor crime is an issue of substantial public interest.**

This case should be decided because it is an issue of substantial public interest. To determine when an issue is of substantial public interest, this Court looks to (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination that will provide future guidance to public officers, and (3) the likelihood that the question will recur. *In re Silva*, 166 Wn.2d 133, 137 n.1, 206 P.3d 1240 (2009). B.O.J.'s case satisfies all three criteria.

First, the public has a great interest in the protection of youth. The imposition of lengthy sentences in juvenile cases has been a focus of courts and legislatures. See *Graham*, 560 U.S. at 71-73; *Miller*, 567 U.S. at 472; *Montgomery*, 136 S. Ct. at 724; see also *Bassett*, 2018 WL 5077710, at \*8, *Houston-Sconiers*, 188 Wn.2d at 22, SB 6160 (2018) (amending RCW 13.04.030). Imposing lengthy sentences for minor crimes solves no



problems and only exacerbates the problems of youthfulness. Justice Policy Institute at 6. It is also an issue of great public interest.

Second, providing an authoritative determination of whether courts may impose lengthy sentences for minor offenses will provide future guidance to public officers. *Silva*, 166 Wn.2d at 137 n.1. These questions are especially important for juvenile offenders. *State v. Linssen*, 131 Wn. App. 292, 295, 126 P.3d 1287 (2006). Providing an authoritative opinion on the issues raised here will assist sentencing courts. *Id.*

Third, the issues raised in this case are likely to recur. My office currently has at least five other cases like this one, as detailed below.

<b>Court</b>	<b>Case Name</b>	<b>Case No.</b>	<b>Standard Range</b>	<b>Sentence Imposed</b>
<b>S. Ct.</b>	<i>State v. O.C.</i>	76941-3	0-30 days	46-52 weeks
<b>S. Ct.</b>	<i>State v. F.T.</i>	35524-1	0-30 days	42-52 weeks
<b>Div. 1</b>	<i>State v. M.S.</i>	78442-1	0-30 days	52-52 weeks
<b>Div. 1</b>	<i>State v. H.C.R.</i>	78360-2	0-30 days	40 weeks
<b>Div. 1</b>	<i>State v. M.H.</i>	78427-7	0-30 days	51-52 weeks

These cases demonstrate that the issues raised here are recurring. Because of the fleeting nature of juvenile sentences, these issues will never be reviewed, unless this Court determines that review is warranted.

E. CONCLUSION

Incarcerating youth for minor offenses does not reduce crime and will not rehabilitate the child. It increases the likelihood the youth will commit future crimes, subjects the youth to the probability of institutional violence, and is contrary to the goals of the Juvenile Justice Act. This Court should hold that the juvenile court's sentence violated the Juvenile Justice Act and this Court's juvenile justice jurisprudence. The reasons for imposing the sentence were not supported by clear and convincing evidence and the sentence was clearly excessive.

This Court should also hold that the prosecutor breached the plea agreement when it asked for a manifest injustice sentence without proving that B.O.J. had first violated the agreement.

DATED this 7th day of November 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)  
Washington Appellate Project (91052)  
Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 ) NO. 95542-5  
 v. )  
 )  
 B.O.J., )  
 )  
 Juvenile Petitioner. )

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF NOVEMBER, 2018, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> SAMUEL DINNING, DPA	( )	U.S. MAIL
[paoappellateunitmail@kingcounty.gov]	( )	HAND DELIVERY
[sam.dinning@kingcounty.gov]	(X)	E-SERVICE VIA PORTAL
KING COUNTY PROSECUTING ATTORNEY		
APPELLATE UNIT		
<input checked="" type="checkbox"/> B.O.J.	( )	U.S. MAIL
(NO CURRENT ADDRESS ON FILE)	( )	HAND DELIVERY
C/O COUNSEL FOR APPELLANT	(X)	RETAINED FOR
WASHINGTON APPELLATE PROJECT		MAILING ONCE
		ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2018.



X \_\_\_\_\_

Washington Appellate Project  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

# WASHINGTON APPELLATE PROJECT

November 07, 2018 - 3:56 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95542-5  
**Appellate Court Case Title:** State of Washington v. B.O.J.  
**Superior Court Case Number:** 16-8-00845-5

### The following documents have been uploaded:

- 955425\_Briefs\_20181107155540SC733341\_1010.pdf  
This File Contains:  
Briefs - Petitioners Supplemental  
*The Original File Name was washapp.110718-01.pdf*

### A copy of the uploaded files will be sent to:

- paoappellateunitmail@kingcounty.gov
- sam.dinning@kingcounty.gov
- Washington Appellate Project (Undisclosed Email Address)
- Thomas Michael Kummerow (Undisclosed Email Address)
- Travis Stearns (Undisclosed Email Address)
- Gregory Charles Link (Undisclosed Email Address)

### Comments:

---

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

**Filing on Behalf of:** Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20181107155540SC733341**