Supreme Court No. ____

(COA No. 77360-7-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.L,

Petitioner.

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

PETITION FOR REVIEW

KATE BENWARD

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

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT 5

1. Review by this Court is needed to address an important constitutional question that is fundamental to the fairness of juvenile proceedings and which has not yet been decided this Court: Is a juvenile entitled to notice of the aggravating factors that a court will rely on to impose a substantially harsher sentence prior to the juvenile entering a guilty plea? 5

a. Juveniles are entitled to equivalent due process procedural protections as adults in criminal proceedings, including at sentencing. ……………………………………………………………………..6

b. Due Process requires notice, prior to entry of a guilty plea, of the aggravating factors the State will seek to prove beyond a reasonable doubt before the court may impose a sentence outside the standard range. 7

c. The due process concerns of *Apprendi* and *Blakely* must apply with equal force to imposition of a manifest injustice sentence because its determinate sentencing scheme mirrors the Sentencing Reform Act. 9

d. D.L. was not given notice prior to entry of his plea of the aggravating factors that would be used to substantially increase his sentence. 13

e. The Court of Appeals wrongly treated the constitutional issue raised by D.L. as a policy concern rather than a constitutional violation. 14

2. D.L.'s case raises the constitutional question of whether it violates the doctrine of separation of powers for a court employee to charge and seek to prove aggravating factors in juvenile felony cases. 16

a. The doctrine of separation of powers requires the prosecutor to make charging decisions and prove guilt, and the court to confirm guilt and impose the appropriate sentence. 16

b. The prosecutor alone is authorized to make felony charging decisions in juvenile felony cases; it violates the doctrine of separation of powers for the probation officer, a member of the judicial branch, to allege and seek to prove aggravating factors. 18

F. CONCLUSION 20

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

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

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

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

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

Washington Court of Appeals Decisions

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

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

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

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

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

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

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

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

United States Supreme Court Decisions

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

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

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

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

Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) 7

Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984) . 11

Federal Constitutional Provisions

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

Washington Constitutional Provisions

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

Statutes

RCW 13.04.035 17

RCW 13.04.040(2) 18

RCW 13.04.040(5) 18

RCW 13.40.070(5)(a) 18

RCW 13.40.130 18

RCW 13.40.130 (5) 19

RCW 13.40.150(1) 19

RCW 13.40.150(3)(i) 10, 19

RCW 13.40.150(1) 19

RCW 9.94A.535(3)(b) 11

RCW 9.94A.535(3)........10

RCW 9.94A.537(1)........9

Rules

RAP 3.4........1

RAP 13.3 1

RAP 13.4(b)(3) 1, 5, 16, 20

RAP 13.4(b)(4)………………………………………………1, 5, 16, 20

A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

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

C. ISSUES PRESENTED FOR REVIEW

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

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

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

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

2. The doctrine of separation of powers protects individuals against centralized authority and abuse of power. The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake. Where aggravating factors must be pled and proven beyond a reasonable doubt, and the prosecutor alone is authorized to bring criminal charges in juvenile felony cases, does it usurp the role of the executive branch for the probation officer, a member of the judiciary, to allege these factors and seek to prove them beyond a reasonable doubt?

D. STATEMENT OF THE CASE

Fourteen-year-old D.L.'s stepfather was a convicted sex offender who had a history of physically abusing D.L. RP 8/30/17; 237. D.L's grandfather believed that D.L.'s stepfather had "been on a task to get

[D.L.] out of that house because he didn't want him there." RP 8/30/17; 237.

So when D.L's stepfather reported that he believed D.L. sexually abused his five-year-old son, D.L.'s grandfather questioned the State's reliance on the stepfather's account of events, and did not think the State treated D.L. fairly. RP 8/30/17; 238-239. D.L.'s grandparents took D.L. into their home after his stepfather made the allegations against him, where D.L stayed throughout the juvenile proceedings. RP 8/30/17; 244.

The State first charged D.L. with three counts of rape of a child in the first degree, and attempted rape of a child in the first degree based on these allegations. CP 1-2. On the day of trial, the State reduced the charges to one count of attempted child molestation in the first degree. CP 100.

D.L. plead guilty to one count of attempted child molestation in the first degree. CP 107. D.L. had no prior offenses and an offender score of "0." CP 108; 195. In exchange for D.L.'s plea to this reduced, single charge, the State agreed to support and recommend a SSODA disposition if D.L. was found eligible for the program. CP 111. D.L.'s guilty plea also memorialized that if D.L. were not eligible for the SSODA, the State

would recommend a "standard range disposition of 15-36 week commitment at JRA." CP 111.

D.L.'s plea form did not state that the probation officer would or could recommend a manifest injustice sentence. CP 107-112. Nevertheless, over two months after D.L entered his plea, and after D.L. was found ineligible for the SSODA program, the probation officer filed a "Notice of Intent to Seek Manifest Injustice." CP 158. The probation officer alleged the following aggravating factors—that the "victim was particularly vulnerable," and that D.L. "presents a serious risk to reoffend." CP 227. The probation officer requested a manifest injustice sentence of a minimum of 36 weeks. CP 230.

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

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

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

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

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

E. ARGUMENT

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

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

which the Court of Appeals recognized is of "strong public concern: Does due process require that a juvenile be given notice of the aggravating factors alleged in support of a manifest justice sentence *prior* to entry of a guilty plea or verdict when the court relies on this these factors to impose a harsher sentence than what the juvenile agreed to in his or her guilty plea?

a. Juveniles are entitled to equivalent due process procedural protections as adults in criminal proceedings, including at sentencing.

The Due Process Clause requires that juveniles receive "the essentials of due process and fair treatment." *In re Winship*, 397 U.S. 358, 359, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *Application of Gault*, 387 U.S. 1, 30, 87 S. Ct. 1428, 1445, 18 L. Ed. 2d 527 (1967) (Juvenile hearings "must measure up to the essentials of due process and fair treatment."); U.S. Const. Amend XIV; Const. Article 1, section 22 ("the accused shall have the right ... to demand the nature and cause of the accusation against him"); see also U.S. Const. Amend VI (the accused shall be informed "of the nature and cause of the accusation.").

It is well established that due process protections accorded adults in criminal proceedings are to be given to children in juvenile court proceedings, with the exception of the right to a jury trial. *State v. Poupart,* 54 Wn. App. 440, 445, 773 P.2d 893 (1989) (citing *Gault*, 387

U.S. 1); *State v. Whittington*, 27 Wn. App. 422, 425, 618 P.2d 121 (1980) (Juveniles are entitled to the "highest standards of due process" in sentencing by the juvenile court). Indeed, *Winship*'s foundational due process requirements arose in a juvenile adjudication in which the Court required the "essentials of due process and fair treatment." *Winship,* 397 U.S. at 359.

b. Due Process requires notice, prior to entry of a guilty plea, of the aggravating factors the State will seek to prove beyond a reasonable doubt before the court may impose a sentence outside the standard range.

Under the Sentencing Reform Act, the accused is entitled to notice of the aggravating factors that will be alleged in support of an exceptional sentence prior to trial or entry of the plea.

"Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 2355, 147 L. Ed. 2d 435 (2000)(citing *Jones v. United States,* 526 U.S. 227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)). The Fourteenth Amendment requires the same for state charges. *Apprendi*, 530 U.S. at 476.

"The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the…verdict or admitted by the defendant*." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original). Where the court seeks to impose a sentence outside of the standard range, *Apprendi* requires "procedural protections in order to provide concrete substance for the presumption of innocence, and to reduce the risk of imposing such deprivations erroneously." *Apprendi,* 530 U.S. at 484 (citing *Winship,* 397 U.S. at 363)(internal quotations omitted)).

Apprendi concerned the two vital constitutional rights of due process of law under the Fourteenth Amendment, and the Sixth Amendment right to a jury trial: "At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' Amdt. 14, and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury' Amdt. 6." *Apprendi*, 530 U.S. at 476-477.

Accordingly, *Apprendi* emphasized that a person's due process right to notice is implicated when the State seeks a sentence above the standard range: "if a defendant faces punishment beyond that provided by

statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not--at the moment the State is put to proof of those circumstances--be deprived of protections that have, until that point, unquestionably attached." *Apprendi*, 530 U.S. at 484.

The Washington State Legislature amended the Sentencing Reform Act (SRA) to comport with the requirements of *Apprendi* and *Blakely*. *In re Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009) (citing the "*Blakely*-fix Laws" of 2005, ch. 68, § 4). RCW 9.94A.537 (1) requires that before a court can impose an exceptional sentence, the accused must be provided notice of the State's intent to seek a sentence outside the standard range "at any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced…" The statute further requires that the "notice shall state aggravating circumstances upon which the requested sentence will be based." (emphasis added). RCW 9.94A.537(1).

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

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

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

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

---

[2] RCW 13.40.150 (3) (i) provides that the court shall:

(i) Consider whether or not any of the following aggravating factors exist:

(i) In the commission of the offense, or in flight therefrom, the respondent inflicted or attempted to inflict serious bodily injury to another;

(ii) The offense was committed in an especially heinous, cruel, or depraved manner;

(iii) The victim or victims were particularly vulnerable;

(iv) The respondent has a recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement;

(v) The current offense included a finding of sexual motivation pursuant to RCW 13.40.135;

(vi) The respondent was the leader of a criminal enterprise involving several persons;

(vii) There are other complaints which have resulted in diversion or a finding or plea of guilty but which are not included as criminal history; and

(viii) The standard range disposition is clearly too lenient considering the seriousness of the juvenile's prior adjudications.

factors are nearly identical, such as one of the statutory factors at issue in D.L.'s case, "that the victim or victims were particularly vulnerable."[3]

However, after *Apprendi* and *Blakely,* Division I refused to apply the Sixth Amendment jury trial right to the State's proof of aggravating factors for juvenile dispositions because of the "well-established precedent of holding that non-jury trials of juvenile offenders are constitutionally sound." *Tai N.*, 127 Wn. App. at 740. But in so holding, the court restated the well-established importance of ensuring that juvenile "proceedings comport with the 'fundamental fairness' demanded by the Due Process Clause." *Tai N.*, 127 Wn. App. at 738 (citing *Schall v. Martin,* 467 U.S. 253, 263, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)). And because *Tai N.* determined that the Juvenile Code already requires the court to find aggravating factors beyond a reasonable doubt before imposing a manifest injustice sentence as required by *Apprendi* and *Blakely,* the court did not need to decide that issue as a matter of constitutional due process. *Tai N.*, 127 Wn. App. at 742.

Post *Blakely* and *Apprendi,* this Court found that even though juveniles do not have a jury trial right, because of the strength of a

---

[3] RCW 9.94A.535 (3) (b) "The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance."

juvenile's due process rights that accord with adult criminal proceedings, juvenile convictions could be used in calculating an adult offender score.

> [T]he Juvenile Justice Act of 1977 (JJA), chapter 13.40 RCW, specifically mandates numerous safeguards for juvenile adjudications, such as the right to notice, counsel, discovery, an opportunity to be heard, confrontation of witnesses, and an unbiased fact finder.

State v. Weber, 159 Wn.2d 252, 264, 149 P.3d 646 (2006) (citing RCW 13.40.140); *See also State v. Kuhlman*, 135 Wn. App. 527, 533, 144 P.3d 1214 (2006) ("Because of the constitutionally required procedural safeguards in juvenile proceedings, we hold that juvenile adjudications fall within the prior convictions exception and can be used in setting an adult offender's sentence.").

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

Thus *Apprendi* and *Blakely's* foundational due process requirements, which include notice of the aggravating factors prior to entry of the plea, and proof beyond a reasonable doubt of these factors

prior to the court imposing a sentence outside the standard range, must apply in juvenile proceedings.

d. D.L. was not given notice prior to entry of his plea of the aggravating factors that would be used to substantially increase his sentence.

D.L. entered his plea of guilty to one count of attempted child molestation in the first degree. CP 107. D.L.'s plea form contained no notice that the probation department would be requesting a manifest injustice sentence. CP 107-111. Nor was D.L. informed any time prior to entry of his plea that the probation department would seek a manifest injustice sentence. And the record does not reflect that the court requested a manifest injustice report from the probation officer. RP 8/30/17; 210. It was only months after entry of his plea that the juvenile probation officer Linda Barry filed a "Notice of Intent to seek Manifest Injustice." CP 158.

Though D.L.'s plea form advised him of his right to appeal a manifest injustice sentence, there were no facts admitted in the plea form that would have supported a manifest injustice sentence, or any notice of the aggravating factors that could be relied on for a manifest injustice sentence.[4] Though D.L.'s plea form stated that he could appeal a manifest

[4] D.L.'s plea form stated that the sentencing judge "must impose a sentence within the standard range, unless the judge finds by clear and convincing evidence that the standard range sentence would amount to a manifest injustice." CP 110.

injustice sentence, this does not constitute notice that a manifest injustice sentence would be sought. To the contrary, D.L.'s plea form informed him that he would receive a standard range sentence: "the judge may impose any sentence he or she feels is appropriate, up to the maximum allowed by law." CP 111; *Blakely*, 542 U.S. at 303 ("The 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the…verdict or admitted by the defendant.").

The statement in D.L.'s plea form that allows the court to "review the probable cause statement to establish a factual basis" does not constitute a stipulation to facts that can then be relied on for the court's imposition of a manifest injustice sentence. CP 111; *Beito*, 167 Wn.2d at 505. Any such facts would have to be alleged separately and prior to entry of D.L.'s plea because "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Weber*, 159 Wn.2d at 259 (citing *Blakely* at 303–04).

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

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

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

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

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

Slip Op. at 6.

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

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

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

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

a. The doctrine of separation of powers requires the prosecutor to make charging decisions and prove guilt, and the court to confirm guilt and impose the appropriate sentence.

"The separation of powers doctrine is one of the cardinal and fundamental principles of the American constitutional system and forms the basis of our state government." *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012) (internal citations omitted). "This constitutional division of government is 'for the protection of individuals' against centralized authority and abuses of power." *Rice*, 174 Wn.2d at 900–01 (citing *Guillen v. Pierce County,* 144 Wn.2d 696, 731, 31 P.3d 628 (2001)). "The division of governmental authority into separate branches is especially important within the criminal justice system, given the substantial liberty interests at stake and the need for numerous checks against corruption,

abuses of power, and other injustices." *Rice*, 174 Wn.2d at 901. And "[s]eparation of powers ensures that individuals are charged and punished as criminals only after a confluence of agreement among multiple governmental authorities, rather than upon the impulses of one central agency." *Id.*

"A prosecuting attorney's most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual, and if so, which available charges to file." *Rice*, 174 Wn.2d at 901. And "the legislature cannot interfere with the fundamental and inherent charging discretion of prosecuting attorneys, including discretion over the filing of available special allegations." *Id.* at 906.

A juvenile disposition hearing in which a finding of manifest injustice is sought is an adversary proceeding because of the possibility that a sentence outside the standard range will be imposed. *State v. Beard*, 39 Wn. App. 601, 607, 694 P.2d 692 (1985) (citing *Whittington*, 27 Wn. App. at 428-429). During such hearings, it is the judicial power to confirm guilt and impose an appropriate sentence. *See Rice*, 174 Wn.2d at 901.

Probation officers' functions are administered by the superior court. RCW 13.04.035.[5]

b. The prosecutor alone is authorized to make felony charging decisions in juvenile felony cases; it violates the doctrine of separation of powers for the probation officer, a member of the judicial branch, to allege and seek to prove aggravating factors.

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

The Legislature sets the parameters for the charging of criminal offense. *Rice*, 174 Wn.2d at 903 ("each charge filed must be authorized by the legislature."). Under the Juvenile Justice Act (JJA), where the alleged offense is a Class A or B felony, or an attempt to commit a Class A or B felony, such as in D.L.'s case, the prosecutor alone may charge the offense. RCW 13.40.070 (5)(a).

The Juvenile Justice Act specifies that the duties of a probation officer are to "[m]ake recommendations to the court regarding the need for continued detention or shelter care of a child unless otherwise provided in this title;" and "prepare disposition studies as required in RCW 13.40.130, and be present at the disposition hearing to respond to questions regarding

[5] "Juvenile probation counselor and detention services shall be administered by the superior court."

the predisposition study." RCW 13.04.040(2),(4). Finally, the probation officer supervises "court orders of disposition to ensure that all requirements of the order are met." RCW 13.04.040(5).

The trial court, not the probation officer, is required to consider the existence of aggravating factors: "the court shall" "[c]onsider whether or not any of the following aggravating factors exist…" RCW 13.40.150(3)(i) (emphasis added). The court's consideration of whether to impose a manifest injustice sentence may include all oral and written reports. RCW 13.40.150(1). RCW 13.40.130(5) specifies that the court may request a predisposition report be prepared "*following an adjudicatory hearing*." There is no statute that authorizes the juvenile probation officer to independently allege aggravating factors either before or after a juvenile enters a plea of guilty.

RCW 13.40.150(1) does not delimit who may submit *evidence,* including oral and written reports, like the probation officer's disposition report, but it does specify that the prosecution and the defense are the two parties who may submit *recommendations for disposition.* Id.

There is thus no question that a probation officer has a duty "to make studies and recommendations to the court respecting dispositions." *Poupart,* 54 Wn. App. at 447. And these recommendations may be different from the recommendation made the prosecutor. *Id.* But the filing

of available special allegations is the role of the prosecutor alone. *Rice,* 174 Wn.2d at 906. The Court of Appeals failed to properly distinguish between sentencing recommendations by a probation officer, and "recommendations on disposition," in determining it did not violate the doctrine of separation of powers for the probation officer to allege and seek to prove aggravating factors in support of a manifest injustice sentence. Slip op. at 7-8.

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

F. CONCLUSION

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

DATED this 24th day of July, 2018.

Respectfully submitted,

Kate Benward (43651)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

Table of Contents

Court of Appeals Opinion..1