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

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.L.,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

KATE L. BENWARD
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
katebenward@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Supreme Court Decisions

Washington Court of Appeals Decisions

Statutes

Washington Constitutional Provisions

Federal Constitutional Provisions

United States Supreme Court Decisions

A. INTRODUCTION

Fourteen-year-old D.L. had no prior criminal history when on the day of trial, after extensive pre-trial litigation, he agreed to plead guilty in exchange for the prosecutor's agreement to dismiss and reduce the original charges. The prosecutor also agreed to recommend a sentence within the standard range. Months later, the probation officer independently filed a notice to seek a manifest injustice sentence, alleging aggravating factors well beyond what D.L. admitted to in his guilty plea. The court imposed a manifest injustice sentence based on these additional allegations.

The court's reliance on factors D.L. did not have notice of before he waived his constitutional rights violated well-established due process requirements. This violation necessitates reversal of the manifest injustice sentence.

B. ISSUE PRESENTED FOR REVIEW

Article I, section 22 and the Sixth and Fourteenth Amendments require the State plead and prove beyond a reasonable doubt any fact which increases the available range of punishment. The court imposed a manifest injustice sentence

based on aggravating factors D.L. was not given notice of before he pled guilty, and which were not proved beyond a reasonable doubt. Does this sentence violate his state and federal constitutional rights to notice and due process?

C. STATEMENT OF THE CASE

1. The State secures a guilty plea from 14-year-old D.L. on the day of trial, reducing his charges in exchange for recommending a standard range sentence.

Fourteen-year-old D.L.'s stepfather claimed that D.L. sexually abused his five-year-old stepbrother. CP 4-5; 238. 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.

D.L.'s extended family insisted D.L. was innocent of the charges. RP 10, 14. D.L.'s grandparents took him into their home after his stepfather's allegations, where D.L stayed throughout the proceedings. RP 244.

After months of pre-trial litigation, D.L. was prepared for trial. RP 39. Just days before trial, the State filed an amended information charging D.L. "in the alternative" with three counts of child molestation in the first degree, and one count of

attempted child molestation in the first degree. CP 51. Then, on the day of trial, the State again reduced the charges to one count of attempted child molestation in the first degree. CP 100.

D.L. pleaded 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 single reduced charge, the State agreed to support and recommend a SSODA disposition if D.L. were found eligible for the program. CP 111. If D.L. was not eligible for the SSODA, the State agreed to recommend a "standard range disposition of 15-36 week commitment at JRA." CP 111.

2. After D.L. waives his constitutional rights and pleads guilty to the reduced offense, the probation officer for the first time alleges aggravating factors in support of an aggravated sentence.

The guilty plea did not inform D.L. that the probation officer would recommend a manifest injustice sentence. CP 107-12. Nevertheless, over two months after D.L waived his rights and entered his guilty plea, the probation officer filed a "Notice of Intent to Seek Manifest Injustice." CP 158. Even though the parties recommended a standard range sentence, the probation officer cited an "elevated concern based on D.L.'s lack of

participation in the SSODA process, and a lack of parole and community supervision on the back end of the standard-range sentence in this matter." RP 215-16.

The probation officer alleged that the "victim was particularly vulnerable" and that D.L. "presents a serious risk to reoffend." CP 227. This report asserted facts neither proved nor admitted to by D.L. in his guilty plea. CP 228-30. The report also included statements attributed to D.L.'s grandparents about their difficulty controlling his behavior. CP 229-30. The probation officer also opined, without evidentiary support, D.L.'s stepbrother had cognitive limitations that the probation officer believed made him particularly vulnerable. RP 247; CP 228.

The probation officer requested a manifest injustice sentence of at least 36 weeks. CP 230. D.L. objected to the probation officer's request for a manifest injustice sentence where neither the prosecution nor the defense solicited the recommendation, and probation officer's request ran counter to the plea agreement of the parties. RP 210-11, 214.

The court imposed the 36-40 week exceptional sentence sought by the probation officer. CP 209-10.

3. Despite realizing this procedure is unfair and undermines the legitimacy of juvenile courts, the Court of Appeals refuses to recognize juveniles, like adults, have a right to notice of factors that increase the range of punishment.

The Court of Appeals agreed that the absence of notice of the allegations used to impose a harsher sentence than D.L. agreed to in his guilty plea raised "strong public concerns about fairness in the juvenile justice system, including the appearance of fairness." Slip Op. at 6. But rather than address the due process infirmity that made this procedure unfair, the Court of Appeals simply noted the justice system would be "better served" if a juvenile had "actual explicit notice prior to any plea agreement" that a probation officer has the independent authority to seek an exceptional sentence. Slip Op. at 6.

D. ARGUMENT

Due process requires juveniles receive notice of any factor used to increase the range of available punishment before trial or a guilty plea.

a. Notice of the particular allegations is a foundational constitutional right in juvenile proceedings.

Those accused of a crime have a constitutional right to be informed of the "nature and cause of the accusation" against them. U.S. Const. amends. VI, IV, §1; Const. art. I, § 22.

This constitutional right to notice applies equally to juvenile and adult proceedings. *In re Gault*, 387 U.S. 1, 20, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *see also* RCW 13.40.140(7) ("the right to adequate notice" is required in juvenile proceedings). "Due process of law requires. . . notice which would be deemed constitutionally adequate in a civil or criminal proceeding." *Gault*, 387 U.S. at 33.

The "condition of being a [child] does not justify a kangaroo court." *Id.* at 28. Without due process procedural protections, the juvenile receives "the worst of both worlds: . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 18 n. 23 (citing *Kent v. United States,* 383 U.S. 541, 556, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)). *Gault* emphasized procedural due process is necessary to achieve fairness and accuracy in juvenile proceedings: "these instruments of due process . . . enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." *Id.* at 21.

That a judge, rather than a jury, is the fact finder in juvenile court does not deprive them of the protections afforded adult criminal defendants under the Fifth, Sixth, Fourteenth Amendment, and Article I, § 22. "[T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness," requiring "notice, counsel, confrontation, cross-examination," and proof beyond a reasonable doubt. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); *see also State v. Weber*, 127 Wn. App. 879, 890-91, 112 P.3d 1287 (2005) (citing *In re Winship,* 397 U.S. 358, 368, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970)), *aff'd,* 159 Wn.2d 252, 149 P.3d 646 (2006). These procedures "ensure the accuracy of the fact-finding proceedings without the need for a jury." *Weber*, 127 Wn. App. at 891 (citing *McKeiver,* 403 U.S. at 543).

Constitutionally adequate notice requires "a reasonable opportunity to prepare" and must "set forth the alleged misconduct with particularity." *Gault*, 387 U.S. at 33. *Gault* specifically prohibits "a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake

without giving them timely notice, in advance of the hearing, of the specific issues that they must meet." *Id.* at 34.

b. The accused is entitled to notice and proof beyond a reasonable doubt of any factor that increases the range of available punishment.

Winship requires "proof beyond a reasonable doubt of every fact necessary" to the charged crime in juvenile proceedings, as for adults, because "[t]he same considerations that demand extreme caution in factfinding . . . protect the innocent adult . . . as well as the innocent child." *Winship*, 397 U.S. at 364-65.

A state sentencing scheme may not "circumvent the protections of *Winship* merely by redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 485, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (internal citations omitted)).

A "sentencing factor, such as an aggravating circumstance, becomes the functional equivalent of an element when it triggers the availability of a penalty greater than that authorized for the commission of the underlying crime." *State v.*

McEnroe, 181 Wn.2d 375, 380, 333 P.3d 402 (2014) (citing *Apprendi,* 530 U.S. at 494 n.19) (internal citations omitted).

This requirement creates "a concrete limit on the types of facts that legislatures may designate as sentencing factors." *Alleyne v. United States*, 570 U.S. 99, 105, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Because there is no "'principled basis for treating' a fact increasing the maximum term of imprisonment differently than the facts constituting the base offense," this test applies regardless of the label the legislature gives it. *Id.* at 106 *(citing Apprendi*, 530 U.S. at 476).

Though Washington courts "have yet to fully weave *Apprendi* into the fabric of our case law" when distinguishing "elements" and "sentence enhancers," *McEnroe*, 181 Wn.2d at 389, the test for making this determination is clear. Any fact that increases the range of punishment triggers the constitutional protections afforded to all elements of the offense regardless of how that fact is labeled. *Id.*; *State v. Allen,* 192 Wn.2d 526, 544, 431 P.3d 117 (2018) (aggravators that increase the mandatory minimum sentence are essential elements); *see also State v. Recuenco*, 163 Wn.2d 428, 441, 180 P.3d 1276

(2008) (firearm sentencing enhancements increase the range of punishment, requiring notice and a jury finding of proof beyond a reasonable doubt).

Whether labeled an "aggravating factor" or an "enhancement," due process requires those facts to be pleaded before trial or a guilty plea. *Recuenco,* 163 Wn.2d at 440-41; *see also State v. Siers,* 174 Wn.2d 269, 277, 274 P.3d 358 (2012) (art. I, § 22 and Sixth Amendment require the accused receive notice, before trial, of factors alleged to increase the available sentence). The State must prove those facts beyond a reasonable doubt. *McEnroe,* 181 Wn.2d at 380. A verdict on those facts triggers double jeopardy protections. *Allen,* 192 Wn.2d at 534.

These requirements exist because where a court seeks to increase the range of available punishment, the Constitution 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)).

c. Like aggravating factors under the Sentencing Reform Act, the Juvenile Justice Act's aggravating factors increase the range of available punishment.

In 1977, the legislature revised the Juvenile Justice Act (JJA) to require "disposition standards for all offenses … established on the basis of a youth's age, the instant offense, and the history and seriousness of previous offenses." Laws of 1977, 1st Ex. Sess. Ch. 291, §57(1).

This change in the juvenile sentencing scheme was based on stakeholders' concerns that "[j]udicial discretion, coupled with the 'individual's best interest' approach, has led to frequent inequitable dispositions…[d]emands were being made for a more uniform and predictable disposition system from the point of view of both the juveniles and the public." Mary Kay Becker, *Washington State's New Juvenile Code: An Introduction*, 14 Gonz. L. Rev. 289, 295 (1978). This "presumptive sentencing scheme is intended to hold youngsters more accountable for their crimes by dealing with them according to the nature and frequency of their criminal acts rather than on the basis of their social background and need for treatment." *Id.* at 308.

The JJA sets sentencing guidelines for juvenile offenders. RCW 13.40.0357. The JJA allows the Court to impose either a "standard range" disposition, (option A); suspend a standard range disposition (option B); impose chemical dependency or a mental health disposition alternative if the child is subject to a standard range disposition (option C); or "if the court determines that a disposition under option A, B or C would effectuate a manifest injustice, the court shall impose a disposition outside the standard range." RCW 13.40.0357.

A "manifest injustice" means "a disposition that would either impose an excessive penalty on the juvenile or would impose a serious, and clear danger to society in light of the purposes of this chapter." RCW 13.40.200(19). The court must enter "reasons" for its conclusion that that disposition within the standard range would effectuate a manifest injustice. RCW 13.40.160(2). To this end, the Act provides a list of aggravating and mitigating factors that a court shall consider at disposition. Laws of 1977, 1st Ex. Sess. Ch. 291, § 69(1)(h)(i); RCW 13.40.150(3)(h),(i). The court's "finding of a manifest injustice

shall be supported by clear and convincing evidence." RCW 13.40.160(2).

Though the Juvenile Justice Act and Sentencing Reform Act were enacted separately—the JJA in 1977 and the SRA in 1981—they have a "shared philosophical base and . . . breadth of reformist vision." David Boerner & Roxanne Lieb, *Sentencing Reform in the Other Washington*, 28 Crime & Just. 71, 74, 82 (2001). Indeed, many of the JJA's aggravating factors are nearly identical to the SRA's aggravating factors, including one at issue in D.L.'s case, that the victim was "particularly vulnerable." RCW 13.40.150(3)(i)(iii); RCW 9.94A.535(3)(b).

Interpreting Washington's guidelines sentencing scheme, the United States Supreme Court determined "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury 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).

Washington's legislature amended the SRA to comport with these requirements.[1] *In re Beito*, 167 Wn.2d 497, 507, 220 P.3d 489 (2009) (citing the "*Blakely*-fix Laws" of 2005, ch. 68, § 4). Before *Blakely,* the sentencing court could engage in additional fact-finding beyond what the State charged or was reflected in the guilty plea or jury verdict, without notice to the defendant of the factors that would be relied on to impose a sentence beyond the standard range. Laws of 1984, ch. 209 §§ 6(2) & 24(1). After *Blakely,* aggravating factors must be alleged before trial and found beyond a reasonable doubt before the court can rely on these factors to impose an exceptional sentence. RCW 9.94A.537(1). Based on these findings, the court may impose a sentence outside the standard range if the court "finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6).

[1] The analogous provision of the JJA has not been updated since its enactment. *Compare* Laws of 1977, 1st Ex. Sess. Ch. 291, § 69(1)(h)&(i) *with* RCW 13.40.150(3)(h)&(i).

Since the JJA, like the SRA, allows a court to increase the range of available punishment beyond the standard range based on additional facts not reflected in the verdict, these aggravating factors, or "reasons" for the manifest injustice sentence as required by RCW 13.34.160(2), are the functional equivalent of elements that must be alleged prior to trial or the guilty plea, and proved beyond a reasonable doubt in order for the court to impose a manifest injustice sentence.[2] *Gault,* 387 U.S. at 33; *Recuenco*, 163 Wn.2d at 434-35.

d. The court increased D.L.'s sentence based on additional allegations that he did not admit to or receive notice of before he pled guilty, in violation of due process.

D.L. pled guilty to the charged crime. CP 107. In his plea form, D.L. stated he understood the prosecution was recommending a "standard range disposition of 15-36 week commitment at JRA" if he did not enter or complete the SSODA program. CP 111. D.L.'s plea form contained no notice that the probation department would be requesting a manifest injustice

[2] This Court's decision in *State v. T.J.S.-M.* that affirmed the "clear and convincing" standard of proof for the court's finding of a manifest injustice sentence did not address whether the factors alleged in support of a manifest injustice sentence are the functional equivalent of elements that must meet the constitutional requirements of the Sixth and Fourteenth Amendments and Article I, §22 at issue here. 193 Wn.2d 450, 462 n 3, 441 P.3d 1181(2019).

sentence. CP 107-11. Nor was D.L. informed any time before he entered is guilty plea, that the probation officer would seek a manifest injustice sentence, or on what grounds. CP 107-11. Months after entry of his plea, the juvenile probation officer 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 supported a manifest injustice sentence, or any notice of the aggravating factors that could be relied on for a manifest injustice sentence.[3] This does not constitute notice that a manifest injustice sentence would be sought, and certainly did not set forth any "alleged misconduct with particularity," *Gault*, 387 U.S. at 33, or give notice of "the specific issues," *id.* at 33-34, that would constitute a basis for the court to depart from the standard range and impose a manifest injustice sentence.

To the contrary, D.L.'s plea form informed him he would receive a standard range sentence: "the judge may impose any

[3] 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.

sentence he or she feels is appropriate, up to the maximum allowed by law." CP 111; *see 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."). Providing "notice" the judge might engage in an unconstitutional fact-finding is not the notice that due process demands.

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 to impose a manifest injustice sentence. CP 111; *see Beito,* 167 Wn.2d at 505 ("it is not enough to stipulate to facts from which the trial court could find additional facts . . . which would support finding the aggravating factor was present"). Any such facts would have to be alleged separately and before 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*, 542 U.S. at 303-04).

Because D.L. was not informed about the probation officer's factual allegations and aggravating factors it alleged in support of its request for a manifest injustice sentence before D.L. waived his constitutional rights and entered his guilty plea, reversal of D.L.'s manifest injustice sentence is required. *Gault,* 385 U.S. at 33; *Apprendi,* 530 U.S. at 490.

e. A child is entitled to due process regardless of whether the probation officer or prosecutor seeks an exceptional sentence.

The Court of Appeals acknowledged that "[d]ue process requires that a defendant must receive notice before the proceeding that the State seeks to prove circumstances warranting a manifest injustice sentence." Slip op. at 3 (citing *Siers*, 174 Wn.2d at 277). But the court inexplicably concluded this notice requirement applies only where the *prosecutor* seeks a manifest injustice sentence, and not where a probation officer is the accuser. *Id.* at 3-4 ("here, the State did not seek a manifest injustice sentence. Instead, the probation department did").

The court cited no authority for its novel exception to the notice requirement. It is well-settled that the constitution protects individuals against all adverse state action – whether

from prosecutors or court employees. *See Shelley v. Kraemer,* 334 U.S. 1, 14, 68 S. Ct. 836, 92 L. Ed. 1161 (1948) ("That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."). And specifically, "[t]he action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 16.

Nor would the Court of Appeals' new limitation make sense. The purpose of the notice requirement is to apprise the accused of the factual as well as legal accusations so that they may prepare to meet the charge. *State v. Pry*, 194 Wn.2d 745, 752, 452 P.3d 536 (2019). The identity of the accuser is irrelevant to this imperative, which is fundamental to a fair proceeding. *Gault,* 387 U.S. at 33.

Nor is it enough that RCW 13.40.150(3)(i) states the court "shall" consider whether any of the aggravating factors exist.

Under *Gault*, due process requires "notice of the specific issues that [the child] must meet." *Gault,* 387 U.S. at 34. Moreover, the trial court did not constrain itself to the statute. Instead, the court imposed a manifest injustice sentence based on both a statutory and *nonstatutory* aggravating factor, relying on allegations of D.L.'s "serious risk to reoffend," CP 223 FF 2.3, which is not provided for by statute. RCW 13.40.150(3)(i).

D.L. was not given notice, before pleading guilty, of the additional factual or legal allegations that could result in the court imposing an exceptional sentence.

E. CONCLUSION

Due process ensures the fairness of and legitimacy of juvenile proceedings. That requires notice to juveniles, before their guilty plea, of the factual and legal allegations on which a court may rely to impose a sentence above the standard range.

Respectfully submitted this 1st day of June 2020.

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 96143-3
	)	
D.L.,	)	
	)	
JUVENILE PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF JUNE, 2020, 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:

[X] HILARY THOMAS, DPA	( )	U.S. MAIL
WHATCOM COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
[Appellate_Division@co.whatcom.wa.us]	(X)	E-SERVICE VIA PORTAL
311 GRAND AVENUE		
BELLINGHAM, WA 98225		
[X] PHILIP BURI	( )	U.S. MAIL
BURI FUNSTON MUMFORD & FURLONG, PLLC	( )	HAND DELIVERY
[philip@burifunston.com]	(X)	E-SERVICE VIA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF JUNE, 2020

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☏(206) 587-2711

WASHINGTON APPELLATE PROJECT

June 01, 2020 - 4:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96143-3
Appellate Court Case Title:	State of Washington v. D.L.
Superior Court Case Number:	16-8-00165-1

The following documents have been uploaded:

- 961433_Briefs_20200601162118SC627481_1364.pdf
  This File Contains:
  Briefs - Petitioners Supplemental
  The Original File Name was washapp.060120-10.pdf

A copy of the uploaded files will be sent to:

- Appellate_Division@co.whatcom.wa.us
- hthomas@co.whatcom.wa.us
- philip@burifunston.com
- Washington Appellate Project (Undisclosed Email Address)
- Kate Benward (Undisclosed Email Address)

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Kate Benward - Email: katebenward@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 20200601162118SC627481