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No. 96480-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

F.T.,

Petitioner.

MEMORANDUM OF *AMICI CURIAE* AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON, JUVENILE LAW
CENTER, THE MOCKINGBIRD SOCIETY, TEAMCHILD, AND
COLUMBIA LEGAL SERVICES
IN SUPPORT OF PETITION
FOR REVIEW

Counsel list for *Amici Curiae* appear on following page:

AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON
FOUNDATION

Nancy Talner, WSBA# 11196
Vanessa Hernandez, WSBA#
42770
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: 206-624-2184
talner@aclu-wa.org
vhernandez@aclu-wa.org

JUVENILE LAW CENTER

Marsha I. Levick
PA Bar # 22535
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Tel: 215-625-0551
mlevick@jlc.org

TEAMCHILD

Chen-Chen Jiang, WSBA No.
51914
Sara Zier, WSBA No. 43075
715 Tacoma Avenue South
Tacoma, WA 98402
(253) 274-9929 (main)
sara.zier@teamchild.org
chen-
chen.jiang@teamchild.org

THE MOCKINGBIRD SOCIETY

Hickory Gateless, WSBA #41031
Deputy Director,
2100 24th Avenue S,
Suite 240
Seattle, WA 98144
Tel: 206-407-2139
Hickory@MockingbirdSociety.org

COLUMBIA LEGAL SERVICES

Nicholas Allen, WSBA No. 42990
101 Yesler Way Ste 300
Seattle, WA 98104-2528
United States
(206) 464-0838
nick.allen@columbialegal.org

Attorneys for Amici Curiae

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I. INTERESTS OF AMICI CURIAE

The interests of *amici* are set forth in the Motion accompanying this Memorandum.

II. ISSUE TO BE ADDRESSED BY AMICI

Where a juvenile's past victimization by adults and need for help constituted mitigating circumstances but instead, in violation of numerous constitutional, statutory, and policy provisions, were used as aggravating sentencing factors to impose a longer period of harmful incarceration, should this Court grant review?

III. STATEMENT OF THE CASE¹

F.T.² faced sentencing for shoplifting \$97 worth of candy and clothes from a Kohl's department store. Clerk's Papers at 3 ("CP"). Prior to this incident, F.T. did not have any criminal history. *Id.* at 24. Pursuant to the Juvenile Justice Act (JJA) sentencing guidelines, F.T. should have been sentenced to no more than 30 days detention based on her alleged crime and criminal history. RCW 13.40.0357; RCW 13.40.020.

Instead, the court imposed a manifest injustice disposition of 27 to 36 weeks—more than six times the length prescribed by the JJA sentencing guidelines. CP at 29. Despite her lack of criminal history and lack of

¹ The facts are taken from the parties' briefs.

² We use F.T.'s initials to protect her identity and to maintain consistency with the Court of Appeals' opinion and the parties' briefing.

failed treatment history, the State argued, and the court agreed, that a significantly longer period of incarceration was necessary to provide F.T. with treatment and “structure.” *Id.* at 28. The sentencing court relied on warrants for F.T. from the dependency case against F.T.’s parents, and her history as a victim of sex trafficking and prostitution, as the legal grounds for an exceptionally long period of detention. *Id.* at 28–29; Report of Proceedings at 128, 130 (“RP”). The Court of Appeals’ published opinion upheld these grounds for a manifest injustice sentence, and F.T. seeks this Court’s review.

IV. ARGUMENT

This Court has said that increased incarceration under a manifest injustice sentence is a tool that juvenile courts should rarely wield, and only when expressly authorized by the JJA on the basis of legally valid aggravating factors. *State v. Bacon*, 190 Wn.2d 458, 463–465, 415 P.3d 207 (2018). Review should be granted here because the manifest injustice sentence was not supported by any valid aggravating factor about the crime but to increase punishment for a child due to hardships inflicted on her by her traumatic and abusive family background and her victimization in sex trafficking.

F.T. was a dependent child. CP at 25. DSHS failed to successfully place her in foster care or provide successful treatment. *Id.* at 25–27. This

was F.T.’s first offense. *Id.* at 24. F.T. received a sentence far in excess of the standard range for shoplifting. *Id.* at 25. The court, in imposing an exceptionally long sentence, punished her for having an unstable, dysfunctional, and under-resourced life. *Id.* at 28–29.

This Court has already accepted review of similar issues in *State v. B.O.J.*, 2 Wn. App. 2d 1014, No. 76258-3-I, 2018 WL 500200 (Wash. Ct. App. Div. 1 Jan. 22, 2018), *appeal docketed*, No. 95542-5 (Wash. Mar. 12, 2019). Accordingly, this Court should accept review and stay in light of *B.O.J.* As explained below, review is warranted under RAP 13.4(b) based on conflict with Washington and federal case law, significant constitutional questions, violation of applicable statutes, and issues of substantial public interest requiring decision by this Court.

a. Imposing a manifest injustice disposition violates the Juvenile Justice Act as well as case law defining valid aggravating factors and factors diminishing culpability for youth.

The legislature, in the JJA, specified only eight “aggravating factors” justifying the imposition of increased incarceration on a juvenile under a manifest injustice sentence. RCW 13.40.150(3)(i).³ Most of the

³ “(i) [Before entering a disposition order, the court must c]onsider 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;

specified valid aggravating factors involve increased culpability reflected in the crime, and a few relate to the seriousness of a juvenile's prior record. None of those circumstances apply here. The "serious, and clear danger to society," required for a manifest injustice sentence under RCW 13.40.020(19), is not present. The requirement that a manifest injustice disposition must be supported by clear and convincing evidence of an "aggravating" factor is not present. RCW 13.40.160(2); RCW 13.40.150(3)(i). Thus, the court's justification for imposing a manifest injustice sentence on F.T., to provide her structure and services, does not satisfy the standards set forth by RCW 13.40.160(2). This improper reliance on grounds which do not constitute valid aggravating factors is an issue of substantial public concern that should be determined by this Court, thus satisfying RAP 13.4(b) and justifying a grant of review.

In fact, the Juvenile Justice Act specifically prohibits the court

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- (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).

from considering a youth's dependent status in sentencing. RCW 13.40.150(4)(e). Dependency proceedings are concerned with the safety and welfare of the child, and dependency warrants are unrelated to criminal conduct. RCW 13.34.050. The dependency warrants issued against F.T. establish that she was a ward of the state and the state was unable to successfully find her a placement. Her running away from unsuitable placements is not a criminal offense and does not reflect on her likelihood to reoffend. RCW 13.34.050; *see also* RCW 43.185C.260. This authority establishes that it was legal error for the Court of Appeals to base its ruling on "the dependency [being] an unmitigated failure as to F.T." *State v. F.T.*, No. 35524-1-III, slip op. at 2 (Wash. Ct. App. Div. 3 Sep. 25, 2018) (*available at* https://www.courts.wa.gov/opinions/pdf/355241_pub.pdf). The existence of these warrants does not satisfy any of the eight factors enumerated in RCW 13.40.150(3)(i).

F.T.'s manifest injustice sentence is also inappropriate because it is inconsistent with the goals of the Juvenile Justice Act. *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)). Punishing a juvenile for the state's failure to find her safe placements and for crimes committed against her is counter to the JJA's objectives. *See* RCW 13.40.010 (one of

the purposes of the JJA is to “[p]rovide for punishment commensurate with the age, crime, and criminal history of the juvenile offender.”). The increased incarceration imposed on F.T. therefore constitutes a violation of the law and cannot be allowed to stand.

Moreover, the United States Supreme Court has recognized that a young person’s difficult life circumstances should be considered as a mitigating factor in sentencing. “[J]uveniles have less control . . . over their own environment. . . . Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.” *Roper v. Simmons*, 543 U.S. 551, 569-570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). This mitigates the culpability of young people who commit even the most serious offenses, and the U.S. Constitution demands that sentencing courts take these attributes of youth into account. *Id.*; *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, 391 P.3d 409 (2017) (“The Supreme Court’s recent decisions explicitly hold that the Eighth Amendment to the United States Constitution compels us to recognize that children are different.”) Similarly, F.T.’s troubled childhood, lack of adult guidance, victimization by adults, and resulting trauma serve to lessen her culpability for her offense. These factors should mitigate her sentence, not support an

increase in incarceration.

b. Review of FT's manifest injustice sentence is warranted because the law does not authorize prolonged incarceration based on a child's being a trafficking victim.

Another, more egregious, reason the court presented for imposing a manifest injustice disposition on F.T. was its belief that probation could be a “life or death situation where there is a reasonable inference of trafficking activity.” CP at 28. The Court of Appeals described F.T.’s sexual abuse as “an extremely dangerous adult lifestyle” that justified extended incarceration. *F.T.*, No. 35524-1-III at 9. Essentially, the court reasoned that F.T.’s history as the *victim* of sex trafficking justified the imposition of a 27-36-week sentence for her first offense – a theft of less than \$100 – rather than the 30-day maximum suggested by the JJA. *See* RCW 13.40.0357.

This reasoning implies that F.T. is to blame for her sexual abuse and, in turn, punishes her for crimes committed against her, and is not supported by the record. F.T. was recruited and victimized by the Sureño gang. CP at 27. One of the Sureño gang’s hallmarks is the recruitment and subsequent trafficking of young runaway girls. Jan Fox, *Into Hell: Gang-Prostitution of Minors*, 20 Wash. & Lee J. of Civ. Rts. & Soc. Just. 591, 596 (2014) (*available at*

<https://scholarlycommons.law.wlu.edu/crsj/vol20/iss2/11/>) (notes that SUR-13, an alias of the Sureños, is active in juvenile prostitution nationwide); *see also Online and Anonymous: New Challenges to Prosecuting Sex Trafficking*, National Pub. Radio (Aug. 3, 2013) (available at <https://www.npr.org/templates/transcript/transcript.php?storyId=20866406>) (“Online and Anonymous”) (Nationally, the majority of victims in the sex industry are runaway and homeless youth).

Punishing F.T. for being a victim of sex trafficking is contrary to clearly established Washington policy emphasizing that the state has the obligation to help such victims rather than lock them up for many times longer than the standard sentence authorizes.⁴ Washington law treats children engaged in prostitution as victims; prosecutors are required to divert juvenile cases involving the defendant’s first alleged offense of prostitution or prostitution loitering, RCW 13.40.070(7)(a), and youth charged with prostitution and prostitution loitering who are subsequently diverted must then be referred to the Department of Social and Health

⁴ The legislature has long recognized that prolonged incarceration is not the approved method of providing services to young people who have been victims of commercial sex trafficking. Juvenile Prostitution Offenders—Diversion Act, 2009 Wash. Sess. Laws, Ch. 252 § 1 (2009) (*enacted in* RCW 13.40.070) (finding that juveniles who are involved in the commercial sex trade are “in critical need of comprehensive services” and that “a diversion program to provide these comprehensive services...may be an appropriate alternative to the prosecution of juveniles involved in the commercial sex trade.”).

services for appropriate treatment. RCW 13.40.087. Under Washington law, a minor's being a victim of sex trafficking does not justify a manifest injustice disposition.

Moreover, the harmful effects on F.T., increasing her trauma rather than ameliorating it, are clear. Frequent and repeated contact with the criminal justice system uniquely traumatizes victims, especially children, and further compounds the overall trauma they have endured. Malika Saada Saar, et al., *The Sexual Abuse to Prison Pipeline: The Girl's Story* 12 (2015). According to the National Child Traumatic Stress Network, "[m]any characteristics of the detention environment (seclusion, staff insensitivity, loss of privacy) can exacerbate negative feelings and feelings of loss of control among girls, resulting in suicide attempts and self-mutilation." *Id.* at 15 (quoting Marianne Hennessey, et al., *Trauma Among Girls in the Juvenile Justice System* 5 (2004)).

Despite F.T.'s history of being sex trafficked, she was charged with shoplifting; an issue that was wholly unrelated to her history as a victim of sex trafficking. This was her first time being charged in juvenile court. Instead of considering F.T.'s sexual trauma and history as a victim of sex trafficking as a mitigating factor, the court used this history against her. Contrary to Washington law and policy, the prolonged incarceration will likely further trigger trauma and will not serve the rehabilitative goals

of the JJA. *Id.* at 12.

V. CONCLUSION

As mentioned above, this Court has already accepted review of *B.O.J.*, which raises substantially similar questions of appropriate sentencing for juvenile offenders. *See State v. B.O.J., supra.* Both B.O.J. and F.T. were dependent children at the time of their incarceration. *Id.* at *1; CP at 25. But different from B.O.J., this was F.T.'s first criminal charge. *B.O.J.*, 2018 WL 500200, at *1; CP at 24. There is a significant public interest in a determination of whether a young person's trauma, vulnerability, and dependency justifies a manifest injustice disposition.

DATED this 2nd day of January, 2019.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON FOUNDATION

By: /s/Nancy Talner

Nancy Talner, WSBA# 11196
Vanessa Hernandez, WSBA# 42770
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Tel: 206-624-2184
talner@aclu-wa.org
vhernandez@aclu-wa.org

JUVENILE LAW CENTER

By: /s/Marsha Levick

Marsha I. Levick
PA Bar # 22535

1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Tel: 215-625-0551
mlevick@jlc.org

THE MOCKINGBIRD SOCIETY

By: /s/Hickory Gateless
Hickory Gateless, WSBA #41031
Deputy Director,
2100 24th Avenue S,
Suite 240
Seattle, WA 98144
Tel: 206-407-2139
Hickory@MockingbirdSociety.org

TEAMCHILD

By: /s/Chen-Chen Jiang
Chen-Chen Jiang, WSBA No. 51914
Sara Zier, WSBA No. 43075
715 Tacoma Avenue South
Tacoma, WA 98402
(253) 274-9929 (main)
sara.zier@teamchild.org
chen-chen.jiang@teamchild.org

COLUMBIA LEGAL SERVICES

By: /s/Nicholas Allen
Nicholas Allen, WSBA No. 42990
101 Yesler Way Ste 300
Seattle, WA 98104-2528
United States
(206) 464-0838
nick.allen@columbialegal.org

Counsel for Amici Curiae.

AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION

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- vhernandez@aclu-wa.org

Comments:

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