No. 56917-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint of

KEONTE SMITH,

Petitioner.

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, TEAMCHILD, AND WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTRODUCTION

Black and brown children are disproportionately declined to adult court and more severely sentenced than their white counterparts. These observed disparities are consistent with adultification bias, whereby Black and brown children are perceived as chronologically older and more culpable than their white counterparts. When the Court stated that "children are different," *Miller v. Alabama*, 567 U.S. 460, 480, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), it did not say that only white children are different, or that only white children deserve the benefit of the carefully crafted procedures that guard against harsh punishment. Without careful attention by jurists to the impact of adultification bias, as well as a record that enables meaningful appellate review, disproportionate outcomes in decline and sentencing will persist.

SUMMARY OF ARGUMENT

This case presents the opportunity to account for adultification bias that operates against children of color in both the decline and sentencing contexts. Addressing how race rendered Keonte's decline and sentencing proceedings unconstitutional on collateral review is appropriate under RAP 16.4(c)(2). The record declining him to adult court demonstrates the court perceived him as older and more culpable than the facts established. And the record of his *Houston-Sconiers*[1] sentencing hearing is deficient such that it is impossible to rule out the possibility that Keonte's race contributed to his lengthy sentence.

Regarding decline, this Court should recognize that adultification bias can tip the scales towards decline like it did for Keonte. It should instruct trial courts to be mindful of adultification bias in the discretionary decline context, as it did

[1] *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017).

in the sentencing context in *In re Pers. Restraint of Miller*, 21 Wn. App. 2d 257, 505 P.3d 585 (2022), to ensure that courts account for juvenile brain science in applying the *Kent*[2] factors.

In the sentencing context, this Court should recognize a presumption of a mitigated sentence under article I, section 14 for children prosecuted in adult court. This presumption would mitigate adultification bias and anchor bias, where judges remain tethered to harsh SRA sentences. This Court should also require written *Houston-Sconiers* findings so appellate courts can determine compliance with *Houston-Sconiers* and discern whether race played an impermissible role.

ARGUMENT

I. The Adultification of Black Children Contributes to Racial Disparities in Decline and Sentencing Outcomes for Black Youth.

Washington courts have consistently acknowledged the impact of implicit bias in legal proceedings, and the prosecution

[2] *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).

and sentencing of children in adult court is no exception.[3] This Court recently addressed the adultification[4] of Black children in *Miller*, acknowledging 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." 21 Wn. App. 2d at 265. This Court acknowledged that "adultification may detrimentally affect children of color at criminal sentencings." *Id.* at 266. This Court urged trial courts to do more to eradicate adultification bias in our system: "In the face of…disparities in sentencing, trial courts should consider, in addition to issues common with all youth…these potential [adultification] biases when sentencing children of color." *Id.* at

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[3] *See State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326, 335 (2013); *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019); GR 37.

[4] As the 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), https://www.courts.wa.gov/subsite/gjc/documents/2021_Gender_Justice_Study_Report.pdf.

267; *see also State v. Anderson*, 200 Wn.2d 266, 312-13, 516 P.3d 1213 (2022) (Yu, J., concurring in dissent) (urging criminal legal system stakeholders to bear in mind the adultification of Black youth and other youth of color (quoting *Miller*, 21 Wn. App. 2d at 265-67)).

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 their actual age; boys were therefore misperceived as legal adults at roughly the age of 13.5. *Id.* at 531-32. And when primed with dehumanizing[5] associations for Black people, the participants' belief in the essential distinction between Black children and Black adults was reduced,[6] causing a decreased perception of innocence. *Id.* at 533-36, 539-40. Circumstances that "provoke[] consideration of a child as an adult," such as a discretionary decline hearing, are more likely to be "particularly susceptible to the effects of dehumanization." *Id.* at 528.

[5] Dehumanizing words or images associated with Black people include apes, which in previous experiments led test participants primed "with great apes (but not big cats) to [endorse]…police violence against Black (but not White) criminal suspects." *Id.* at 536.

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

B. Adultification Bias Helps Explain the Observed Racial Disproportionality in Decline and Sentencing for Black Youth.

Adultification likely contributes to the overrepresentation of Black children at every stage of the criminal legal process. 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 Juvenile Report]. Youth of color are less likely to receive 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 (Appx A).

Against this backdrop of overrepresentation in the juvenile legal system, Black and Latinx children are

disproportionately overrepresented in discretionary and auto decline. An Administrative Office of Courts (AOC) report analyzing youth convictions and charges from 2009 to 2019 revealed not just that Black and Latinx children are disproportionately overrepresented among youth convictions, discretionary decline, and auto-decline cases, but also that this overrepresentation cannot be explained by differences in criminal history or offense type. Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State* 2009-2019, at 4 (2021), https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf. Even when offense type is accounted for, youth of color are over-represented. *Id.* at 26.

Adultification bias can negate the constitutional protections afforded to children, leaving race to operate as an aggravator. As a result, Black children are deprived of the constitutionally-mandated considerations of youth in both decline and sentencing, leading them to be overrepresented in adult court and more harshly punished.

II. Ameliorating Race Disproportionality in Decline Requires That Courts Account for Adultification Bias and Understand the *Kent* Factors Through the Lens of Advances in Adolescent Brain Development.

Keonte has raised the constitutionality of the juvenile court's decline decision as being improperly influenced by race. PRP at 50-60, 61-62 (citing RAP 16.4(c)(2)). This is properly before this Court as a constitutional violation under RAP 16.4(c)(2) that causes actual and substantial prejudice, which may be raised for the first time on collateral review. *Hews v. Evans*, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). Keonte's waiver of the right to appeal the decline order, by the terms of the plea agreement, was limited to waiver of appeal only, and does not apply to collateral review. Resp't Appx at 73 (CP 34) (stipulating "right to appeal the trial court's decision in his decline hearing").

In Washington, Black and Latinx children charged with felonies are adjudicated as adults through discretionary decline

at disproportionate rates. The recent AOC decline study showed that Black children charged with felonies in the same offense category as Keonte are adjudicated as adults at a rate that is almost 4 times the rate of white children. Evans & Herbert, *supra*, at 26 (Table 14).[7] Though human trafficking is not categorized as a sex crime, the facts here involved sexual acts by minors; it is therefore notable that Black children charged with felony sex crimes are adjudicated as adults at a rate of 7.32 times the rate of white children. *Id.* This extreme disparity is consistent with explicit and implicit bias that combines adultification of Black boys and the worst societal stereotypes about Black men as sexual threats deserving harsh treatment in the criminal legal system.[8]

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[7] Human trafficking falls into the "Felony Other" category of Table 14, which demonstrates a disparity ratio of 3.97 for Black children. *Id.*

[8] *See, e.g.*, N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1345-46 (2004) (discussing persistence of perceptions of Black criminality and Black men as sexually predatory).

In *State v. Bassett*, our supreme court recognized that the exercise of discretion with high stakes (binary choice of death in prison versus possibility of release) produced the "unacceptable risk that children undeserving of a life without parole sentence will receive one." 192 Wn.2d 67, 89-90, 428 P.3d 343 (2018). Decline requires the high stakes binary choice between treating a child as a child, or as an adult subject to the full panoply of adult punishment. The observed race disproportionality in decline, not explainable by criminal history and offense type, shows that discretion exercised at decline produces the unacceptable risk that race plays too great a role. These data also strongly indicate that if Keonte were white, his chances of remaining in juvenile court would have been much greater. This should be enough to show prejudice.

A. This Court's Direction from *Miller* that Trial Courts Account for Adultification Bias Applies Equally in Discretionary Decline.

This Court in *Miller* instructed trial courts to account for adultification bias when sentencing children of color in adult

court to mitigate the possibility that their race may result in a harsher sentence. 21 Wn. App. 2d at 266. This Court should give the same instruction to courts conducting a decline hearing involving a child of color. Various *Kent* factors ask courts to consider crime-related characteristics that invite operation of adultification bias or child-related characteristics that do not account for the systemic racism of the criminal legal system.

Kent factor 2 requires courts to consider whether the alleged offense was committed in an aggressive, violent, premediated, or willful manner. *Kent*, 383 U.S. at 567. Studies have demonstrated that Black children are perceived as older, less innocent, and more culpable than any other racial group, Goff, *supra*, at 539-540, which may lead to courts viewing conduct by a Black child as *more* aggressive, violent, or willful than that of a white counterpart.

Under *Kent* factor 7, courts consider the "record and previous history of the juvenile," including contact with law enforcement agencies, *State v. Furman*, 122 Wn.2d 440, 447,

858 P.2d 1092 (1993), but do not account for disproportionate law enforcement actions against Black children at every step of the juvenile legal system. *See generally* Juvenile Report, *supra*, at 1-2, 12-14, Appx A. Considering a Black child's history in the justice system without recognizing that the system operates in a racially disparate manner tips the scale towards decline before the child steps into court.

To counteract adultification bias, Washington courts should explicitly address disproportionality in discretionary decline. Missouri has taken remedial steps by instructing judges to consider "racial disparity in certification" when making a transfer determination. Mo. Ann. Stat. § 211.071-6(10). This "encourage[s] judges to consider the potential for such [racial] disparities to have negative effects on youth at earlier points of contact…and to be mindful of propagating such disproportionality when making their transfer decisions." Amanda NeMoyer, *Kent Revisited: Aligning Judicial Waiver Criteria with More Than Fifty Years of Social Science*

Research, 42 Vt. L. Rev. 441 (2018). This instruction requires courts to engage directly with race bias in the criminal legal system and, with proper consideration, may lead to a decrease in cases where race plays an improper role in decline decisions. *See id*. at 474-75. This Court should instruct lower courts to consider adultification bias in *Kent* factor 2 and the race disparities in our criminal legal system in assessing a child's history in *Kent* factor 7.

B. Advances in Juvenile Brain Science Should Guide Courts' Interpretation of *Kent* Factor Six.

Kent was decided long before advances in neuroscience demonstrated that all children are biologically different than adults in ways that directly impact behavior and decision-making—no matter their specific life circumstances. NeMoyer, *supra*, at 442-47 (explaining outdated assumptions about children on which juvenile courts were originally based). Since then, we have also come to understand that a child's individualized circumstances, such as trauma and family

situations, may further impact development and therefore support retaining jurisdiction of a child in juvenile court. *See* NeMoyer, *supra*, at 472. Under factor 6, courts consider "the sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living." *Kent*, 383 U.S. at 567. Because of what we now know, courts should decouple consideration of a child's "maturity and sophistication" from the "consideration of the home, environmental situation, emotional attitude, and pattern of living" because these considerations assess different aspects of a child's circumstances.

Like *Kent* factors 2 and 7, the consideration of "sophistication and maturity" in factor 6 creates the potential for adultification bias to infect the decline decision, both because Black boys are perceived as less innocent than white children, Goff, *supra*, at 529, and because they are consistently perceived as chronologically older than their white peers, *id.* at 532.

Further, when properly understood through the lens of brain science, "maturity and sophistication" are better understood as the "immaturity, impetuosity, and failure to appreciate risks and consequences" that courts must consider when sentencing a child. *Houston-Sconiers*, 188 Wn.2d at 23 (quoting *Miller*, 567 U.S. at 477). Ensuring that *Kent* factor 6 accounts for brain science allows courts to "better incorporate modern understanding of youth, their behaviors, and the best ways to effectively facilitate their development into healthy, prosocial adults." Frank W. Putnam, *The Impact of Trauma on Child Development*, 57 Juv. & Fam. Ct. J. 1, 7, 11 (2006) (history of trauma has long-term negative impacts on youth's neurological and psychosocial development). With this developmentally appropriate lens, courts are directed to consider a characteristic that all children possess—immaturity and impetuosity—rather than characteristics they innately lack—maturity and sophistication. *See Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

When considering a child's "home, environmental situation, emotional attitude and pattern of living," *Kent*, 383 U.S. at 567, courts should also consider a child's history of trauma. This approach (1) recognizes that trauma further impedes adolescent brain development; (2) assesses whether the young person's trauma may be better addressed in juvenile court; and (3) reduces the likelihood that a child's behavior will be understood as showing a lack of remorse, because trauma causes emotional numbing.

Considering a child's environment and family circumstances to explicitly include neglect and trauma ensures the decline analysis remains rooted in the impacts of trauma rather than blaming the child for circumstances outside of his control. *See Miller*, 567 U.S. at 477 (sentencer must consider "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional" to prevent imposition of same sentence on a "child from a stable household and the child from a chaotic

and abusive one"). Courts must address a child's history of trauma because of "[t]he long-term negative impacts of childhood trauma on neurological and psychosocial development." NeMoyer, *supra*, at 472 (citing Putnam, *supra*, at 1, 7, 11).

Consideration of a child's history of neglect or abuse also encourages courts to consider whether the child could be better treated in the juvenile system[9] because those with such history "would likely be further traumatized by involvement in the criminal system and would likely benefit from specialized, trauma-informed services provided in the juvenile system." NeMoyer, *supra*, at 469. Because justice-involved youth have high levels of experience with these issues, *id.* at 472, it is

[9] California, Illinois, and New Jersey legislatures have adopted specific transfer criterion dedicated to a youth's history of neglect or abuse for discretionary transfers. *See* Cal. Welf. & Inst. Code § 707(a)(2) (2017); 705 Ill. Comp. Stat. 405/5-805 (2017); N.J. Stat. Ann. § 2A:4A-26.1(3) (2017).

particularly important that judges be required to explore trauma history as part of their consideration of factor six.

Finally, consideration of a child's environment and family circumstances helps prevent an assumption that children lack empathy and remorse if they fail to outwardly express those emotions.[10] "[Trauma] often include[s] emotional numbing, which may develop to protect the child…avoid[] the painful emotions associated with past trauma; however, juvenile justice personnel may view this emotionlessness as a *lack of empathy or remorse or detachment* when evaluating a youth's demeanor." *Id.* at 468-469 (citing Patricia K. Kerig & Stephen P. Becker, *From Internalizing to Externalizing: Theoretical Models of the Processes Linking PTSD to Juvenile*

[10] *See id.* at 468 ("Research investigating the effects of trauma on youth has consistently revealed a link between trauma exposure and delinquency…." (citing Patricia K. Kerig & Stephen P. Becker, *Posttraumatic Stress Symptoms Are Associated with the Frequency and Severity of Delinquency Among Detained Boys*, 40 J. Child & Adolescent Psychol. 765, 768-69 (2011))).

Delinquency, *in* Posttraumatic Stress Disorder (PTSD): Causes, Symptoms, and Treatment 33, 37, 43, 58 (Sylvia J. Egan ed., 2010)). With this lens, courts can address trauma exposure and how it might contribute to delinquency rather than focusing on a perceived lack of empathy.

This Court should instruct trial courts to consider the potential for adultification bias when conducting discretionary decline hearings for children color. *See, e.g.*, *Miller*, 21 Wn. App. 2d at 265-67. Instructing courts to apply *Kent* factors 2, 6, and 7 through the lens of juvenile brain science will also help mitigate the improper influence of adultification bias, and will harmonize discretionary decline with how neurobiological differences of children are considered at sentencing.

III. Additional Procedural Rules Will Mitigate the Adultification of Black Children at Sentencing and Will Result in Fairer Sentences for All Children.

This Court should give further guidance to sentencing courts, building on its important guidance in *Miller* to account for adultification bias. Keonte has raised the constitutionality of

his sentence under RAP 16.4(c)(2). PRP at 8, 10, 13-47. Even though he challenged his sentence on direct appeal, collateral review is warranted because the trial court failed to adhere to the strictures of *Houston-Sconiers*. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999), *as amended* (June 30, 1999) (issue raised on direct appeal may be addressed if the ends of justice would be served by reexamining the issue, and if error caused prejudice). A sentencing court is constitutionally required to account for each *Houston-Sconiers* factor.[11] Here, the trial court considered only his immaturity and impetuosity, and that analysis is likely colored by adultification bias. And without a robust record to review, it is impossible to tell whether the sentencing court actually

[11] Courts must consider "(1) mitigating circumstances of youth, including…immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's environment and family circumstances, the juvenile's participation in the crime, or the effect of familial and peer pressure; and (3) how youth impacted any legal defense, [and] any factors suggesting that the child might be rehabilitated." *Houston-Sconiers,* 188 Wn.2d at 23.

considered and properly weighed the other *Houston-Sconiers* factors, or whether race may have played an impermissible role.

Keonte can demonstrate by a preponderance[12] that had the sentencing court actually weighed every *Houston-Sconiers* factor and been mindful of adultification—which is now required under this Court's decision in *Miller*[13]—he would have received a lower sentence.

A. Sentencing Data Shows that Children Continue to Receive Sentences in the Adult Standard Range, with the Impact of Lengthy Incarceration Falling Disproportionately on Black and Brown Children.

Despite the extraordinary discretion given to sentencing courts by *Houston-Sconiers*, most children declined to adult

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[12] *In re Pers. Restraint of Crabtree*, 141 Wn.2d 577, 587, 9 P.3d 814 (2000); *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992).

[13] This basis alone meets the "interests of justice" standard for addressing an issue raised on direct appeal. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013) (interests of justice are served if there has been "an intervening change in the law"). *Miller* amounts to an intervening change in the law that explicitly instructed trial courts to account for race when sentencing Black and brown children. 21 Wn. App. 2d at 266-67.

court still receive standard range sentences. Washington sentencing data shows that children sentenced in adult court often receive standard range sentences, even though courts have discretion to depart from the SRA based on the mitigating qualities of youth. *Houston-Sconiers*, 188 Wn.2d at 21. Between 2018 and 2021, 161 children were declined to adult court.[14] During this same period, forty-eight people received

[14] Decline data calculated from the Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2021, 70 (2021) [hereinafter Statistical Summary], https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2021.pdf; Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2020, 72 (2020), https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2020.pdf; Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2019, 71 (2019) https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2019.pdf; Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing, Fiscal Year 2018, 71 (2018), https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2018.pdf.

mitigated sentences based on age.[15] This figure could include children, young adults,[16] or elderly offenders. Even assuming all forty-eight were children whose sentences were mitigated based on age,[17] the most conservative assumption is that less than one third of declined youth received exceptional sentences downward based on age after *Houston-Sconiers*.

One possible explanation for this is "anchor bias"—where reliance on an initial starting value affects a decisionmaker's ability to objectively consider new information in decision-making. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1128 (1974). Anchor bias has been shown to

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[15] Mitigated sentences calculated from the Washington Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing Fiscal Years 2018-2021. 2021 Statistical Summary at 61; 2020 Statistical Summary at 64; 2019 Statistical Summary at 63; 2018 Statistical Summary at 62.
[16] *See State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015).
[17] A perfect comparison of the data sets is not possible because declination and sentencing do not necessarily take place during the same fiscal year.

impact judicial decision-making in sentencing. *See, e.g.*, Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. Applied Soc. Psychol. 1535 (2001). Research shows that many judges adhere to guidelines in discretionary sentencing schemes, suggesting judges may experience anchor bias when imposing sentences. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 525-26 (2014). In Washington, although sentencing judges have discretion to give mitigated sentences, data suggests they may be anchored to the SRA.

Even where sentencing courts exercise their discretion to go below the SRA range, the empirical literature discussed in Part I suggests that white children more likely will benefit from the exercise of discretion under *Houston-Sconiers*, whereas Black children will not. Adultification bias, as well as other

implicit racial bias, likely influences how judges consider the *Houston-Sconiers* factors.

Perceiving Black children as more adult, more culpable, and less human negates protections for children removed from the juvenile system and prosecuted in adult court. In one study, a researcher surveyed 735 white Americans divided into two groups, giving them a factual scenario involving a 14-year-old defendant with prior juvenile convictions who was convicted of rape and was being considered for a life sentence without the possibility of parole. Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, 7 PLOS ONE at 2 (2012), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.003668. In one group, a male defendant was described as white; in the other, Black. *Id.* Those in the group with the Black defendant expressed significantly more support for life without parole sentences for juveniles, and perceived juvenile defendants overall as more similar to adults in blameworthiness. *Id.* at 2-3. Sentencing data from both the

United States as a whole and in Washington confirm that juveniles may be particularly vulnerable to implicit racial bias both individually and systemically. *Id.* at 4; *see also* Kristen Hennings, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 Cornell L. Rev. 383, 420-22 (2013) (studies have found evidence of bias in perceptions of culpability, risk of reoffending, and deserved punishment of youth when the decision-maker explicitly knew the race of the offender).

In *Anderson*, the concurrence in dissent highlighted how facially neutral factors—like the mitigating qualities of youth—can be unevenly applied based on the defendant's race: the same set of facts can be a mitigator for one individual and an aggravator for another. *Anderson*, 200 Wn.2d at 311-14 (Yu, J., concurring in dissent) (discussing how 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).

When anchor bias compounds the effects of adultification bias, Black children are at a higher risk of receiving more severe sentences than white children in adult court.

B. In Implementing the Presumption of a Mitigated Sentence, Courts Should Anchor a Sentence Between the Juvenile Range and Low End of the Adult Range, and Make Written Findings to Enable Meaningful Appellate Review.

To counteract anchor bias and adultification bias, courts should presume a mitigated sentence for a child sentenced in adult court, with the state bearing the burden to demonstrate youth was not a factor in the crime. PRP at 30-47. The defense must still present mitigating evidence of youth under *Houston-Sconiers* as relevant to the extent of the downward departure. However, by presuming a mitigated sentence and placing the burden on the state to prove that a standard range sentence is warranted, the court acknowledges that children are different, and only in rare cases should children receive an adult sentence.

This Court should give additional guidance to trial courts implementing the presumption of a mitigated sentence, given the empirical research related to adultification and anchor bias.

First, because mitigation is presumptively warranted, trial courts should routinely consider the JJA range along with the SRA range. Without simultaneous consideration of the JJA, research on anchor bias demonstrates that a sentencing court is far more likely to be anchored to the higher adult range. Consideration of a sentence that falls between the juvenile sentencing range and the low end of the SRA range helps account for anchor bias and gives the sentencer a meaningful reference point for a downward departure, and a more appropriate proposed sentencing range for children in adult court that accounts for the mitigating qualities of youth.[18]

[18] In Keonte's case, the sentencing court would have considered a range of 129 weeks (high end of juvenile range) to 111 months (low end of adult range).

Second, trial courts should be required to enter written *Houston-Sconiers* findings to protect a child's constitutional right to be protected from disproportionate sentencing. *Houston-Sconiers*, 188 Wn.2d at 21, 23. Though courts are required to consider all of the mitigating qualities of youth, *id.*, there is no requirement for that consideration to be put into written findings. To date, our supreme court has expressed a preference for written findings to ensure consideration of the constitutionally required *Miller* factors and to facilitate appellate review. *State v. Ramos*, 187 Wn.2d 420, 444 387 P.3d 650 (2017). These same considerations animated *Kent*'s requirement for written findings in the discretionary decline context. Written findings help ensure careful consideration of all the *Kent* factors and a record that permits meaningful review. *Kent*, 383 U.S. at 541, 560-61.

Keonte's case illustrates that without the requirement of written findings like in the decline context, the constitutional protections against disproportionate punishment may not be

fully realized. The record demonstrated only that the first *Houston-Sconiers* factor had been considered;[19] without detailed written findings, "[t]he lack of discussion leaves [an appellate] court unable to determine whether the *Houston-Sconiers* factors were meaningfully considered." *State v. Smith*, noted at 14 Wn. App. 2d 1025, at *9 (2020) (Glasgow, J., dissenting in part). Requiring written findings helps serve as a check on implicit racial biases inherent in discretionary sentencing.

CONCLUSION

This Court should give further guidance to lower courts to counteract adultification bias in both the decline and

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[19] All the record shows beyond consideration of the first *Houston-Sconiers* factor is that the sentencing court read all of the mitigation materials; despite the court's assurances that it had "considered all of it," PRP at Appx D (VRP at 35), there is no way to discern *how* or *whether* the additional mitigating evidence was considered.

sentencing context, ensuring all children receive the constitutional protections guaranteed by their youth.

RAP 18.17 Certification

Undersigned counsel certifies that, pursuant to RAP 18.17(b), this brief contains 4,999 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).

DATED this 19th day of December, 2022.

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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on December 19th, 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 19th day of December, 2022.

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