

No. 100894-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

J.W.M.,

Petitioner.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY, AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON, CHOOSE180,
CREATIVE JUSTICE, KING COUNTY DEPARTMENT OF
PUBLIC DEFENSE, AND TEAMCHILD IN SUPPORT OF
PETITIONER

Jessica Levin, WSBA #40837

Melissa R. Lee, WSBA #38808

Robert S. Chang, WSBA #44083

RONALD A. PETERSON LAW CLINIC

SEATTLE UNIVERSITY SCHOOL OF LAW

1112 East Columbia St.

Seattle, WA 98122

Tel: (206) 398-4167

levinje@seattleu.edu | leeme@seattleu.edu | changro@seattleu.edu

Counsel for Amici Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY*,
CHOOSE 180, & CREATIVE JUSTICE

Additional counsel listed on next page

*The Korematsu Center recognizes Ronald A. Peterson Civil Rights Clinic students Charla Boley, '23, Moira Farrell, '23, Manmit Kaur, '23, and Amanda Lee, '23, for their contributions to this brief.

Nancy Talner, WSBA #11196
La Rond Baker, WSBA #43610
ACLU OF WASHINGTON FOUNDATION
P.O. Box 2728
Seattle, WA 98111
(206) 624-2184
talner@aclu-wa.org
baker@aclu-wa.org
Counsel for Amicus Curiae
ACLU OF WASHINGTON

Katherine Hurley, WSBA # 37863
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
710 Second Avenue, Ste 200
Seattle, WA 98104
(206) 263-6884
katherine.hurley@kingcounty.gov
Counsel for Amicus Curiae
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

Danielle Dallas, WSBA #58773
Grace H. Kimm, WSBA #51930
Sara Zier, WSBA #43075
TEAMCHILD
1225 South Weller St, Suite 420
Seattle, WA 98144
(253) 507-8435
danielle.dallas@teamchild.org
grace.kimm@teamchild.org
sara.zier@teamchild.org
Counsel for Amicus Curiae
TEAMCHILD

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IDENTITY AND INTEREST OF AMICI

The identity and interest of amici are set forth in the Motion for Leave to File, submitted with this brief.

INTRODUCTION

Black children, as well as other children of color, are punished more harshly than their white counterparts. One dynamic producing these different outcomes, as demonstrated in the empirical literature, is that Black children tend to be regarded and treated as older than they actually are, a process called “adultification.” When Black children are deprived of the benefit of being seen and treated as children—a benefit that white children receive—Blackness can operate as a silent aggravator. Disparate outcomes in disposition decisions are left intact when courts fail to appreciate these biases in disposition decisions. This is particularly true when courts consider mitigating or aggravating circumstances under RCW 13.40.150, as some of the factors invite operation of adultification bias.

This Court should instruct juvenile courts to consider on the record how adultification might influence their disposition decisions when sentencing youth of color, particularly when considering the statutory mitigating and aggravating factors under RCW 13.40.150. This Court should also instruct juvenile courts to account for the empirically observable harms of incarcerating young people by requiring courts to consider the harms of incarceration as a non-statutory mitigating factor in every disposition decision in which incarceration is requested.

ARGUMENT

I. The Adultification of Black Children Contributes to Racial Disparities in Disposition Outcomes for Black Youth.

Washington courts have consistently acknowledged the impact of implicit bias in legal proceedings,¹ and there is no

¹ *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013) (“we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them”); *State v. Berhe*, 193 Wn.2d 647, 657,

reason to believe that the sentencing of youth of color in juvenile court is somehow free of implicit bias. Even when prosecuted in juvenile court, which is ostensibly designed to account for children's diminished culpability and capacity for change, not all children are extended the same privileges of youth. Instead, a young person's race likely influences how harshly a young person is punished.

Adultification² likely contributes to the disparity between white youth and youth of color through the juvenile legal

444 P.3d 1172 (2019) (“[I]mplicit racial bias ... influence[s] our decisions without our awareness.”); *see also* GR 37 (an objective observer is “aware that implicit, institutional, and unconscious bias... contributed to the unfair exclusion of jurors.”).

² As this Court's own Gender and Justice Commission has recognized, adultification results in youth of color being seen as older, more blameworthy, and more deserving of harsher punishment than their white counterparts. Gender & Just. Comm'n, Wash. Cts., *How Gender and Race Affect Justice Now* 452-53 & nn. 96-97 (2021); *see generally* Task Force 2.0 Race and the Criminal Justice System, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court* 116, App. B-6, B-5, E-5 (2021)

system. Statewide, Black youth are nearly three times as likely as white youth to be arrested. Task Force 2.0 Race and the Criminal Justice System, *Report and Recommendations to Address Race in Washington's Juvenile Legal System: 2021 Report to the Washington Supreme Court* 12, (2021), https://digitalcommons.law.seattleu.edu/korematsu_center/118/ [hereinafter Task Force 2.0 Juvenile Report]. Youth of color are less likely to receive a diversion relative to white youth, and Black youth are convicted at a rate 4.8 times the rate of white children. *Id.* at 13. As of 2017, the incarceration rate for white youth was 73 per 100,000 versus a rate of 386 per 100,000 for Black youth – a Black-white disparity of 5.29. *Id.* at A-8 (App'x A).

https://digitalcommons.law.seattleu.edu/korematsu_center/116 (discussing anecdotal evidence of adultification of Native Hawaiian Pacific Islander youth).

This Court should take this opportunity to urge trial courts to consider adultification bias on the record when young Black people like JWM are sentenced in juvenile court.

A. Empirical Literature Shows that Black Children Are Perceived as Older and More Culpable than White Children.

In a seminal study on adultification of Black youth, researchers demonstrated that Black youth are perceived to be more adult, less innocent, more culpable, and less in need of protection than their white counterparts. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psychol. 526, 529, 539-540 (2014), <https://www.apa.org/pubs/journals/releases/psp-a0035663.pdf>. Participants consistently perceived Black children over the age of 10 as less innocent than their peers. *Id.* at 529. Participants also deemed Black boys more culpable for their actions than any other racial group, especially when those targets were accused of serious crimes. *Id.* at 532, 540. Black boy felony suspects were seen as approximately 4.5 years older

than they actually were; boys were therefore misperceived as legal adults at roughly the age of 13.5. *Id.* at 531-32. Finally, when primed with dehumanization associations for Black people, the participants' belief in the essential distinction between Black children and Black adults was reduced,³ implicating a decreased perception of innocence, also known as a loss of "essentialism." *Id.* at 533-36, 539-40.

For Black girls, gender stereotypes compound the harmful effects of adultification bias. Rebecca Epstein, Jamila J. Blake & Thalia González, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, Geo. Law. Ctr. on Poverty & Ineq. 2, 4, 8 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>. Adults see Black girls as being more mature, and needing less nurturing, support, and protection than

³ The perception of Black children as adults that flows from this implicit dehumanization was also a predictor of racially disparate police violence against them. *Id.* at 535-36, 40.

other groups. *Id.* at 1, 4, 7-8. This combination can lead to a view that Black girls have greater culpability for their actions and deserve greater punishments to match. *Id.* at 1, 8-12; *see generally* Lori D. Moore & Irene Padavic, *Racial and Ethnic Disparities in Girls' Sentencing in the Juvenile Justice System*, 5 Feminist Criminology 263, 269, 279-80 (2010) (Black girls receive more severe dispositions than their white peers after controlling for the seriousness of the offense, prior record, and age).

The adultification studies align with the empirical research showing that juvenile probation officers (JPOs) often assess Black children to be more dangerous than their white counterparts, and therefore are likely to recommend harsher outcomes for Black children in their reports. *See, e.g.*, George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Socio. Rev. Ass'n. 554, 561 (1998). The research shows that JPO assessments of Black

children's propensity to commit future crimes generally rely on negative internal attributions, compared to assessments of white children that generally rely on positive external attributions.⁴ *Id.* at 563, 564, 567. The internal attributions JPOs rely on when assessing Black children as more dangerous than white children can often be associated with determinations of greater culpability due to the child's perceived age.

In a study involving three Washington counties, Bridges and Steen used attribution theory to explore the way JPOs assess the future dangerousness of children in the juvenile system using either internal or external attributions. *Id.* at 556. Negative internal attributions have greater influence on the assessment of children's risk to reoffend than negative external

⁴ Attribution theory explores how people construct "causal explanations for events." *Id.* at 556. Internal attributions include factors coming from within the individual; negative internal attributions could include disrespect toward the legal system and its actors. *Id.* at 556, 559. External attributions include factors coming from the individual's environment and could include a child's family and peer group. *Id.*

attributions (e.g., an unstable home life). *Id.* at 564. JPOs are most likely to perceive children whose crimes are attributed to negative internal factors as being dangerous and as having a high risk of reoffending. *Id.* at 567. This perception relies on traits “above and beyond” any risks that could be associated with the child’s criminal history, meaning that a white child and Black child with similar histories are likely to receive very different recommendations from their JPOs. *Id.* Because JPOs may perceive Black children as more dangerous and culpable as compared to white children, they recommend more severe sentences for Black children than for white children. *Id.* Similar to adultification, where Black children are treated as more dangerous and culpable and less changeable because of perceived age, the negative internal attributions given to Black children are also often perceived as unchangeable characteristics, compared to external environmental factors.

Subsequent studies have supported the conclusion that JPOs’ perceptions of Black children differ from their

perceptions of white children, further indicating the need for judges to use caution at disposition when relying upon JPOs' assessments of Black children, like JWM. *See, e.g.,* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & Hum. Behav. 483, 484 (2004). Unconscious racial stereotypes affect the kinds of attributions JPOs assign Black children compared to white children. JPOs who were primed to think about Black people before assessing a hypothetical child were "especially likely" to judge that child as "*not* vulnerable, impressionable, gullible, and naïve," and attributions related to culpability were most responsive to this racial priming. *Id.* at 500. These characteristics attributed to Black children indicate a belief that they are more mature than white children and more "adult-like" and consequently "as blameworthy as adults who commit similar crimes." *Id.*

This Court must look critically at how JWM's JPO report influenced JWM's disposition hearing and whether it should

have played such a pivotal role at all.⁵ Bridges and Steen's study relied on 233 narrative reports from JPOs from 1300 cases in three Washington state counties, making their findings especially relevant to JWM's case. Bridges & Steen, *supra* at 557. Here, the judge relied upon the JPO's testimony and assessment in imposing an upward manifest injustice disposition. RP at 26-27, 42. The judge relied on the JPO's report that recommended the manifest injustice upward based on JWM's internal attributes like his personal decisions and behavior, rather than on external attributes like his peer group, family, and support system. *Id.* at 42. For example, the judge explained how the JPO report recommended manifest injustice because JWM could have simply chosen not to pull the trigger. *Id.* Additionally, the judge referenced the JPO's opinion that since JWM did this act while already on probation, he lacked an

⁵ The JPO report is sealed, so Amici have relied on references to the report from the Report of Proceedings and the parties' briefing.

appreciation for the consequences of his actions. *Id.*

Furthermore, the JPO assigned negative internal attributes to JWM when testifying that: “I’m not sure if he was fully engaged” in his treatment and “maybe he just wasn’t ready to change his lifestyle.” *Id.* at 27. These comments from the JPO reflect the negative internal attribution trend revealed by Bridges and Steen’s study, especially since no weight was given to the positive external attributions presented by JWM’s defense. CP at 42 (pre-sentence report stated JWM’s plan to work with a mentor from Community Passageways upon release, and that JWM’s family agreed to collaborate with Community Passageways and other community organizations in supporting JWM’s transition to the community); RP at 43 (judge stating that if JWM “gets out today and walks into the community he gets nothing,” implying that JWM’s external attributions are either not existent or negative). Because of the underlying bias associated with JPO assessments, judges should use caution in how much they rely on JPO reports in

determining the appropriate disposition. Bridges & Steen, *supra* at 554-570.

B. This Court Should Instruct Juvenile Courts to Explicitly Consider Adultification Bias on the Record When Sentencing Young People of Color.

In September of this year, members of the Washington State Supreme Court urged criminal legal system stakeholders to bear in mind the adultification of Black youth and other youth of color. *State v. Anderson*, No. 97890-5, slip op. at 10-17, 11-13 (Wash. Sept. 8, 2022) (Yu, J., concurring in dissent) (“[I]t is well established by empirical literature and has been acknowledged by [this court] that Black children are prejudiced by, in addition to other stereotypes, ‘adultification,’ or the tendency of society to view Black children as older than similarly aged youths.” (quoting *In re Pers. Restraint of Miller*, 21 Wn. App. 2d 257, 265-67, 505 P.3d 585 (2022) (remanding for resentencing for a *Houston-Sconiers* compliant sentencing hearing, as Ms. Miller had demonstrated prejudice under *Domingo-Cornelio*; cautioning sentencing courts that

adultification, in addition to other stereotypes, could result in harsher punishments of young people of color)))); *see also How Gender and Race Affect Justice Now*, *supra* at 452-53 & nn.96-97.

In *Anderson*, the concurrence in dissent highlighted how facially neutral factors—like the mitigating qualities of youth a court must consider when sentencing a young person prosecuted in adult court—can be unevenly applied based on the defendant’s race. Put another way, the same set of facts can be a mitigator for one individual and an aggravator for another. *Anderson*, slip op at *12 (Yu, J., concurring in dissent) (discussing how differing evaluations of Mr. Anderson’s mitigating qualities of youth were seen as aggravators, whereas very similar mitigating qualities of youth were appropriately treated as mitigating for white defendants); *see also id.* at *17 (González, C.J., dissenting) (discussing problematic nature of relying on the original sentencing determination, which took

place during the racialized tough on crime era of the 1980s and 1990s).

Adultification bias operates whenever young people of color face punishment in the criminal legal system—whether in adult or juvenile court. Juvenile courts must pay close attention to whether the statutory mitigating and aggravating factors that form the basis for manifest injustice dispositions under RCW 13.40.150 invite “subjective judgments”⁶ influenced by adultification bias. For example, although a youth’s lack of contemplation that their conduct “would cause or threaten serious bodily injury” is a mitigating factor, RCW 13.40.150(3)(h)(i), if judges do not control for adultification bias, judges could subjectively conclude that a young person of color had an appropriate amount of time or experience to “contemplate” their conduct, given that they are perceived to be older and more culpable than their white counterparts.

⁶ *State v. Bassett*, 192 Wn.2d. 67, 89, 428 P.3d 343 (2018).

Additionally, some of the aggravating factors require judges to draw subjective conclusions about a young person's internal characteristics that could lead to harsher punishments for youth of color due to adultification bias: whether the youth committed the offense in an especially "heinous, cruel, or depraved manner," RCW 13.40.150(3)(i)(ii); and whether the standard range disposition "is clearly too lenient considering the juvenile's prior adjudications," RCW 13.40.150(3)(i)(viii). Moreover, the aggravating factors that are based on criminal history, allowing judges to consider "other complaints which have resulted in diversion or a finding or a plea of guilty," RCW 13.40.150(3)(i)(vii); and whether the standard range disposition "is clearly too lenient considering the juvenile's prior adjudications," RCW 13.40.150(3)(i)(viii) both leave room for enhanced punishment on potentially biased decisions of others.

In its determination that JWM deserved a manifest disposition upward, the Court (and the State) consistently

characterized his current crime, as well as some of his criminal history, as more serious than they actually were by misrepresenting JWM's criminal history, failing to acknowledge JWM's presumption of innocence for pending crimes, and repeatedly insisting that JWM was almost an adult, all of which suggest that adultification bias contributed to the lengthy sentence.

First, both the court and the prosecution consistently referred to JWM's adjudication of second-degree manslaughter as being either intentional or reckless, while knowing full well JWM's conduct was accidental. The prosecutor twice referred to the crime as murder, RP 7, which requires intent to kill. Furthermore, the court mischaracterized JWM's mens rea, repeatedly suggesting that JWM's actions were reckless, not negligent, despite the trial court's findings. RP 40 ("Everyone knows you don't point a gun at a person, whether you think it's loaded or not; that's what makes this clearly negligent, and, I would argue reckless conduct. But, he was convicted of

Negligence, and that's what I'm addressing it as."); RP 43 ("I don't think that Mr. Mugo intended to kill his friend; I think that he was reckless with guns.").

With respect to JWM's criminal history that acted as an aggravator under RCW 13.40.150(3)(i)(vii), the prosecution and the court repeatedly refer to JWM's fourth-degree assault conviction as second-degree assault. Fourth-degree assault is a misdemeanor and by definition does not implicate serious harm to the victim. RCW 9A.36.041. The court repeatedly referred to JWM being charged with second-degree assault, followed by a disclaimer, in parenthesis, that it was resolved as fourth-degree assault. CP 31, 32; *see also* RP 20 (counsel for the state: "The Assault 4 was filed, actually, as an Assault 2, which really was a first-degree Robbery"). And the court in its oral ruling referred to JWM's fourth-degree assault as second-degree assault. RP 43 ("he was on EHD while other matters were pending, repeatedly, *or on release for the Assault 2*" (emphasis added)).

Second, uncharged or dismissed criminal conduct is not a valid basis for the court to determine that the standard sentencing range is too lenient, as JWM is entitled to the presumption of innocence for crimes that have not been adjudicated. *See* CP 33 (basing manifest injustice disposition on fact that JWM has “uncharged and dismissed criminal conduct”).

Third, the prosecutor repeatedly adultified JWM during the court proceeding with comments such as “if this had happened a month earlier, ... [JWM] would still be considered for adult sentencing.” RP 7 (statement made twice, in conjunction with calling the charge murder, and referring to a recent change in juvenile decline law); RP 23 (“The defendant was 17 1/2 years old, almost an adult. We wouldn’t even be here if this had happened six months later”). Yet there is no bright line at 18 that converts a less culpable child to a fully culpable adult. *In re. Pers. Restraint of Monschke*, 197 Wn.2d

305, 326, 482 P.3d 276 (2021); *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

II. Incarceration Is Harmful to Youth and Undermines Community Safety.

In addition to taking into account adultification of Black youth in disposition contexts, juvenile courts must also begin to consider the well-established literature demonstrating that incarceration undermines community safety and causes significant harm to young people.

A. Incarcerating Youth Does Not Promote Community Safety.

The court indicated that the manifest injustice disposition imposed on JWM was in part because it viewed a period of incarceration as being beneficial to him and to community safety. However, research shows that this is typically not the case. Researchers who have studied the impacts of incarceration at Washington State Juvenile Rehabilitation (JR) prisons to determine the impact of “length of stay (dosage) and recidivism,” “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, 373 (2016), <https://www.tandfonline.com/doi/pdf/10.1080/10509674.2016.1194946> (studying Washington’s Juvenile Justice and Rehabilitation Administration facilities). In addition, the researchers “found no reliable relationship between the time spent in the facility and subsequent improvement in prosocial/problem-solving skill.” *Id.* at 372. This finding directly contradicts any claim that longer periods of incarceration in JR will protect the community, lead to increased skill acquisition, or reduce recidivism. *Id.* at 373.

The findings of the Washington study are consistent with national studies. In 2013, the National Academy of Science’s Committee on Assessing Juvenile Justice Reform examined youth incarceration and interventions and found that “harsh sanctions in institutional settings may contribute to recidivism.”

Nat'l Rsch. Ctr. Comm. on Assessing Juv. Just. Reform,
Reforming Juvenile Justice: A Developmental Approach 124
(2013), <https://nap.nationalacademies.org/read/14685/chapter/1>.

And research demonstrates that congregating youth together—through incarceration—negatively impacts behavior. Social scientists call the phenomenon “peer delinquency training,” and have found significantly higher levels of substance abuse, school difficulties, delinquency, violence, and adjustment difficulties in adulthood for youth incarcerated in congregated settings versus those that were offered treatment in another setting. Thomas J. Dishion et al., *When Interventions Harm: Peer Groups and Problem Behavior*, 54 Am. Psych. 755-764 (1999), https://www.academia.edu/12638521/When_interventions_harm_Peer_groups_and_problem_behavior.

B. Incarceration Frequently Harms Youth By Removing Them from Their Families and By Negatively Impacting Their Health and Education.

Incarceration not only undermines community safety, but also severely harms young people. Task Force 2.0's Juvenile

Justice Subcommittee recently issued its 2021 Report on Race and the Juvenile Legal System to this Court, detailing the harms that result from incarceration:

[i]f a young person is incarcerated, the harms are severe. Incarceration removes young people from their families, their schools, and their communities. Depriving young people of these support systems puts them at high risk of developing mental health conditions, and they lose their connection to school and the other supports the school may provide beyond education.

Task Force 2.0 Juvenile Report at 21.

Regarding the impact of incarceration on mental health, research shows that incarceration causes depression and increases the likelihood for self-harm and even suicide. Barry Holman & Jason Ziedenberg, *Justice Policy Inst., The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* 2 (2006), https://justicepolicy.org/wpcontent/uploads/justicepolicy/documents/dangers_of_detention.pdf (“[F]or one-third of incarcerated youth diagnosed with depression, the onset of the depression occurred after they

began their incarceration, and another [study] suggests that poor mental health, and the conditions of confinement together conspire to make it more likely that incarcerated teens will engage in suicide and self-harm.”). In addition, a 2019 study found that “incarceration during adolescence and early adulthood is independently associated with worse physical and mental health outcomes during adulthood” and “more months in confinement as adolescents and young adults correlates with worse adult health outcomes.” Elizabeth S. Barnert et al. *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*. 139 Pediatrics 1, 7 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260153/pdf/PEDS_20162624.pdf (citations omitted).

Involvement in the juvenile legal system is also linked to poor academic performance.

Educational opportunities are lost or limited by the transitions in and out of detention and Juvenile Rehabilitation facilities, which have inadequate educational programming. Youth are unable to easily move from one school to another and stay

on track. Youth encounter barriers in the form of school discipline laws and policies, are pushed out to alternative schools, receive minimal academic and transition support, and encounter attitudes that discourage high school completion and post-secondary goals.

See Task Force 2.0 Juvenile Report at 22 (citations omitted). In fact, Washington State research shows that 40 to 50 percent of youth with juvenile court involvement dropped out or disappeared from school. Carl McCurley et al., Ctr. for Court Research, *Students Before and After Juvenile Court Dispositions: Student Characteristics, Education Progress, Juvenile Court Dispositions, and Education Outcomes in Washington State* 13, Fig. 10 (2017), https://www.courts.wa.gov/subsite/wscrr/docs/Education%20and%20Juv%20Ct%20Dispositions_finalrev.pdf. The study also emphasizes that academic performance and outcomes are consistently worse for young people who are incarcerated than for young people who are diverted and remain in their communities. *Id.* at 13-14 (“In general, academic performance and outcomes are consistently

worse for students sentenced to local sanctions or to JR than for those, usually with less serious charges, who enter into diversion agreements.”).

C. Conditions of Confinement in Washington State’s Juvenile Rehabilitation Institutions Compound the Harms of Incarceration.

As many of the studies and literature cited herein reveal and as previously argued to this Court in *State v. B.O.J.*, juvenile carceral institutions at best fail to mitigate risks and at worst increase harm. 194 Wn.2d 314, 327-28, 449 P.3d 1006 (2019) (“the studies cited by B.O.J. and amici offer a cautionary tale against imposing lengthy sentences...with the hope of improving outcomes for juvenile defendants”). Washington State is no exception. Young people continue to experience challenges with solitary confinement, including access to basic needs while in isolation, invasive searches, and use of restraints. *See, e.g.*, L.B. Gilbert, MYNorthwest, *WA juvenile detention reforms solitary confinement practices upon settling lawsuit*, July 29, 2022, <https://mynorthwest.com/3579182/after->

[teens-held-solitary-confinement-lawsuit-sparks-change-102000-settlement/](#). Most young people are relocated outside of their home community to serve a period of incarceration at institutions that can be geographically challenging for families and other community supporters to maintain regular visitation and connection. *See* Green Hill School Parent Fact Sheet, DCYF Publication JR_0014 (12-2021), https://www.dcyf.wa.gov/sites/default/files/pubs/JR_0014.pdf (“all calls are limited to 10 minutes....The number of incoming and outgoing calls depend on a youth’s treatment progress in his program....Each youth is allowed one free 10-minute outgoing call per week.”).

The outcomes young people experience leaving a Juvenile Rehabilitation institution demonstrate the limited efficacy of the treatment and programming received in an institutional setting. Recidivism rates have remained stagnant, or even increased for more serious offenses. Off. of Innovation, Alignment & Accountability, *Annual Recidivism Analysis for*

Youth Leaving Juvenile Rehabilitation (SFY17-18) (October 14, 2021), <https://www.dcyf.wa.gov/sites/default/files/pdf/reports/JR-RecidivismFY17-18.pdf>. Youth leaving JR experience homelessness at high rates (25 percent), face barriers to employment, and are far less likely to receive their high school diploma. Sarah Veele, Off. of Innovation, Alignment & Accountability, *Understanding the Strengths and Needs of Youth Exiting Juvenile Rehabilitation* 5-6 (September 23, 2021) <https://www.dcyf.wa.gov/sites/default/files/pdf/gov/docs/2021-9-23-OIAA-HB1186-CTS-Data.pdf>. Only 33 percent of youth with identified mental health needs access treatment within three months of leaving a Juvenile Rehabilitation facility. *Id.* at 7. Given national data, these outcomes are not so much an indictment of specific programs but more an indictment of the overarching model of incarceration to provide treatment. Community-based treatment can provide continuity of programming and supported strategies that have real application

where young people live, and which are impossible to achieve in a carceral setting.

III. The Harms of Incarcerating Young People Should Be a Non-statutory Mitigating Factor that the Court Must Consider on the Record in Every Disposition Hearing Where Incarceration Is Requested.

Courts must take into account the harms of incarcerating young people in every disposition decision where incarceration is requested (in either a JR facility or in detention)—not just in the context of manifest injustice dispositions involving lengthy incarceration. Juvenile courts must account for these harms for two reasons: (1) juvenile courts have wide latitude to consider non-statutory mitigating factors in fashioning appropriate dispositions; and (2) disposition decisions that fail to account for these harms are ultimately inconsistent with the purpose and mission of the juvenile system—to rehabilitate young people and protect the safety of citizenry.

The plain language of RCW 13.40.150(1) grants the court broad discretion to consider and rely upon “all relevant

and material evidence.” *B.O.J.*, 194 Wn.2d at 328 (citing RCW 13.40.150(1) (“In disposition hearings all relevant and material evidence ... may be received by the court and may be relied upon to the extent of its probative value.”); *State v. Rhodes*, 92 Wn.2d 755, 759, 600 P.2d 1264 (1979), *overruled on other grounds by State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003) (citing RCW 13.40.150(1) for proposition that court can rely on psychiatric reports on the issue of danger to society and noting “the court is not limited to consideration of these [statutory] factors”); *State v. Strong*, 23 Wn. App. 789, 793, 599 P.2d 20 (1979) (in determining a disposition, the court must consider the aggravating and mitigating factors set forth in RCW 13.40.150 “*or such other factors occurring in the record which impel the decision to go outside the standard range....*” (emphasis added))).

Washington courts have long considered and applied non-statutory mitigating factors in determining whether to depart from the standard range. *See State v. Radcliff*, 58 Wn.

App. 717, 721, 794 P.2d 869 (1990) (holding a juvenile court is not limited to factors expressly stated in a statute authorizing an alternative disposition outside the standard range). In such cases, the leniency or severity of the court’s disposition requires the court to justify its decision in light of the mitigating or aggravating factors the court considered. *See State v. Crabtree*, 116 Wn. App. 536, 544-45, 66 P.3d 695 (2003), *disapproved of on other grounds by State v. Bacon*, 190 Wn.2d 458, 415 P.3d 207 (2018) (listing several non-statutory mitigating factors including “parental involvement and effectiveness, the juvenile’s improvement in school...participation in treatment” and “the inadequacy of institutional treatment”); *State v. K. E.*, 97 Wn. App. 273, 282–83, 982 P.2d 1212 (1999), *as amended on reconsideration* (Nov. 22, 1999) (a finding that “a standard range disposition is not needed to rehabilitate the juvenile offender or protect the public from criminal” is a valid non-statutory aggravating factor; standard range disposition in K.E.’s case was unnecessary to rehabilitate the juvenile

offender, where imposing one “would presumably be to the detriment of that juvenile”).

In addition to the statutory authority and decisional law authorizing courts to consider broadly non-statutory mitigating factors, it is also consistent with the purposes of the JJA to consider the harms of incarceration in disposition decisions. One of the purposes of the JJA is to meet the needs of youth by focusing on the “rehabilitation and reintegration of juvenile offenders,” RCW 13.40.010(2)(f). As established by the empirical literature discussed above, a thorough consideration of the effects of incarceration demonstrates that incarceration is, at best, inconsistent with rehabilitation and reintegration. At worst, it drives young people deeper into the system, increases recidivism, and inflicts trauma.

Finally, consideration of the harms of incarceration as a non-statutory mitigating factor in disposition decisions involving youth of color where incarceration is requested may counterbalance the operation of race as a silent aggravator.

CONCLUSION

Amici urge this Court to require juvenile courts to explicitly consider adultification bias on the record when sentencing young people of color, and to consider the harms of incarceration as a non-statutory mitigating factor in every disposition hearing where incarceration is requested.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 4,939 words, exclusive of words contained in the appendices, title sheet, table of contents, table of authorities, certificates of compliance and signature blocks, and pictorial images, and therefore meets the word count limitation of 5,000 words for amicus briefs as required by RAP 18.17(c)(6).

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Respectfully Submitted:

/s/ Jessica Levin

Jessica Levin, WSBA #40837
Melissa R. Lee, WSBA #38808

Robert S. Chang, WSBA #44083
Counsel for Amici Curiae
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
CHOOSE 180, & CREATIVE JUSTICE

Nancy Talner, WSBA #11196
La Rond Baker, WSBA #43610
Counsel for Amicus Curiae
ACLU OF WASHINGTON

Katherine Hurley, WSBA # 37863
Counsel for Amicus Curiae
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

Danielle Dallas, WSBA #58773
Grace H. Kimm, WSBA #51930
Sara Zier, WSBA #43610
Counsel for Amicus Curiae
TEAMCHILD

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on September 26, 2022, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 26th day of September, 2022.

/s/ Melissa R. Lee

Melissa R. Lee

Counsel for Amici Curiae

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY,
CHOOSE 180, & CREATIVE JUSTICE

FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

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