

No. 96143-3
(COA No. 77360-7-I)

THE SUPREME COURT FOR 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

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ARGUMENT

The constitutional questions raised in *State v. D.L.* are of continuing and substantial public interest in need of authoritative determination by this Court.

This Court stayed D.L.’s case pending decision in *State v. B.O.J.*, 194 Wn.2d 314, 449 P.3d 1006 (2019), and now invites the parties to submit supplemental briefing to address this decision.

This Court’s decision in *State B.O.J.* supports D.L.’s request for review because, like in *B.O.J.*, the issues D.L. raises meet the criteria for review by this Court, even if his case is technically moot. *Id.* at 321.

B.O.J. articulated the following criteria to determine whether a court should review a moot juvenile sentencing issue raised on appeal:

- (1) the public or private nature of the question presented;
- (2) the desirability of an authoritative determination which will provide future guidance to public officers; and
- (3) the likelihood that the question will recur.

Id. at 321. This Court recognized that the need to clarify a statutory scheme is a matter of continuing and substantial public interest. *Id.*

Accordingly, this Court found in *B.O.J.*, that whether treatment may support a juvenile court’s manifest injustice finding is a matter of continuing and substantial public interest meriting review. *Id.* at 321-22.

This Court also considered “the likelihood that the issue will never be

decided by a court due to the short-lived nature of the case.” *Id.* These same grounds justifying review are present in D.L.’s case.

The first issue in D.L.’s case—whether *Apprendi*¹ and *Blakely*² require notice of the aggravating factors alleged in support of a manifest injustice sentence is unquestionably a matter of substantial public interest that will recur and requires authoritative determination by this Court, because it involves the constitutionality of the juvenile sentencing scheme. While D.L.’s case was pending, this Court decided *State v. T.J.S.-M.*, also a moot juvenile sentencing case. *State v. T.J.S.-M.*, 193 Wn.2d 450, 454, 441 P.3d 1181 (2019). This Court ruled that the standard of proof in juvenile sentencing hearings was clear and convincing evidence, not proof beyond a reasonable doubt, based on the juvenile sentencing statute and Washington case law. *Id.* at 461-62. This Court noted that it did not analyze whether *Apprendi* and *Blakely* required a different result, because the parties did not adequately brief the issue *Id.* at 462, n. 3.

Justice González, in his dissent, noted that had T.J.S.-M. presented sufficient argument on the issue, it “may well be that we would conclude *Apprendi* and *Blakely* require proof beyond a reasonable doubt in juvenile

¹*Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed.2d 435 (2000).

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

sentencing context.” 193 Wn.2d at 466-67. This decision highlights the need for this Court to address *Blakely* and *Apprendi* in the context of juvenile sentencing. This is especially true, as Justice González notes in his dissent, because the majority’s application of *Winship*³—from which *Apprendi* and *Blakely* stem—may cause confusion. *Id.* at 467. D.L.’s analysis of this line of cases will help clarify any potential confusion and provide much needed authoritative determination to this unresolved question after *T.J.S.-M. See B.O.J.*, 194 Wn.2d at 321.

Also during the pendency of the stay in this case, this Court issued a decision in *State v. Allen*, which further highlights the need for determination of whether *Apprendi* and *Blakely* apply at juvenile sentencing. *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018). In *Allen*, this Court ruled that where the aggravating circumstances of RCW 10.95.020 increase the minimum sentence, the constitution requires the aggravating circumstances be proved to a jury beyond a reasonable doubt. *Id.* at 544. This Court held that these “aggravating circumstances therefore no longer meet the definition of ‘sentencing factors’ for Sixth Amendment purposes. They are elements.” *Id.* *Allen*’s analysis of the application of *Apprendi* and *Blakely* to aggravating factors should also be considered in

³ *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970).

the context of juvenile sentencing in order to provide authoritative guidance to lower courts, where these aggravating factors are used to increase the length of a child's sentence. *B.O.J.*, 194 Wn.2d at 321.

There is a strong likelihood this constitutional question will recur, because it is central to a child's due process and Sixth Amendment rights at sentencing. *See B.O.J.*, 194 Wn.2d at 321. This very issue is pending review in this Court in *State v. M.S.*, No. 96894-2, and was raised, but rejected for consideration by this Court in *State v. M.H.*, No. 96993-I.

D.L.'s second issue regarding the separation of powers meets the same criteria. Juvenile probation officers are regular participants at juvenile sentencing hearings, and this Court's clarification of the statutory scheme is necessary to determine the permissible scope of probation officers' role at sentencing. This is a matter of public interest that will nearly always be moot because of the relative short length of juvenile sentences. *B.O.J.*, 194 Wn.2d at 321.

Because the issues raised in D.L.'s motion for discretionary review fall so squarely within the scope of *B.O.J.*'s criteria for review of a moot juvenile case, D.L. asks this Court to accept review under RAP 13.4(b)(3) and (4).

B. CONCLUSION

The question of whether *Apprendi* and *Blakely* apply in the context of juvenile sentencing is a matter of substantial public interest in need of authoritative determination by this Court that is likely to recur, meriting review by this Court under RAP 13.4(b)(3) and (4), even if his case is technically moot. *B.O.J.*, 194 Wn.2d at 321. The same is true for D.L.'s challenge to his sentence on the grounds that it violates the doctrine of separation of powers. Though technically moot, D.L. respectfully asks this Court to accept review under RAP 13.4(b)(3) and (4).

Respectfully submitted this 10th day of January 2020.

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