No. 96894-2

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

M.S.,
Petitioner.

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The identity and interest of Amici Curiae are set forth in the accompanying Motion for Leave to File *Amicus Curiae* Brief.[1]

II. INTRODUCTION

Discretionary decisions made at various levels of the juvenile criminal system are entrenched in racism and bias that further existing disparities. These decisions ultimately impact and feed into aggravating factors that courts rely on when considering a manifest injustice sentence.

The law permits a manifest injustice upward disposition only when the standard range "would impose a serious, and clear danger to society in light of the purposes" of the Juvenile Justice Act of 1977 (JJA). RCW 13.40.020(19). The courts did not explain how M.S. or D.L. were dangers to society. Rather, the juvenile courts in M.S. and D.L. imposed sentences above the standard range based on speculation about their likelihood of reoffending and other aggravating factors not statutorily identified in the Juvenile Justice Act after they had given up their trial rights.

To complement the arguments raised by Petitioners regarding the statutory interpretation of the Juvenile Justice Act, *Amici Curiae* argues that

[1] Although this case was not consolidated with *State v. D.L*. No. 96143-3, because both present common questions regarding the non-statutory factors supporting a manifest injustice sentence, amicus submits substantially the same brief in both matters.

only statutorily identified aggravating factors which a child is given notice of prior to giving up their trial rights may support a manifest injustice disposition because holding otherwise allows for inconsistencies and may further increase the disproportionate treatment of young people of color in the juvenile system. Furthermore, without adequate notice, a child cannot properly weigh the risks of accepting a plea and their perception of unfairness will impact their long-term relationship with the law and society. Due process is the necessary check on the otherwise unfettered sentencing discretion and explicit notice of the factual basis for a manifest injustice sentence is a necessary step to achieving an equitable justice system for young people in Washington.

III. STATEMENT OF THE CASE

Amici curiae adopt Petitioner's Statement of the Case.

IV. ARGUMENT

A. Utilization of Non-Statutory Factors for Upward Manifest Injustice Departures Will Result in the Disproportionate Punishment of Black, Indigenous, Young People of Color

"[G]ender, race and class discrimination are entrenched, in varying degrees, and at all levels of the youth justice system." Jessica Elizabeth Pulis, *Set Up for Failure? Understanding Probation Orders and Breaches of Probation for Youth in Conflict with the Law*, UW SPACE 45 (2014) (citations omitted) https://uwspace.uwaterloo.ca/handle/10012/8475. Upward

departures carry unique consequences and effects on the system as they lead to lengthier sentences, symbolically represent a dispute with the guidelines advice, and contribute to mass incarceration. Melissa Hamilton, *Sentencing Disparities*, 6 BRIT. J. AM. LEGAL STUD. 177 (2017). To avoid further increasing disparities in the system and contributing to mass incarceration, this Court should decide that courts cannot rely on non-statutory factors for upward departures in manifest injustice sentencing.

1. The juvenile criminal system disproportionately targets and penalizes children of color.

In Washington, young people of color are disproportionately in contact with the juvenile criminal system. Data from 2017-18 in Washington demonstrates that race and ethnicity influence decisions at multiple points in Washington's juvenile criminal system and the disparate outcomes between young people of color and young white people become amplified with each successive decision point, from initial contact to their eventual incarceration. *See* Office of Juvenile Justice and Delinquency Prevention, *OJJDP FY 2019 Title II Racial and Ethnic Disparities Action Plan*, WASH. ST. DEP'T OF CHILD., YOUTH & FAMILIES (2019), https://www.dcyf.wa.gov/sites/default/files/pdf/2019TitleIICompPlan.pdf.

Statewide data shows that young Black people are more than four times more likely and young Indigenous people are three times more likely

than young white people to be referred to juvenile court. DSHS, WASHINGTON STATE PARTNERSHIP ON JUVENILE JUSTICE 2017 ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE (2017), https://www.dcyf.wa.gov/sites/default/files/pdf/18-1271-Juv-Justice-Report-w-DataSection.pdf. The data also shows young people of color's increased involvement at later critical points such as the decision to offer the child a diversion (rather than prosecution) and the decision to incarcerate the child. *Id.* Indeed, young Black people are 40 percent less likely than young white people to receive a diversion or deferred disposition. DSHS, WASHINGTON STATE PARTNERSHIP ON JUVENILE JUSTICE 2017 ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE (2017), https://www.dcyf.wa.gov/sites/default/files/pdf/18-1271-Juv-Justice-Report-w-DataSection.pdf. Disproportionality increases throughout the stages of the juvenile criminal system because each decision made by police, prosecutors, probation officers, and judges are based on decisions from the preceding decision point and create a cumulative discriminatory effect. *Id.* This Court has recognized "racialized policing and the overrepresentation of Black Americans in every stage of our criminal and juvenile justice systems. Our institutions remain affected by the vestiges of slavery: Jim Crow laws that were never dismantled and racist court decisions that were never disavowed." Letter from The Washington State

Supreme Court, to Members of the Judiciary and the Legal Community (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

Of the children incarcerated in adult jails, 50 percent of them are children of color. *Id.* In Washington, children of color comprised 59 percent of juvenile cases transferred to adult court. *Id.* And of the children subjected to incarceration in Washington, 72 percent of them were children of color. *Id.* In King County, young Black, Indigenous and People of Color (BIPOC) represented about 72 percent of the young people prosecuted and 86 percent of the young people incarcerated in 2019. *Id.*

These racial disparities exist—and seem to be increasing—in Washington, even as overall numbers of young people in the system decrease. DSHS, WASHINGTON STATE PARTNERSHIP ON JUVENILE JUSTICE 2017 ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE (2017), https://www.dcyf.wa.gov/sites/default/files/pdf/18-1271-Juv-Justice-Report-w-DataSection.pdf. Indeed, this court recognized that the harms of a juvenile court record frequently fall on young BIPOC who "face disproportionately high rates of arrest and referral to juvenile court." *See State v. S.J.C.*, 183 Wn.2d 408, 432–34, 352 P.3d 749 (2015).

Of great concern here, "[e]xperimental research on unconscious stereotypes of police and probation officers' beliefs about minorities and deserved punishment suggests that such beliefs can have profound effects on sentencing outcomes." THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 6 (2d ed. 2008). Probation officers often prepare pre-sentencing reports for a judge. Bias from the probation officer can impact these reports and their own recommendations to the judge to help make sentencing decisions. CRF, *The Color of Justice*, CONST. RTS. FOUND. (last visited Aug. 3, 2020), https://www.crf-usa.org/brown-v-board-50th-anniversary/the-color-of-justice.html. In a study of probation officers' assessments dealing with offending by race, "researchers found that probation officers tended to portray the delinquency of black youth as stemming from negative attitudinal and personality traits," whereas "portrayal of white youth stressed the influence of the social environment." Ashley Nellis et al., *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, THE SENTENCING PROJECT (2018), https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf. Black youth were seen as more dangerous "which translated into harsher

sentencing than for comparable white youth" based on the reliance of the probation officer's assessment with juveniles. *Id.*

These biases can impact manifest injustice sentencing in cases such as D.L. where a judge inappropriately relies a probation officer's subjective, biased opinion about a juvenile respondent and their family background as a basis for an MI. CP 229–30.

2. Non-statutorily based reasons for aggravated sentences increase the likelihood of impermissible racial bias influencing juvenile sentencing.

The legislature specified eight "aggravating factors" justifying increased incarceration for juveniles through a manifest injustice sentence. RCW 13.40.150(3)(i).[2] Courts should be barred from relying on aggravating factors not expressly identified in the JJA to justify an upward departure from

[2] The eight "aggravating factors" are: "(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." RCW 13.40.150(3)(i)(i)–(vii).

the standard sentencing guidelines.[3] This is because non-statutory aggravating factors that trial courts may rely on are often the result of institutionalized racism. The result is that non-statutory aggravating factors, whether intentional or unintentional, are often proxies for factors that are prohibited by the JJA—such as race—and therefore subject BIPOC children to harsher sentences and longer incarceration.

Research suggests that adopting "high risk to reoffend" as an aggravating factor will disproportionately affect BIPOC. This occurs because the factors that are considered when making a determination of likelihood to reoffend are akin to risk assessments which are proven to have racist outcomes. It is well established that the use of scores designed to guess the likelihood of re-offense, like risk assessments, are biased against Black individuals. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing. Indeed, the national leader in pretrial research, Pretrial Justice Institute, recently disavowed risk assessments because they are inherently racist. PJI cautioned that:

[3] Out of the five aggravating factors that the court in M.S. relied on, four were non-statutory and included: (i) the risk of reoffending, (ii) lack of parental control, (iii) the inability to obtain treatment and services in the community, and (iv) the standard range being inappropriate. CP 40–43. Likewise, the court in D.L. relied on the risk of reoffending as an aggravating factor. CP 227.

> We now see that pretrial risk assessment tools, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems. Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity.

Pretrial Justice Institute, *Updated Position on Pretrial Risk Assessment Tools*, PJI (Feb. 7, 2020), https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf.

Not only are risk assessments racially discriminatory, they are also inaccurate. Although risk assessments are increasingly common, the implementation of such tools are particularly problematic because of their remarkable inability to accurately and reliably forecast future behavior. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

Notably, in a study where risk scores were assigned to more than 7,000 people arrested in Broward, Florida "only 20% of the percent of the people predicted to commit violent crimes actually went on to do so." *Id.*

Moreover, in attempting to forecast the likelihood of reoffending, algorithms such as these have also been shown to make significant mistakes with Black and white defendants with some inaccurately identifying Black defendants as future criminals at almost twice the same rate as their white

counterparts, while also mislabeling white defendants as low risk, more often than Black defendants. *Id.* These mechanisms end up only further exacerbating the existing unjust disparities that shape the juvenile criminal system today.

Risk assessments of future criminal activity should also be barred because they often cause the harm they are meant to protect against. Prophylactic-like considerations allowed under "high likelihood to reoffend" end up increasing a child's likelihood of recidivism. This is because children are incarcerated longer than the standard range, and a robust body of research demonstrates that lengthy incarceration makes it more likely a young person will reoffend. *See* RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 15 (2011) (finding that "incarcerating children—especially for lengthy periods of time—undercuts public safety by increasing recidivism," and linking longer periods of juvenile incarceration to heightened criminality in adulthood). *See also* Michael E. Ezell, *Examining the Overall and Offense-Specific Criminal Career Lengths of a Sample of Serious Offenders*, 53 CRIME & DELINQ. 3 (2007).

Indeed, in Florida's "state-wide data driven juvenile justice reform," researchers found that upward departures in youth incarceration increased the likelihood of recidivism by at least 75 percent. RYAN C. MELDRUM,

EVALUATION OF THE FLORIDA DEPARTMENT OF JUVENILE JUSTICE DISPOSITION RECOMMENDATION MATRIX: FINAL REPORT 4 (2017).

The same is true in Washington. A 2016 peer reviewed study of Washington young people incarcerated in juvenile rehabilitation facilities "failed to find a relationship between length of stay and felony recidivism occurring within one year of release." Sarah Cusworth Walker & Asia Sarah Bishop, *Length of Stay, Therapeutic Change, and Recidivism for Incarcerated Juvenile Offenders*, 55 J. OFFENDER REHAB. 355, 371 (2016). The study found that "[t]he recidivism rate among . . . five lengths of stay levels stayed consistent with a slight, nonsignificant, dip for stays lasting 9-11 months," which the authors suggested "adds to a growing body of literature also failing to find any empirical support for the relationship between longer custodial sentences and reduced future offending." *Id.*

Incarcerating young people like M.S. and D.L. does not increase public safety but instead increases the likelihood of recidivism. This is contrary to the Juvenile Justice Act's goals and trial courts should be barred from relying on non-statutory aggravating factor of "high risk to reoffend" as a basis to incarcerate children above the standard range. *See cf. State v. Ogden*, 102 Wn. App. 357, 370, 7 P.3d 839 (2000) (quoting *State v. Bourgeois*, 72 Wn. App. 650, 661 n.7, 866 P.2d 43 (1994)).

B. A Child's Legal Socialization Is Shaped by how Fairly They Are Treated During Early Interactions With the Legal System.

In order to advance procedural justice[4] and to begin addressing the overall inequities of the juvenile legal system, this Court should find that due process requires that children receive notice—before a trial or guilty plea—of any factor that may be used to increase the available punishment.

1. Courts must disclose to children any factor that may aggravate their sentence.

Public defenders represent hundreds of children charged with crimes each year in Washington's juvenile legal system. As public defenders advise children whether to plead guilty to a crime, assert their right to trial or agree to a deferred disposition, they witness children desperately struggle to weigh the options, conceptualize the long term potential impact of a plea, and not let criminal charges undermine their sense of self worth. The decision to accept a plea bargain or assert the right to a trial is wrenching even for adults and it is even harder for young people who are developmentally immature cognitively, socioemotionally, and neurologically. Elizabeth Cauffman & Laurence Steinberg, *Emerging*

[4] Research on procedural justice examines how people experience fairness, including how they experience procedural rules and treatment by legal officials. Tom R. Tyler & E. Allan Lind, *Procedural Justice*, *in* HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 65–69 (Joseph Sanders & V. Lee Hamilton eds., 2001).

Findings from Research on Adolescent Development and Juvenile Justice, 7 VICTIMS & OFFENDERS: AN INT'L J. EVIDENCE-BASED RSCH., POL'Y, & PRACTICE 428 (2012), http://dx.doi.org/10.1080/15564886.2012.713901.

In addition, even with their attorney's diligent assistance, young people often do not fully understand the panoply of legal options before them and also often have difficulty navigating the complex plea-bargaining process. *See* Tarika Daftary-Kapur & Tina M. Zottoli, *A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court*, 13 INT'L J. FORENSIC MENTAL HEALTH 323 (2014), http://dx.doi.org/10.1080/14999013.2014.960983. Further, young people are less likely than adults to consider the short *and* long-term consequences in their legal decision-making. Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611 (2016), http://dx.doi.org/10.1037/lhb0000205. This makes it imperative that children receive all information about the impact of a plea agreement or the consequences of proceeding to trial, especially the possible sentence range.

The need for full disclosure of potential sentences is necessary because when advising a child regarding whether to plead guilty, "[c]ounsel must ensure that the client has the time and information necessary to understand and reflect on the benefits and risks of accepting a plea."

National Juvenile Defense Standards, NAT'L JUV. DEFENDER CTR. 83 (2013) (citing Abbe Smith, "*I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007)), https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf (tactics for discussing pleas). Almost always, children faced with the decision about whether to accept or reject a plea offer have one, pressing, potentially life-changing question -- "Am I going to jail?". A child client cannot assess and weigh the benefits and risks of accepting a plea without knowing the recommendations of the prosecutor *and* the probation counselor *and* the range of permissible sentences.

Public defenders have witnessed incarcerated children plead guilty after learning that the disposition recommendations of the prosecutor and the probation counselor would result in the child's release from incarceration and return to their families, teachers, and community. Similarly, public defenders have witnessed children exercise their right to trial—even though they were incarcerated pre-trial for longer than the standard range—upon learning that the prosecutor and probation counselor were recommending a manifest injustice upward sentence. Public defenders have seen children's decision-making improve when provided concrete as opposed to theoretical information regarding their options. Hiding or not

providing information about sentencing recommendations when a young person is deciding whether to plead guilty or go to trial completely eviscerates their ability to weigh their options and decide if they want to give up their constitutional right to a trial.

Unlike in adult court, this Court recognizes the importance of the recommendations of *both* the prosecutor and the probation counselor in juvenile court and includes them on the juvenile court plea form. *See Court Forms: Guilty Plea*, WASHINGTON COURTS, http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=21 (last visited July 28, 2020). Because of the importance of these two entities in sentencing, it is essential for young people to have notice of the aggravating factors of both the prosecutor *and* the probation counselor before making a decision about whether to plead guilty and go to trial. This is especially true regarding a probation counselor's recommendation for a manifest injustice sentence—which usually carries great weight with the trial court.[5]

[5] This is not surprising as juvenile probation services are administered by Superior Court in most, if not all, counties in Washington State. RCW 13.04.035.

2. How legal system actors treat children impacts their evaluation of the legal system.

"How children experience the law, or how they believe others experience the law, shapes their evaluations of legal actors and the underlying social norms that inform law." Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RSCH. 217, 231 (2005). What's more, "delinquency among children and adolescents is predicted by legal socialization processes through which adolescents develop positive values about the law.[6] *Id.* at 234. "Legal socialization is a developmental capacity that is the product of accumulated social experiences in several contexts where children interact with legal and other social control authorities." *Id.* at 220. In this framework, what adolescents see and experience through interactions with police and other legal actors subtly shapes their perceptions of the relation between individuals and society." *Id.* "These experiences influence the development of their notions

[6] Acknowledging this, currently the King County Department of Public Defense and community leaders in Seattle and King County are advancing a proposed "Youth Right to Counsel" ordinance that will connect a young person under the age of 18 with an attorney before a police officer can ask the youth to waive a constitutional right. The proposed ordinance is meant to ensure that when a young person is initially contacted by the legal system—via law enforcement—that their rights are affirmed and the legal system's respect for those rights is evident to the child.

of law, rules, and agreements among members of society, and the legitimacy of authority to deal fairly with citizens who violate society's rules." *Id.*

A young person's perceptions of procedural justice impacts whether they accept and continue to abide by decisions, how they evaluate judges, the court system, the criminal legal system and the law. That's because "over the past several decades, researchers have demonstrated that experiences of procedural justice influence not only satisfaction with how disputes are handled, but also the degree to which the public views legal officials as legitimate and accepts and adheres to legal decisions. Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745, 764 (2017) (citing Tom R. Tyler,). How a young person perceives the fairness of their treatment as they move through the juvenile criminal system will impact their long-term relationship with that system and society in general.[7] As such, it is critical that a young person feel the system and its actors are not treating them unfairly, railroading them, or violating their constitutional protections.

[7] "Research has demonstrated that procedural justice has important downstream effects on behavior as well. In the legal context, procedural justice promotes acceptance of legal decisions and compliance with law. For example, in criminal proceedings, procedural justice decreases recidivism." Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PA. ST. L. REV. 745, 770 (2017) (citations omitted).

Of utmost importance to adolescent social legal development are public defenders, prosecutors, judges and probation counselors. For example, public defenders can foster client satisfaction by ensuring prompt, iterative and complete communication. Janet Moore et al., *Attorney–Client Communication in Public Defense: A Qualitative Examination*, 31 CRIM. JUST. POL'Y REV. (2019). Prosecutors and probation counselors can embrace procedural justice by helping make sure that young people in the system can have predictability about what is going to happen. Judges can advance procedural justice by treating young people respectfully, which includes establishing court procedures so that young people know what is going to happen and to communication critical information in a way that young people can understand.[8]

Due process is critical to procedural justice. Notice of the factors a court may rely on to increase a child's sentence before the child makes a decision about whether to plead guilty is a critical step to achieving a more

[8] For example, the Washington Judicial Colloquies Project, A Guide for Improving Communication and Understanding in Juvenile Court recognized that the degree to which youth were confused about what happened in court, "unclear about the roles of the various adults in the courtroom, and unsure of what was expected of them." As a result, the Washington State Judicial Colloquies Project was developed, which aimed to improve young people's comprehension of the conditions of pre-adjudication release and post-adjudication probation.

equitable system and decrease children's experience and perception of unfairness in the law.

V. CONCLUSION

Amici request that the Court grant this motion and permit them to file the attached Amici Curiae Brief in support of Petitioner's arguments for reversal of his manifest injustice disposition

RESPECTFULLY SUBMITTED this 7th day of August, 2020

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Certificate of Service

I hereby certify that on August 7, 2020, the foregoing document was electronically filed with the Court's electronic filing system, which will send notification of such filing to all attorneys of record.

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