NO. 96894-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

M.S.,

Petitioner.

RESPONDENT'S ANSWER TO AMICI CURIAE

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Respondent State of Washington files this answer to briefs of amici curiae King County Department of Public Defense, American Civil Liberties Union, Korematsu Center for Law and Equality, TeamChild, and Juvenile Law Center.

INTRODUCTION

Every day across this state, juvenile offender court judges face the unenviable task of responding to juvenile crime in a way that delivers accountability and protects the community, but also rehabilitates the young offender. On rare occasion, despite a judge's best efforts, the young offender proves so dangerous and so resistant to community-based interventions that a manifest injustice disposition (MI Up) becomes necessary and appropriate. That is what happened in this case.

The central issue on review is the degree of notice constitutionally required in juvenile offender cases before imposing an MI Up.

The issue is not whether juvenile offender courts are empowered to impose MIs Up. They are, and were explicitly granted that power by the legislature. RCW 13.40.0357; 13.40.160(2).

M.S. received constitutionally sufficient notice of his aggravating factors, in accordance with long-established principles of due process.

ARGUMENT

A. DUE PROCESS REQUIRES THAT JUVENILE OFFENDERS RECEIVE ADEQUATE NOTICE OF AGGRAVATING DISPOSITION FACTORS

Amici are correct that the juvenile justice system in Washington, like its adult counterpart, suffers from issues of racial disproportionality. Amicus Brief of ACLU and King County DPD at 3; Amicus Brief of Korematsu Center and TeamChild at 8. Implicit bias among police, prosecutors, judges, probation counselors, other system actors, and the public at large has contributed to youth of color being pulled into the justice system in disproportionate numbers. Disproportionality is a tragic and embarrassing truth about our justice system, and one that numerous system-based and community-based groups— in King County and beyond— are working diligently to address.[1]

[1] As one example, due to recent joint system collaborations, the King County Executive's Office of Performance, Strategy and Budget reports that significant reductions have occurred in juvenile referrals, charges, and detentions, with such reductions positively impacting BIPOC youth the most. While disproportionality still exists—e.g. BIPOC youth still make up 78% of youth in detention— the progress is truly heartening. Some highlights from the Executive's report:

- Juvenile referrals and filings both dropped 16% overall since the beginning of 2019. Black youth referrals decreased by 28%. Latinx referrals decreased 23%.
- Referrals by the prosecutor's office to community-based diversion programs increased 22% since early 2019.
- Youth placed in alternatives to secure detention (ASD) fell 60% in the first half of 2020 when compared to 2019, causing the average number of youth in ASD each day to fall to 26 (a reduction of 31%).
- Youth admissions to detention plummeted 42% in the first half of 2020, resulting in the lowest average daily population (ADP) for this time period on record, and affecting BIPOC young people the most. There were an average 14 fewer young people in detention who were Black, Indigenous, or youth of color

But amici do not explain how a simple recitation of aggravating factors at the time of a motion for deferred disposition would reduce disproportionality later in sentencing. Logically, there is no nexus. As the Court reasoned in State v. Siers, 174 Wn.2d 269, 281, 274 P.3d 358, 364 (2012), if there were such a requirement, any reasonably prudent prosecutor would simply allege all aggravating factors at the time of a motion for deferred disposition, in all cases in order to preserve judicial discretion, and then decide later which if any factors to argue to the judge at a disposition hearing. Such recitation would simply make plea and deferred disposition colloquies longer, but do nothing to curb disproportionality in sentencing.

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from January to June 2020 than there were for the same timeframe in 2019. The total ADP in King County (pop: 2.3 million) is now 31 youth and ADP continues to trend downward.

See: link to King County Juvenile Legal System Statistics See also: link to Zero Youth Detention Dashboard.

As a second example, the King County Prosecutor's Office is partnering with the King County Department of Public Defense and community groups like Choose 180, Creative Justice, Community Passageways, and Collective Justice to fund large-scale programming that would, over the next two years, divert *more than 75% of anticipated cases out of the juvenile justice system entirely*. Such youth would not see the inside of a courtroom nor suffer conviction-related consequences, and would instead be connected directly to community-based services and mentorship. This partnership will result in vastly fewer youth of all colors charged, convicted, detained, and incarcerated. The program is tentatively called Restorative Community Pathways. It is expected to launch in early 2021 and is one of multiple efforts currently underway to re-direct youthful offenders back into the community and reduce incarceration. These executive branch changes are in addition to the legislative changes already referenced in the Supplemental Brief of Respondent. Amici are wrong, then, in claiming that the juvenile justice system is "increasingly focused on punishment." Amicus Brief of Korematsu Center and TeamChild at 16.

If there is concern about disproportionality in sentencing, it is an opportunity to better train juvenile offender court judges on their own implicit biases. It is not a moment to reduce judicial discretion at sentencing, which has historically served as a bulwark against prosecutorial power.

B. DUE PROCESS WAS SATISFIED

Amici incorrectly assert that M.S. was deprived of notice in this case. Amici also incorrectly assert that at the time of M.S.'s motion for deferred disposition, the State agreed to "recommend a sentence within the standard range" of local sanctions. Amicus brief of Juvenile Law Center at 5. The latter error underscores an important procedural aspect of deferred dispositions, generally: at the time of a motion for deferred disposition, a disposition hearing is neither imminent nor likely.

When M.S. moved for his deferred disposition on January 3, 2018, he neither proceeded to disposition nor did the State make a disposition recommendation. RP 6-19; CP 7-20. The parties recommended a length of time during which time disposition would be deferred: in essence, the parties recommended how far out to continue the sentencing hearing. But because the primary purpose of a deferred disposition is to allow a juvenile offender to have a case dismissed *prior to* disposition, and

because the large majority of deferred dispositions are successfully dismissed *prior to* disposition, the terms recommended (and imposed) at the January 3rd motion hearing were emphatically not sentencing terms.

At the time of his motion for deferred disposition, M.S. was properly informed of the direct consequences of the deferred disposition. He was notified that if community supervision proved inadequate during the deferred disposition, an MI Up could be imposed later at disposition. RP 14. M.S. acknowledged these concepts orally and in writing. During the deferred disposition, M.S. was warned multiple times about the possibility of an MI Up if he did not begin to comply with the terms of the deferred disposition order. And as the record makes clear, during the deferred disposition, M.S. repeatedly refused to comply with community-based services, his physical and mental condition deteriorated, and he violently assaulted and threatened multiple new victims. RP 70-153; CP 73-115.

It is well-established as a matter of due process that notice of aggravating factors is required. State v. Siers, 174 Wn.2d 269, 278, 274 P.3d 358 (2012). The notice requirement exists as a means to allow a defendant to "mount an adequate defense" in response to State allegations. State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993). A defendant must receive notice prior to the proceeding in which the State seeks to

prove its allegations. Siers, at 281. Due process is satisfied when a defendant receives sufficient notice from the State of applicable aggravating factors in order that the defendant may mount a defense against them. Id. Like adult defendants, juvenile offenders are entitled to these due process protections. In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970); In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967). Amici are correct when they cite to Siers, then, as it accurately states the legal standard applicable in this case.

M.S. was provided adequate notice of the aggravating factors applicable to him and was able to mount an adequate defense against them. After multiple failed opportunities at community-based services while on the deferred disposition, warnings about the possibility of revocation and a JRA commitment, and bench warrants, M.S. was booked into detention and presented to the trial court on April 20, 2018. RP 65.

It was at that time that revocation of the deferred disposition and disposition itself became imminent. It was also at that time that the State alleged aggravating disposition factors and gave notice of its intent to seek an MI Up. CP 73-115. The judge allowed both parties time to submit briefing on the subject and to prepare for live witness testimony. After briefing containing the alleged aggravating factors was received on April 24, 2018, M.S.'s attorney requested and was granted a continuance to

April 30, 2018 to prepare for the hearing on the subject. M.S.'s attorney requested no further continuances of the hearing. The revocation and disposition hearing at which the State would eventually prove the aggravating factors was held between April 30th and May 8th, 2018. RP 70-71, 97. Both sides presented sworn testimony and questioned witnesses; M.S. also testified. Disposition was, in essence, a "mini-trial" presented over two days with the parameters clearly defined beforehand.

M.S. was given written notice of the aggravating factors at the time they became applicable, he was given ample time to prepare for the hearing (between 7-14 days), and was given ample opportunity to mount a defense. The due process afforded to M.S. in this case easily passed constitutional muster.

C. APPRENDI AND BLAKELY ARE INAPPOSITE IN THIS CONTEXT

As noted above, amici are correct that a juvenile offender must receive adequate notice of aggravating factors so that the juvenile offender may mount a defense. Such due process was satisfied here.

Amici are incorrect, however, in arguing that such a due process right springs from Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124

S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Those suggest the triggering event for such notice is the filing of charges. Instead, the triggering event for notice of aggravating factors in juvenile offender matters is a period of time sufficiently in advance of the disposition hearing to provide the juvenile offender opportunity to "mount a defense." Siers, at 281.

1. APPRENDI AND BLAKELY IN CONTEXT

Both Apprendi and Blakely had as their core concern the Sixth Amendment right to a jury trial. Apprendi applied to the states a federal-level holding initially outlined in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The United States Supreme Court noted:

> *[We held in Jones] that "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." The Fourteenth Amendment commands the same answer in this case involving a state statute.*

Apprendi, at 476. The Fifth Amendment Due Process Clause at issue related to the extent of information that must be alleged in an indictment. Id. The Court went on to describe aggravating sentencing factors as "essential elements of the offense" that must be alleged in an indictment. Apprendi, at 467. The Court concluded its opinion by holding that "[t]he New Jersey procedure challenged in this case is an unacceptable departure

from the jury tradition that is an indispensable part of our criminal justice system." Apprendi, at 497.

Relatedly, in Blakely, the U.S. Supreme Court struck down a Washington State sentencing procedure that allowed a trial court to impose an exceptional sentence without first requiring that the relevant aggravating factors be submitted to a jury[2] and proven beyond a reasonable doubt. The Court made abundantly clear that its holdings in Blakely and Apprendi were based on the Sixth Amendment:

> *Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid… Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial… Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.*

Blakely, at 305–06.

In the years that followed, the U.S. Supreme Court cautioned against over-application of Apprendi and Blakely, noting that "[t]he jury-trial right is best honored through a 'principled rationale' that applies the rule of the Apprendi cases 'within the central sphere of their concern.'"

[2] Of note, Blakely did not contemplate a system wherein a judge, rather than a jury, was acting as fact-finder on a case. The juvenile system in Washington relies upon judges to act as both fact-finder and sentencing authority.

Oregon v. Ice, 555 U.S. 160, 172, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).

This Court and others have repeatedly recognized that Apprendi and Blakely were fundamentally Sixth Amendment cases. Siers, at 275 ("Sixth Amendment principles explicated in Blakely… and Apprendi"); State v. Childress, 169 Wn. App. 523, 530, 280 P.3d 1144, 1147 (2012) ("Apprendi had as its 'core concern' the traditional role of a jury and expectations regarding jury trials"); State v. Tai N, 127 Wn. App. 733, 113 P.3d 19 (2005) ("The Blakely court acknowledged… that its holding rested heavily on the need to give intelligible content to the right of jury trial… The role of the jury as a 'circuitbreaker' in this context was crucial to the Court's decision").

This Court and others have also recognized that there are limits on the applicability of Apprendi and Blakely in Washington generally, and in juvenile offender cases specifically. The Fifth Amendment Due Process Clause is not applicable to Washington state cases through the Fourteenth Amendment, and therefore aggravating factors do not need to be alleged in a charging document. Siers, at 362, overruling State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009). Aggravating factors in juvenile offender cases must be proven by clear and convincing evidence, not beyond a reasonable doubt. State v. T.J.S.-M., 193 Wn.2d 450, 463, 441 P.3d 1181, 1189

(2019). And juveniles have no constitutional right to a jury trial. State v. Chavez, 163 Wn.2d 262, 267–71, 180 P.3d 1250 (2008).

In light of these well-established limitations, amici are mistaken in suggesting that Apprendi and Blakely impliedly confer upon a juvenile offender the right to have aggravating factors alleged at a pre-determined time, e.g. at a motion for deferred disposition. The timing of notice of aggravating factors is more properly governed by the concepts of due process outlined in Siers.

2. THE JUVENILE SYSTEM IS DIFFERENT THAN THE ADULT SYSTEM, AND AGGRAVATING FACTORS SERVE DIFFERENT PURPOSES

For adults, the Sentencing Reform Act (SRA) sets forth an "exclusive list" of over two dozen aggravating factors that may justify an exceptional sentence above the standard range. RCW 9.94A.535(3). These SRA factors are "*crime-focused*" factors: the nature of the crime, the extent of the damage caused, the egregiousness of the behavior, etc. They are not "*offender-focused*" factors. In fact, consideration of individual circumstances and personal history of an adult offender at sentencing is forbidden. State v. Freitag, 127 Wash.2d 1418, 96 P.2d 1254 (1995).

In contrast, for juveniles, the Juvenile Justice Act (JJA) allows juvenile offender court judges to hear and consider "all relevant and material evidence" and rely on such evidence in crafting a disposition.

RCW 13.40.150. The JJA mandates that a court "shall consider" numerous factors including crime-focused factors, a juvenile's social history, probation reports containing sensitive information about the juvenile's treatment needs and amenability to services, and input from the juvenile's parents. RCW 13.40.150(3)(a) – (g). The JJA lists only eight aggravating factors and authorizes the court to "consider whether or not any of [them] exist." RCW 13.40.150(3)(i). The JJA contains no language suggesting RCW 13.40.150(3)(i) is exclusive. Moreover, as previously referenced in Supplemental Brief of Respondent, the structure of RCW 13.40.150 suggests that factors outside of 13.40.150(3)(i) may similarly be considered when crafting a disposition.

The purposes and policies underlying the JJA are fundamentally different and more complex than those underlying the SRA. State v. Rice, 98 Wn.2d 384, 392, 655 P.2d 1145, 1150 (1982). Id. Whereas the JJA's enumerated purposes include, *inter alia*, juvenile rehabilitation, reintegration, necessary treatment, and community-based services whenever possible, the SRA forbids such sentences. The primary purpose of the SRA is punishment. Nowhere in RCW 9.94A.010, or anywhere else

in the SRA, is there an express policy of "responding to the needs" of adult offenders.[3]

While the SRA allows only "*crime-focused*" factors to justify an exceptional sentence, the JJA requires consideration of "*offender-focused*" factors in crafting an MI Up—and for good reason. By design, the juvenile justice system is separate and distinct from the adult criminal system, and it focuses more directly on rehabilitation. Rice, at 388-391; Chavez, at 267–71. That identical services may be made available to a juvenile regardless of whether he or she is convicted of a gross misdemeanor or a felony is a strength of the juvenile system and is good public policy. [4] Rice, at 397.

The aggravating factors at issue in Apprendi and Blakely, like those enumerated in the SRA, were crime-focused factors. The factors could be identified from the outset of criminal proceedings, so it followed that they should be alleged early in the proceedings. Such factors related

[3] The SRA contains only a passing reference to "offer[ing] the offender an opportunity to improve himself or herself." RCW 9.94A.010. This does not suggest the same degree of commitment to rehabilitation as is expressed by the legislature in the JJA. State v. Rice, 98 Wn.2d 384, 393, 655 P.2d 1145, 1151 (1982) The legislative directive that the juvenile system respond to the needs of the offender is therefore of considerable significance. Rice, at 392–93.

[4] Conversely, were this not so, it could have the unfortunate effect of encouraging reasonably prudent prosecutors to seek higher-level felony convictions or additional charges on high-risk youth in order to preserve judicial discretion at sentencing. That would be contrary to public policy, especially in light of felony collateral consequences.

to the crime charged, after all, and the paramount purpose of the adult criminal system was to punish the wrongdoer for the crime.

The same cannot be said of the aggravating factors in M.S.'s case or of the juvenile system generally. M.S.'s aggravating factors were predominantly offender-focused factors, unearthed and documented by probation *during the course of proceedings*. Some of the factors even manifested *after* M.S. entered his deferred disposition. The deferred disposition procedure in juvenile court is unique and has no true equivalent in the adult system.[5] It allows a juvenile— if he or she complies with community-based services— to avoid a disposition altogether, but preserves the possibility of an MI Up at disposition if community-based interventions prove insufficient to protect the community. Importantly, because the juvenile justice system is intended to be rehabilitative, the JJA allows judges increased discretion to respond to the changing needs of

[5] Per RCW 13.40.127, a juvenile is eligible for a deferred disposition even on felony charges, the motion must be made at least two weeks prior to fact-finding, the court is permitted to determine guilt based solely on police reports, the supervision period imposed can be no more than one year, a commitment to JRA is possible after revocation, and successful completion of a deferred disposition results not only in dismissal but in vacation of the conviction and sealing of the case. The closest adult analog is a deferred sentence, per RCW 3.50.330 and 35.20.255. But deferred sentences are available only for adults on certain non-DUI related misdemeanors, an adult must plead guilty or be convicted at trial to be eligible, deferred sentences can be granted after trial, the probationary period imposed can be up to two years (or 5 years for domestic violence offenses), and successful completion of a deferred sentence neither vacates nor seals the case.

high-risk juveniles, especially where a juvenile's needs begin to endanger the community.

It therefore follows that in order to preserve the juvenile system's strengths and provide juvenile offender court judges responsiveness in sentencing, the timing of notice of aggravating factors is more appropriately governed by Siers than by Apprendi and Blakely.

CONCLUSION

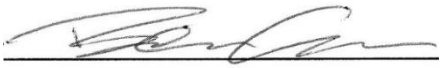
Amici are correct that juvenile offenders have a right to adequate notice of aggravating factors, per Siers. M.S. received such notice. Amici are incorrect, however, in suggesting that Apprendi and Blakely confer upon a juvenile offender a right to have aggravating factors— especially those that have not yet manifested themselves— alleged at the time of a motion for deferred disposition.

For the reasons set forth above, this Court should affirm M.S.'s MI Up disposition.

DATED this 8th day of September, 2020.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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