Supreme Court No. 101971-8
(COA No. 83765-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

K.J.B.,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

K.J.B., petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

K.J.B. seeks review of the Court of Appeals decision dated April 10, 2023, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Must the juvenile court consider the role race plays in disproportionate sentencing before imposing the harshest possible sentence for violating an Option B sentence?

2. Does imprisonment for technical violations of an Option B juvenile sentence conflict with the legislature's intent to keep youth in the community?

D. STATEMENT OF THE CASE

K.J.B., a Black youth, first entered the juvenile court system at thirteen. RP 148. He engaged in a series of escalating crimes with other youth and young adults. RP 14. The police arrested K.J.B. for first-degree robbery when he was fourteen. RP 19.

K.J.B. had supportive parents. RP 5. After his arrest, K.J.B. returned home and was ultimately removed from electronic home monitoring. RP 5, 21.

K.J.B.'s family teetered on the edge of poverty. RP 33. Communication with K.J.B. was through his parents, as he could not afford a phone. *See, e.g.,* RP 33. Their phone would often get disconnected. RP 91.

School was not easy. K.J.B. had an Individual Education Plan (IEP). RP 103. His disabilities were amplified when the world became virtual because of

Covid-19. K.J.B. had difficulties working with computers and needed to do his work on paper. RP 27.

K.J.B. struggled to find a school that would accommodate his disability. RP 103. Even though an IEP requires the government to provide children with specialized education, K.J.B. was placed on a district waiting list to do homeschooling. RP 103.

These challenges were known before the juvenile court accepted K.J.B.'s guilty plea and the parties' recommendation for an Option B sentence. RP 75. As an Option B sentence, the court suspended 52 to 65 weeks of incarceration and imposed one year of community supervision. RP 77.

Life continued to improve for K.J.B. after sentencing. His parents enrolled him at Youth Link, where he could watch live classes and work with a

special education teacher. RP 27. He found a mentor who provided him with resources and a phone. RP 74.

K.J.B. became a father and developed a deep emotional attachment to his infant daughter. RP 169. He participated in parenting classes. RP 88. He took his role as a father seriously. *Id*.

Then, K.J.B.'s mentor left for a new job. RP 86. K.J.B.'s natural distrust for outsiders took over. *Id*. K.J.B. engaged in the Credible Messengers class, a program designed to disrupt the prison-to-graveyard pipeline.[1] But he did not want to participate in new programs with the new probation officers. *Id.*

Probation stated that K.J.B. felt frustrated by not being able to enroll in school. RP 86. The Covid-19 pandemic amplified his struggles. RP 27. He wanted to

[1] https://northwestcrediblemessenger.org/

enroll in regular classes but was told the Auburn school district could not meet his needs. RP 134.

Instead, K.J.B. signed up for an online school through Youth Source that required him to take tests that would count towards a GED or diploma. RP 112. As before, he had trouble with his computer. The school could not verify K.J.B. completed the tests, setting up a new account for him weeks after enrolling. RP 118.

Other than cannabis, K.J.B. stayed away from drugs. He was ordered to get a drug evaluation, which he did. RP 130. His parents did not support the court forcing him to be treated for drug use, as he had no drug dependencies. RP 93. The evaluation recommended level one out-patient treatment, the lowest level of treatment. RP 112.

For the two-plus years K.J.B. was under pre-trial monitoring and his Option B sentence, he committed

no further crimes. Instead, he remained with his family, committing to caring for his daughter. RP 169. He completed a drug evaluation and remained enrolled in school, although he made little progress with his education. RP 130, 112.

And even though K.J.B. had turned his life around, focusing on his family rather than delinquent activity, the court determined it needed to imprison K.J.B. to hold him "accountable." RP 167. It decided his lack of progress with school and his incomplete drug treatment class required prison and revoked his Option B sentence. RP 171. The Court of Appeals held it could not conclude the revocation was based on untenable reasons or outside the range of acceptable choices and affirmed the juvenile court decision. App. 1.

E. ARGUMENT

The over-incarceration of youth is an issue of substantial public interest that this Court should address. RAP 13.4(b)(4). When the juvenile court determined that K.J.B., a Black youth who had stayed out of trouble for over two years, had to be imprisoned, it disrupted all of the efforts K.J.B. had taken to rehabilitate himself. Black youth like K.J.B. are statistically likely to receive prison even when other options are available. It was, therefore, incumbent on the juvenile court to determine whether its decision to revoke K.J.B.'s Option B sentence resulted from bias. To address the juvenile court's misinterpretation of accountability and to require courts to consider the role their bias plays at sentencing, this Court should take review. RAP 13.4(b)(4).

1. Keeping youth in the community promotes community safety and rehabilitation.

The Juvenile Justice Act protects youth against many consequences of an adult conviction. *Monroe v. Soliz*, 132 Wn.2d 414, 420–21, 939 P.2d 205 (1997). Unlike the Sentencing Reform Act, which focuses on punishment, the Juvenile Justice Act promotes rehabilitation and reintegration into society. *State v. S.J.C.*, 183 Wn.2d 408, 419, 352 P.3d 749 (2015). The Juvenile Justice Act's purpose is to respond to the needs of the youth. *State v. Bennett*, 92 Wn. App. 637, 641, 963 P.2d 212 (1998); RCW 13.40.010.(2).

Because the purposes of the Juvenile Justice Act are remedial rather than punitive, "full and total" compliance with court orders is not always required, even where there is a willful failure to comply. *J.A.*, 105 Wn. App. at 887. Such a "draconian interpretation" defeats the purposes of the Juvenile Justice Act. *Id.*

Option B sentences are community-based sentences that allow a court to avoid imprisoning a youth. RCW 13.40.0357. When a court imposes an Option B sentence, it suspends the standard range and imposes a local sentence, which can include educational and treatment requirements. *Id.*

2. The role of racial discrimination in sentencing must be considered before imprisoning a youth of color.

The Court of Appeals recognized the role race and bias play in the criminal legal system. App. 21. The court also acknowledges that juvenile courts "must be aware of how its sentence will impact disproportionate punishment." *Id.* at 24 (citing *State v. Quijas*, 12 Wn. App. 2d 363, 373, 457 P.3d 1241 (2020)). But while the Court of Appeals sees the benefit of juvenile courts making a record of how it accounts for race, it

determined courts need not make a record of how it considered race. App. 24.

The role of racial discrimination in the criminal legal system is endemic. Permitting racial prejudice in the jury system damages "'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *State v. Bagby*, 200 Wn.2d 777, 787, 522 P.3d 982 (2023) (quoting *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Courts have an unequivocal duty to reduce and eradicate racism and prejudice and to develop the legal system into one that serves the ends of justice. *Henderson v. Thompson*, 200 Wn.2d 417, 421, 518 P.3d 1011 (2022) (citing Open Letter from

Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020)).[2]

The problem of discrimination is acute in juvenile courts. It is uncontroverted that youth of color are disproportionately prosecuted and punished. Heather Evans and Steven Herbert, *Juveniles Sentenced as Adults in Washington State*, 2009- 019, University of Washington, 11 (June 14, 2021).[3] In King County, where this case originated, Black youth are detained in grossly disproportionate numbers. King County Government, *Zero Youth Data Detention Dashboard, Leading with Equity* (updated June 28, 2022).[4]

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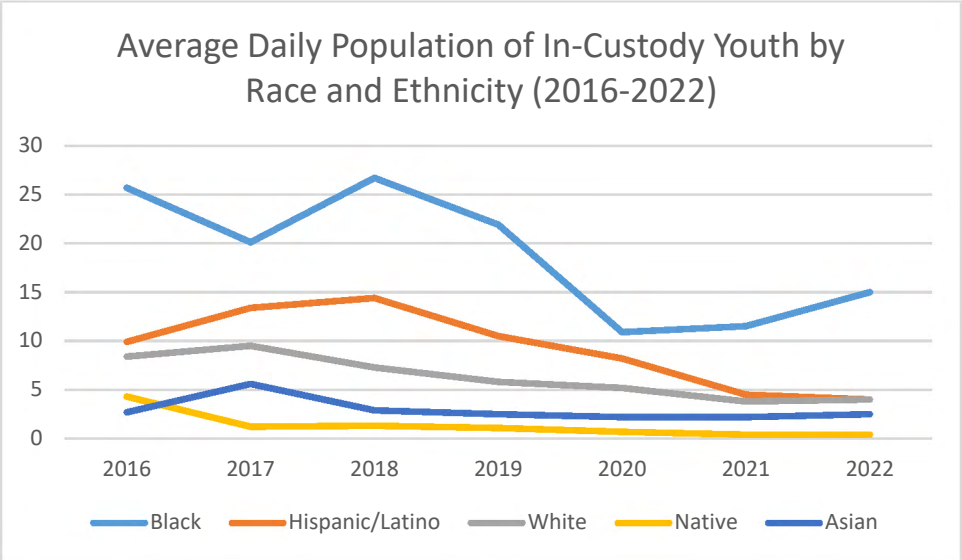
[2]http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

[3] https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf

[4] https://kingcounty.gov/depts/health/zero-youth-detention/dashboard.aspx



King County, *Zero Youth Detention Dashboard*.

Many factors contribute to this disparity. Police are more likely to use force against Black people, especially children. Center for Policing Equity, *The Science of Justice: Seattle Police Department National Justice Database City Report* 20 (January 2021). Of 44 incidents between 2014 and 2019 where police used force against a child 14 years old or younger, 23 cases involved Black children. *Id.* Black people were involved in 59% of incidents where force was used against young

people aged 15 to 21 — 332 of a total of 563 incidents of force over five years. *Id*.

Black people are more likely to live in poverty, as K.J.B. did when the court imprisoned him. U.S. Dep't of Health and Human Services Office of Minority Health, *Profile: Black/African Americans* (updated October 12, 2021).[5] Black youth are also more likely to attend schools with zero-tolerance policies. Barbara Robles-Ramamurthy and Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, J. Amer. Acad. Psychiatry Law 47, Vol. 7, Issue 1 4 (2019).[6] Given the racial disparities within the justice system, minority children often face parental incarceration and family separation. *Id*.

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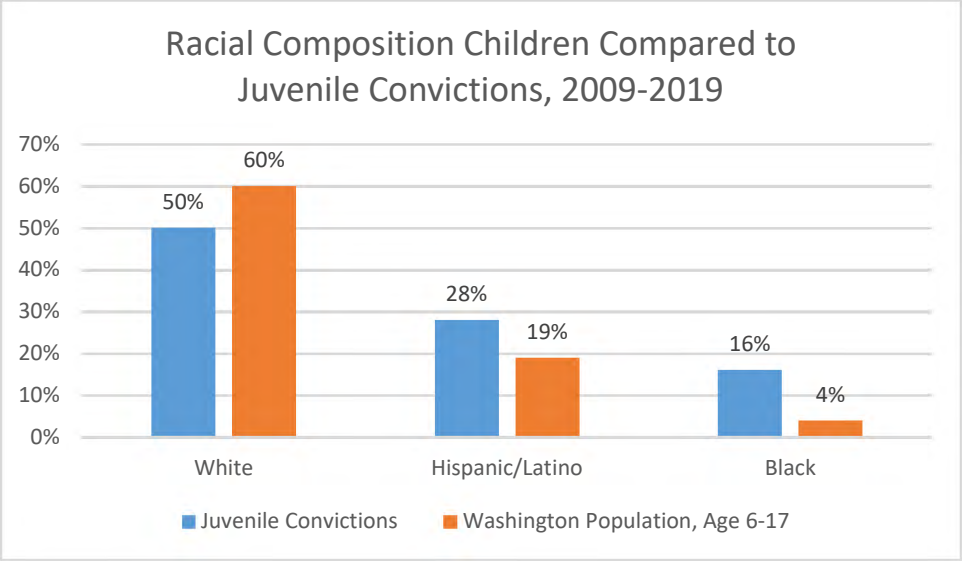
[5] https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlID=61

[6] http://jaapl.org/content/jaapl/early/2019/02/13/JAAPL.003828-19.full.pdf

All of these factors lead to greater incarceration rates for youth of color. When compared to the racial composition of youth aged 7 to 17, white and Asian children are underrepresented, while Black and Latino children are overrepresented. Evans and Herbert, *Juveniles Sentenced as Adults*, at 11.[7]



Some of these disparities are also attributable to how juvenile justice officials frame the social

[7] https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf

circumstances from which a youth emerges. Evans and Herbert, *Juveniles Sentenced as Adults,* at 5. This framing has very real consequences for the decision-making process of the court. There is considerable evidence that bias results in harsher dispositions for children of color. *State v. B.O.J.*, 194 Wn.2d 314, 332, 449 P.3d 1006 (2019) (González, J. concurring) (citing Wendy S. Heipt, *Courts Igniting Change: Girls' Court: A Gender Responsive Juvenile Court Alternative*, 13 Seattle J. Soc. Just. 803, 816 (2015)).

Many judicial officers consider white youth less threatening and more susceptible to treatment. Evans and Herbert, *Juveniles Sentenced as Adults*, at 5. In contrast, youth of color are seen as products of broken families, more adult-like and thus more culpable for crime, less amenable to rehabilitation, and more threatening. *Id.*; *see also B.O.J.*, 194 Wn.2d at 332

(González, J. concurring). These misperceptions and the inclination toward harshly punishing youth of color have real-world results, from charging to punishment decisions.

Faced with this stark reality, it is insufficient for the Court of Appeals to refer to better practices as it did here. App. 24. This Court should reject the frustration expressed by the Court of Appeals in answering how discrimination must be addressed. *Id*. Clearly, courts must confront their own bias. This can only be achieved when courts examine their bias on the record. *Quijas*, 12 Wn. App. 2d at 373. Confronted with the clear evidence of bias in juvenile sentencing, it is not enough to hope for change. This Court should accept review to make explicit that until the legal system has achieved its goal of justice for all, it must continue to confront its own bias. Because this is an

issue of substantial public interest that should be determined by this Court, review should be granted. RAP 13.4(b)(4).

3. Accountability did not require imprisoning K.J.B. for his school issues or not completing a low-level drug treatment class.

The Court of Appeals held that the juvenile court did not abuse its discretion when it imprisoned K.J.B. for not completing his school obligations or low-level drug treatment class. App. 20-21. It noted K.J.B. had two chances to avoid imprisonment. *Id*. at 23. But for youth, accountability does not require imprisonment. To stop the youth prison pipeline, youth must remain in the community. The draconian decision to imprison a youth for school and drug-treatment issues increases recidivism and destroys all the progress youths make in their lives. This issue is a question of substantial importance this Court should review. RAP 13.4(b)(4).

a. K.J.B. had been largely successful while on probation, even if he had trouble attending school and drug-treatment classes.

Prison seemed inevitable for K.J.B. before his arrest for robbery in the summer of 2020. He had committed escalating crimes, including first-degree theft, fourth-degree assault, and attempted robbery. RP 14. He stopped coming to court and in Pierce and King County. *Id*. It seemed unlikely that K.J.B.'s criminal activity would cease.

But somehow, K.J.B. turned his life around. He became a father and developed an excellent bond with his child. RP 53, 129. His living situation became stable. RP 91. His parents recognized the turnaround, telling the court he was doing everything a 16-year-old could to improve his life. RP 129.

K.J.B. learned accountability, committing no new crimes or other delinquent acts. RP 153. He remained

in contact with the courts and probation. *Id*. Given his start, these were remarkable achievements.

Even so, K.J.B. continued to struggle. He had difficulty finding a school that would work with his learning style and his disability, which the pandemic exacerbated. RP 74.

K.J.B.'s poverty multiplied these challenges. He relied on his parents for communication. RP 91. Even so, he remained in contact with probation, speaking with them about once a week and sometimes reaching out independently. *Id*.

Despite these insurmountable barriers, K.J.B. tried to figure out his school problems. He wanted to enroll in a previously attended school but was denied admission because they lacked the resources to comply with his IEP requirements. RP 103. K.J.B.'s parents enrolled him in an online school where he had to

complete multiple online tests. RP 105. This program lacked structure other than for K.J.B. to contact his case manager. RP 112-13. Like his past school experiences, this lack of structure created problems. Because K.J.B. lacked computer skills, he failed to demonstrate progress with his new school. RP 134.

Although drugs were not alleged to have played a role in K.J.B.'s prior delinquency, the court required a drug evaluation and testing. K.J.B. never tested positive for an illegal drug, although the tests showed he used cannabis, which is not allowed by minors. RP 90. K.J.B. completed the required evaluation, which recommended level-one education classes. RP 86. K.J.B. had not finished these classes when the government moved to revoke his sentence.

These violations did not require imprisoning K.J.B. The Juvenile Justice Act does not require full

and total compliance. *J.A.,* 105 Wn. App. at 887. In fact, it is "draconian" to do so. *Id.* Instead, juvenile justice requires understanding how the juvenile mind works and acknowledging that no youth's progress will be perfect. When exacerbated by poverty and discrimination, a juvenile court cannot imprison a youth doing everything they can to reform their life.

The juvenile court focused on K.J.B.'s failures rather than his success, violating the purposes of the Juvenile Justice Act. *See also*, *B.O.J.*, 194 Wn.2d at 332 (Gonzalez, J. concurring). Even though K.J.B.'s school progress and completion of a drug education class were not perfect, he had achieved so much in his year of supervision that it was unfair to deprive him of his liberty. This Court should accept review to make clear that this practice conflicts with legislative intent

and the purposes of the Juvenile Justice Act. RAP 13.4(b)(4).

b. Covid-19 disrupted K.J.B.'s attempts to comply with the court's requirements.

The Court of Appeals does not address how Covid-19 impacted K.J.B.'s progress, except in passing. App. 18. But ignoring the pandemic's impact on America's youth is unfair. Schools have faced severe staff shortages, absenteeism, and school closures. Megan Kuhfeld, James Soland and Karyn Lewis, *Test Score Patterns Across Three COVID-19-impacted School Years*, (January 2022).[8] The cumulative effect on students has been considerable. *Id.*

These issues were exacerbated for low-income families and youth with disabilities, like K.J.B. Jenn Smith, Jeanie Lindsay, Monica Velez, and Dahlia

[8]https://edworkingpapers.com/sites/default/files/ai22-521.pdf

Bazzaz, *Another Pandemic School Year Ends. What Have We Learned So Far?* The Seattle Times (June 19, 2022).[9] Families experienced food insecurity. New York University, *COVID-19 Pandemic Exacerbated Food Insecurity, Especially in Families with Children* (September 22, 2021).[10]

Race played a factor in how people navigated the pandemic. Like K.J.B.'s family, Black and other people of color were unequally affected by the unintended economic, social, and secondary health consequences of COVID-19 mitigation strategies. Center for Disease Control and Prevention, *Introduction to COVID-19 Racial and Ethnic Health Disparities* (December 10,

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[9] https://www.seattletimes.com/education-lab/another-pandemic-school-year-ends-what-have-we-learned-so-far/

[10] https://www.nyu.edu/about/news-publications/news/2021/september/pandemic-food-insecurity.html

2020).[11] According to CDC data, age-standardized data show that "Hispanic, Black, and AIAN (American Indian and Alaska Native) people are about twice as likely to die from COVID-19 as their White counterparts and that Hispanic and AIAN people are at one and a half times greater risk of COVID-19 infection than White people." Latoya Hill Follow and Samantha Artiga, *COVID-19 Cases and Deaths by Race/Ethnicity: Current Data and Changes Over Time*, Kaiser Family Foundation (February 22, 2022).[12]

K.J.B. did not escape these stressors. Before sentencing, K.J.B.'s lawyer explained how the pandemic had caused K.J.B. to fall even further

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[11] https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html

[12] https://www.kff.org/coronavirus-covid-19/issue-brief/covid-19-cases-and-deaths-by-race-ethnicity-current-data-and-changes-over-time/

behind. RP 74. Probation recognized that "working" with youth during the pandemic was a "vague" term. RP 10. Youth Source also told the court how it had slowed everything down. RP 52.

Yet when the court determined it had to revoke K.J.B.'s sentence, it did not refer to the pandemic. Indeed, it was still in full effect as K.J.B. attended court from his home. RP 109. His lawyer was also outside the courtroom. *Id*. Nor did the Court of Appeals address it in its analysis.

In accepting review of whether the juvenile court acted properly when it imprisoned K.J.B., this Court should address how the pandemic has impacted youth, especially youth of color. This issue is of substantial public interest. RAP 13.4(b)(4).

c. Imprisoning K.J.B. for missing school and not completing a drug-treatment court was wrong.

Even if the juvenile court had grounds to sanction K.J.B. for missing school and not completing his drug treatment class, it should not have revoked his sentence. This Court should accept review of whether technical violations of an Option B sentence warrant imprisonment. RAP 13.4(b)(4).

The Court of Appeals determined that missing school and not completing a low-level drug treatment course were not technical violations of the Option B sentence and authorized imprisonment. App. 18. But this Court should be mindful of the many other options provided in RCW 13.40.200 and RCW 13.40.0357, including local sanctions. Here, the court had never imposed sanctions for K.J.B.'s difficulty completing school or attending drug education classes before imprisoning him. RCW 13.40.0357. K.J.B.'s violations

did not require imprisoning him. This Court should accept review to determine when they do.

Option B sentences are not an all-or-nothing alternative sentencing scheme. RCW 13.40.200. Instead, the legislature has authorized alternative solutions for when a youth is not in compliance, whether willfully or otherwise. *Id*. These options include local sanctions and revocation of the suspended sentence. RCW 13.40.200; RCW 13.40.0357.

Despite so many barriers, K.J.B. succeeded in becoming a law-abiding youth. When the court took those accomplishments away from K.J.B. by imprisoning him, it escalated the likelihood K.J.B. would never escape the cycle of imprisonment. Imprisoning youth dramatically increases the probability they will commit new crimes. Nearly 80 percent of imprisoned youth commit a new crime

within three years of their release from incarceration. Justice Center, *Mission Accomplished? The Changing Landscape of Juvenile Incarceration*, The Council of State Governments.[13] Before a court imprisons a youth, it must consider the long-term implications of its decision. That did not occur here.

Instead of focusing on K.J.B.'s accomplishments, the juvenile court looked to his technical violations of the Option B sentence. Certainly, K.J.B. should have been enrolled in school. But it is questionable how he could have succeeded under his circumstances. K.J.B. appears to have been abandoned by the school system, despite his IEP. RP 143. Rather than remain in a brick-and-mortar school, he enrolled in Youth Source, where he had to submit online tests. RP 105. While

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[13] https://csgjusticecenter.org/wp-content/uploads/2020/02/INFO1_The-Changing-Landscape-of-Juvenile-Incarceration.pdf

online learning may be effective for some youth, this was not a suitable learning method for K.J.B. even before he started his Option B sentence. RP 27. And with K.J.B.'s technology struggles, basing his failure to comply with an online testing structure was error.

Likewise, it was improper to imprison K.J.B. because he failed to complete the level one drug education program. K.J.B. did not have a drug dependency, only using cannabis. RP 86. Despite all of the barriers of the pandemic, K.J.B. got an assessment. RP 112. Further, the evaluation did not recommend significant treatment, instead requiring a level one treatment course. *Id*.

K.J.B.'s parents did not support his attendance in a drug treatment program. RP 92-93. And, of course, as a young person, K.J.B. needed his parent's help

finishing this program. Given his circumstances, this was not a valid reason for the court to imprison K.J.B.

Besides these violations, K.J.B. succeeded with the terms of his Option B sentence. K.J.B. had remained out of trouble for years, no longer participated in delinquent activity, and had become a contributing part of his family.

Of course, K.J.B. had a long way to go. But he was still only 16 years old. Neuroscience research shows the parts of the brain engaged in reasoning and self-control are not fully developed until the mid to late 20s. Lael Chester & Vincent Schiraldi, *Public Safety and Emerging Adults In Connecticut: Providing Effective And Developmentally Appropriate Responses For Youth Under Age 21,* Harvard Kennedy School,

Malcolm Wiener Centre for Social Policy (2016).[14] The delay in fully developing self-reasoning and self-control is especially relevant for youth exposed to trauma, which is especially common among youth of color. Erica Adams, *Healing Invisible Wounds: Why Investing In Trauma-Informed Care For Children Makes Sense,* Justice Policy Institute (2010).[15]

Despite all of the barriers in his life, K.J.B. had taken many positive steps forward. Like all teenagers, especially those in trouble previously, it was an imperfect path. By revoking his Option B sentence, the juvenile court disrupted his rehabilitation, making it more likely that K.J.B. would spend the rest of his life

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[14] https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/young-adult-justice/public-safety-and-emerging-adults-in-connecticut

[15] https://www.ojp.gov/ncjrs/virtual-library/abstracts/healing-invisible-wounds-why-investing-trauma-informed-care

in the criminal legal system. Evans and Herbert, *Juveniles Sentenced as Adults*, at 5. Rather than see K.J.B.'s progress while serving his sentence, the juvenile court looked to his technical violations. This Court should take review to address when imprisonment is proper.

d. The legislature did not intend for accountability to require imprisonment for an unsuccessful Option B sentence.

The Court of Appeals determined that when the juvenile court found accountability required imprisonment, it meant that it had tried community-based alternatives to incarceration that had not worked because K.J.B. was not amenable to treatment in the community. App. 26. This is a flawed analysis. Indeed, K.J.B. was successful in the community. But for systemic flaws, including the failure of the school system to provide him with schooling designed to meet

his needs, he would have done better. K.J.B. did not need to receive at least a year in prison for failing to comply. This Court should review whether the court's interpretation of "accountability" was appropriate or whether the legislature's intent to keep youth in the community was overridden by the decision to imprison K.J.B. RAP 13.4(b)(4).

In imprisoning K.J.B., the juvenile court determined "accountability" meant sanctioning K.J.B. with prison time. The court observed it was focusing on two factors: accountability and keeping K.J.B. in the community. RP 167. It found accountability required imprisonment. *Id.*

To determine whether the juvenile court's application of accountability was wrong, this Court looks to the term's plain meaning in RCW 13.40.010 of that term. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328

P.3d 886 (2014). If the statute is unambiguous, the inquiry ends. *Id.*

This term should not be read in isolation but in conjunction with other modifying terms. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). "A court must not interpret a statute in any way that renders any portion meaningless or superfluous." *Jongeward v. BNSF Ry.*, 174 Wn.2d 586, 601, 278 P.3d 157 (2012).

Accountability is "an obligation or willingness to accept responsibility or to account for one's actions." *Accountability*, Merriam-Webster.com Dictionary, Merriam-Webster.[16] The juvenile structure conforms to this meaning, as the juvenile system's focus on accountability and rehabilitation is distinct from the

[16] https://www.merriam-webster.com/dictionary/accountability. Accessed 28 Jun. 2022.

adult purposes of retribution and punishment. Todd Dowell, *The Juvenile Offender System in Washington State* 2 (2019).

The juvenile court conflated accountability with punishment. By thinking the court was required to punish K.J.B. for his trouble complying with his Option B sentence, the juvenile court mistook its obligations under the Juvenile Justice Act, finding accountability synonymous with punishment and retribution. But these terms have very different meanings. Punishment is "a penalty inflicted on an offender through judicial procedure." *Punishment*, Merriam-Webster.com Dictionary, Merriam-Webster.[17] Retribution is "the dispensing or receiving of reward or punishment

[17] https://www.merriam-webster.com/dictionary/punishment

especially in the hereafter." *Retribution*, Merriam-Webster.com Dictionary, Merriam-Webster.[18]

Punishment and retribution are not synonymous with accountability. A court need not punish a youth to hold them accountable. Here, K.J.B. was held accountable through his guilty plea. RP 71. Even before his adjudication, K.J.B. demonstrated his accountability by returning to court for almost a year. RP 77. Despite the pandemic's hardships, he remained in contact with the court and was on probation, demonstrating accountability for his actions. RP 153. Nor, as the Court of Appeals held, is it permissible to imprison K.J.B. because he was not amenable to all of the Option B sentence conditions. App. 26.

[18] https://www.merriam-webster.com/dictionary/retribution

After requiring K.J.B. to return to court for over two years and watching him mature from a youth who did not care to one responsible enough to care for his child, the court achieved its goal of accountability. Revoking his Option B sentence when it was about to expire did not provide K.J.B. with accountability. Instead, the decision was to punish him for failing to comply fully with the Option B conditions. This decision by the court was erroneous and in contravention of the purposes of the Juvenile Justice Act. It was an abuse of discretion.

"No one is well served by a juvenile justice system that behaves more like the rigid and punitive adult criminal justice system, least of all juvenile offenders." *State v. M.S.*, 197 Wn.2d 453, 475, 484 P.3d 1231 (2021). When the juvenile court misapprehended that it had to revoke K.J.B.'s Option B sentence and

imprison him, it improperly treated K.J.B. more like an adult than a juvenile. The juvenile court's reliance on accountability to revoke K.J.B.'s Option B sentence was wrong. This Court should accept review of this issue of substantial public interest. RAP 13.4(b)(4).

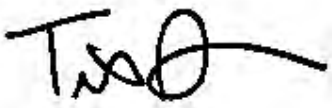
F. CONCLUSION

Based on the preceding, K.J.B. requests that review be granted. RAP 13.4(b).

This petition is 4,515 words long and complies with RAP 18.7.

DATED this 10th day of May 2023.

Respectfully submitted,



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APPENDIX

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4/10/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. K.J.B., Appellant.	No. 83765-6-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, J.P.T. — K.J.B. appeals the juvenile court's revocation of his suspended "Option B" disposition under RCW 13.40.0357, for his noncompliance with the conditions of that disposition. K.J.B. contends the court abused its discretion in revoking his suspended disposition because his violations were merely "technical" in nature and the court did not meaningfully consider mitigating factors, the possibility that its own potential implicit racial bias may have affected the court's judgment, the history of racial disparities in JRA custodial dispositions, or the need for a sanction other than incarceration to remedy racial disparities.

Based on the record before this court, we cannot conclude that the revocation was based on untenable reasons or outside the range of acceptable choices. We therefore affirm.

FACTS

At the age of 14, K.J.B. was convicted of attempted robbery in the second degree, theft in the first degree, and possession of stolen property in the third degree.[1] In June 2020, while K.J.B. was serving a deferred disposition for these crimes, he and a friend assaulted and robbed a man as he was leaving a bank. The State charged K.J.B. with first degree robbery.[2]

In August 2020, the juvenile court released K.J.B. from electronic home monitoring to allow him to get a job and engage with a mentor from Northwest Credible Messengers, an organization whose primary goal is to make connections with youth who, without support, would enter into the criminal justice system.[3] When the court held a review hearing a month later, it learned K.J.B. had neither obtained employment nor connected with a mentor at Credible Messengers. The court approved the recommendation of K.J.B.'s Juvenile Probation Counselor (JPC), Kristin Bennett, to refer K.J.B. to Youth Link, a different mentorship organization, as a way to encourage K.J.B.'s engagement. At this hearing, K.J.B.'s mother reported that K.J.B. would start school on September 9, 2020. The court informed K.J.B. that it expected him to make a connection with Youth Link and to attend school. It scheduled a review hearing for October 1, 2020 to verify his compliance.

At the October 1, 2020 hearing, K.J.B. did not appear and neither his attorney nor the JPC was able to contact him. The State requested a failure to

[1] King County Superior Court No. 19-8-00547-7.
[2] King County Superior Court No. 20-8-00596-9.
[3] NORTHWEST CREDIBLE MESSENGERS, https://northwestcrediblemessenger.org.

appear order and a bench warrant for his arrest, but the court denied this request and continued the hearing for a week. On October 8, 2020, at the rescheduled hearing, the court learned from the JPC that she had had difficulty reaching K.J.B. and that his lack of contact was impeding her efforts to connect him with services. The court also learned that while K.J.B. was enrolled in school, he was experiencing difficulties with his laptop working properly and logging into the school's electronic system. The JPC, K.J.B.'s mother, and the court all acknowledged that many of the difficulties K.J.B. was confronting were not his fault. The court set the next review hearing for October 30, 2020.

At the October 30 hearing, K.J.B.'s outreach worker, Andy Pacificar, reported that K.J.B. had recently begun engaging with him, that he had provided a phone to K.J.B. to ensure they could remain in communication, and that K.J.B. had indicated a desire to make changes. K.J.B.'s mother reported that her son was "doing great" at home, but continued to struggle with school. She stated she was looking to enter K.J.B. into a different school program because of issues she continued to have with his teachers. She also informed the court that K.J.B. was starting a parenting class with his girlfriend to prepare them for the birth of their child. The court ordered the parties to attend a case setting hearing on December 1, 2020.

The next hearing we have in the record occurred on February 26, 2021, at which time K.J.B. pleaded guilty to an amended charge of second degree robbery. K.J.B. admitted that "[o]n June 30, 2020, in King County, WA, I unlawfully and with intent to commit theft participated in taking personal property which was cash from

[T.C.] by the use of force and injury to him. We took the money by hitting and kicking him."

The parties presented the court with a negotiated plea agreement that represented a "package plea" deal for K.J.B.'s two cases. The negotiated plea included the revocation of a deferred disposition in K.J.B.'s 2019 case and a standard range sentence of 52 to 65 weeks in a juvenile rehabilitation facility, to be suspended for 12 months, on the condition that K.J.B. "[e]ngage with Kent Youth and Family, [e]ngage with YouthLinc or equivalent mentorship program per JPC approval, and attend school regularly and without incident." The plea agreement stated that "[t]his negotiated plea agreement contemplates that these latter conditions are of particular importance in complying with the Option B." K.J.B. signed this plea agreement.

Before accepting the recommended disposition, the court noted that the JPC had previously recommended against an Option B suspended disposition and asked her to explain why she had changed her mind. The JPC stated that her previous recommendation was based on K.J.B.'s failure to communicate and engage with his mentor and to attend his parenting classes. In the weeks leading up to this disposition, however, she indicated that K.J.B. had picked up his engagement with Pacificar, attended two parenting classes, and was communicating more consistently with her. Pacificar echoed these sentiments.

The court decided to accept the joint recommendation, explaining that

> Ms. Bennett's former recommendation really gave the court pause about the option B. I think it's fair to say that over the time that this case has been pending, there has not been a level of engagement that I would want to see for the option B until very recently. I'm

> getting this more positive report from Ms. Bennett and Mr. Pacificar. It gives the court a basis on which to conclude that the option B could be successfully completed, as opposed to kind of a more pessimistic outlook.

The juvenile court sentenced K.J.B. to the standard range of 52 to 65 weeks, but suspended it for 12 months. The order included the following finding:

> The court further finds and concludes that the youth is amenable to treatment in the community and that the interests of the community will be furthered by the suspended disposition, *so long as the respondent fully complies with the conditions of supervision imposed in this order.*

(Emphasis added.)

The court imposed a number of conditions with which K.J.B. was required to comply, including maintaining contact with his JPC; living in approved housing; obeying criminal laws; refraining from the possession or use of any controlled substance except by prescription; attending school with no suspensions, expulsions, behavioral referrals, tardiness, or unexcused absences; and submitting to random urinalysis (UA) testing. The court also ordered K.J.B. to obtain a substance use evaluation if any UA was positive and to engage with an approved mentorship program. And as K.J.B. had agreed to do in the negotiated plea agreement, the court ordered him to attend school regularly.

We have no record of what, if any, court oversight K.J.B. had during the eight months between the date of his disposition order in February 2021 and on November 2, 2021, when the court held a review hearing at the JPC's request. At this hearing, the prosecutor represented to the court that "[K.J.B.] is not engaging in any of the services or following through with any of the agreement as agreed upon outlined in his option B suspended sentence." The prosecutor noted that the

State was not moving to revoke the suspended sentence at that hearing, but warned that "if he continues to disregard the agreement that was made for his suspended sentence, the State may note a motion for revocation." The prosecutor asked the court to "remind [K.J.B.] of the benefits of his option B if we could."

The court stated it had received and reviewed a report from K.J.B.'s probation counselor and stated that it "[l]ooks like [she] had quite some contact with [K.J.B.] and his father trying to get this on a better track."[4] JPC Kris McKinney reported that she did not know "where we are," because K.J.B. was neither enrolled in school nor sure about his school status, K.J.B. had refused to engage with any new mentor after his last caseworker had left to take another job, and K.J.B. had tested positive for cannabis, but had failed to follow up with a substance abuse assessment, as required by the disposition order. K.J.B.'s father, who attended the hearing, informed the court that neither parent supported such an assessment.

The court explained to both K.J.B. and his parents that the substance abuse evaluation requirement was mandatory and a "deal breaker" for the court. It also noted that "this can get back on track and everything could ultimately work out well for [K.J.B.] as long as he goes to school and gets that drug and alcohol evaluation completed."

The juvenile court reviewed K.J.B.'s progress six weeks later, on December 14, 2021. The prosecutor who attended this hearing indicated that the State was not asking to revoke the suspended sentence that day, but asked the court to set

[4] None of the probation counselor reports to the juvenile court appear in the record before this court.

a revocation hearing for two weeks later, when the assigned deputy prosecutor would be available. Once again, the court noted it had received and reviewed a report from the JPC, in which she summarized concerns about K.J.B.'s lack of progress, particularly in attending school and obtaining substance use treatment or counseling.[5]

The JPC reported orally at this hearing that she was recommending that K.J.B. obtain outpatient treatment, a recommendation that K.J.B.'s parents apparently resisted. The JPC suggested that an alternative would be for K.J.B. to begin a drug education program through the court and hoped that if K.J.B. started attending school regularly, his substance use would decrease simply because he would be "otherwise occupied." She believed the court needed some assurance that K.J.B.'s drug use was not getting in the way of his success at school.

K.J.B.'s mother reported that she had enrolled her son in an alternative education program at Youth Source to help K.J.B. obtain a GED and that he was set to begin that program on January 3, 2022.[6] The court informed K.J.B. and his mother that the JPC's recommended drug education program was one that K.J.B. "could immediately do and demonstrate to everyone that he's willing to do it. And it doesn't sound overly taxing. It would be just an initial step." It noted that "the State just said that they want to move to revoke the option B. What that means . . . if that were ever granted, [is] that he would go to JRA." The court reminded K.J.B. that he had "a limited amount of time" and if he began the drug education program

[5] This JPC report, like the others reviewed by the trial court, is not in the record.
[6] K.J.B.'s mother explained their efforts to enroll him in school, noting that they had been rejected by one school that reportedly could not accommodate his learning disability and Individual Education Plan.

with his JPC's help, "it could show that other piece that we're looking for to demonstrate compliance with option B." When K.J.B.'s mother indicated her consent, the court stated it was "going to ask [the JPC] to get that going." The court indicated

> for purposes of today's hearing, let's note that he's scheduled to start school on January 3rd at Youth Source in Tukwila. . . . Also, the court wants him to begin some outpatient treatment regarding [cannabis] use and education, that [the JPC] has a program that he could start immediately. I would like to see him do that. If there is some other alternative that is immediately available, that would be comparable. In other words, I think that would be just as good. The issue here is not spending a lot of time searching but actually starting something. That's what I'm trying to emphasize. So, I'd like the order to reflect those two things. That appears to be where we are today.[7]

The court confirmed with K.J.B. that he understood its ruling and said "I hope you get what's going on here because you've been given this option B opportunity to avoid going to JRA, and there were requirements of you to do that. And the report was that there [are] problems with you meeting the requirements, there were things you weren't doing." The court emphasized how important it was for K.J.B. to follow through and noted that "the most important, the big two, are go to school and get some counseling on drug use." K.J.B. confirmed on the record that he understood the court's ruling.

At some point before February 16, 2022, the State notified the court and K.J.B. of its intent to move to revoke his suspended sentence. At the February 16 hearing, the prosecutor reported that the State's motion was based on a JPC report alleging that (1) K.J.B. had failed to engage and participate in educational

[7] If an order was entered at the conclusion of this review hearing, it was not provided to this court.

programming, and (2) K.J.B. had failed to engage in and participate in a substance abuse disorder program.[8] K.J.B., through counsel, denied the allegations.

The State called JPC McKinney to testify about K.J.B.'s noncompliance. McKinney testified that when she took over the case in 2021, she learned he had a "history of resistance" to participating in services. McKinney stated that in the summer of 2021, K.J.B. tested positive for cannabis and had initially refused to complete a drug assessment, claiming that his use was not causing any problems. She also indicated that they brought the issue to the court's attention because there were concerns his drug use was a roadblock to him successfully engaging in education. As a result, she noted, the court ordered K.J.B. to obtain a drug use assessment. McKinney confirmed that K.J.B. completed this assessment and that the evaluator recommended outpatient treatment. But, McKinney reported, K.J.B. did not comply with this recommendation. McKinney put K.J.B. in touch with a treatment provider, but K.J.B. did not follow up with this referral.

With regard to the school requirement, McKinney testified that K.J.B. was supposed to begin school with Youth Source at the beginning of 2022, that she had been speaking with K.J.B. about his school requirement on a weekly basis, and she also spoke to his Youth Source case manager to find out what K.J.B. had done to comply. She learned that K.J.B. had only called the case manager for the first time a week before the revocation hearing, despite the earlier representation from his mother that he was to start on January 3, 2022. McKinney testified that K.J.B. was supposed to meet his case manager weekly, but had not done so.

[8] This JPC report is also not in the record.

When K.J.B. finally contacted him, the case manager assisted K.J.B. in setting up an account online so that he could verify that K.J.B. was doing assigned schoolwork. But, as of the day of the revocation hearing, McKinney testified that K.J.B. had completed no schoolwork.

K.J.B. provided McKinney some screen shots hours before the hearing allegedly demonstrating that he had completed some online school tests, but she verified with the Youth Source case manager that the account he had created with K.J.B. the week before showed that no work had been done. The case manager recommended that the JPC obtain K.J.B.'s account name and password to log into the account to verify the status of his school assignments. McKinney confirmed that her conversation with the case manager was set out in her report to the court.

K.J.B. testified at the revocation hearing and admitted he had not done any outpatient treatment, despite the court order and the evaluation recommendation. But he and his parents testified that he had completed some schoolwork online. Despite this testimony, K.J.B. had no recollection of any details of any assignments he had completed. After the State asked K.J.B. to provide his online school login information, JPC McKinney testified on rebuttal that she logged into his account and confirmed that he had not started any of his assigned schoolwork.[9]

Based on this evidence, the court found the State had proven the alleged violations. The State recommended revocation as a result. The prosecutor explained to the court that K.J.B. entered the juvenile system three years earlier

[9] K.J.B. and his mother testified that he had previously used a different account to complete his work, but that he had to "start all over" the week prior to the revocation hearing. The State challenged the credibility of this testimony given that K.J.B. had also testified that he had had no login access until the week before the hearing.

with "phone snatches [and] robberies," some of which he had committed with his brother. The prosecutor argued that "we tried to make it work in the community. So we reduced those charges, we wrapped them all together into a deferred disposition with the hope that he would finally, because schooling and treatment was already an issue for him, that he would finally get started with them." Then, "just a couple of months into that, he goes out and does this [robbery]." The prosecutor noted how violent this robbery was and that K.J.B was "already on probation and trying to have services delivered on multiple other robberies." He argued:

> So at the time we crafted this resolution, Your Honor may remember that there were a number of hearings where it was made very clear that we weren't going to be ready to proceed with this option B until all of these pieces were in place, until a mentorship was in place, because [K.J.B.] and his family didn't want to engage in Community Passageways, there was a question about Credible Messengers. That ended up falling through for lack of engagement. Youth Link ended up falling through for lack of engagement in terms of mentorship.
>
> But then we also needed to make sure that schooling was in place and treatment were in place. These were made explicit to [K.J.B.] before we even reduced this case to put it on an option B. So for a year, he's known these were critical issues. And I think in fact at that hearing, we also made clear we won't hesitate to move for revocation, [K.J.B.]. You have too much other history. And this was a very serious offense.

After many months, the prosecutor argued, K.J.B. has never really complied. While he had made "minor, half-hearted efforts at the last second to avoid getting in trouble," there had never been any "real compliance," despite being warned multiple times that he faced a year in JRA. The prosecutor stated that the Option B alternative was to ensure a juvenile can obtain services in the community, but the State had exhausted all its efforts to do so in this case.

K.J.B. asked the trial court not to revoke the suspended sentence, arguing that he had not fallen out of contact with his JPC, had spent a lot of time with his daughter learning to be a parent, and had managed to "stay away from getting arrested." While K.J.B. struggled to comply with the schooling requirement, he maintained it was not his fault because he did not have the ability to enroll himself in school, did not have his own phone, and had to rely on his parents to engage with services. Rather than revoke, K.J.B. asked the court to give him one more chance by ordering him to engage in school, to provide proof of therapy check-ins, and to meet with the substance abuse service provider McKinney had previously identified. Counsel asked the court to extend the suspended sentence for two months to give him time to show he was "actually taking this seriously."

JPC McKinney, like the prosecutor, argued that revocation was the appropriate sanction given that K.J.B. had made no effort to contact a service provider available at the court who could have provided him with a cell phone, supplies for his daughter, and basic education on outpatient counseling. McKinney also noted that despite K.J.B. arguing he had trouble accessing schoolwork online, the school was holding in-person sessions twice a week that students were required to attend and K.J.B. had not attended a single in-person session.

In response to K.J.B.'s request that the suspended sentence be extended past the 12-month deadline, the State argued that the court lacked the authority to take such a step. The court sought briefing from the parties regarding the legal issue and set a hearing for the following day.

After considering the parties' respective requests and supplemental briefing, the juvenile court reiterated its findings that K.J.B. had willfully violated the supervision conditions of the Option B disposition. It concluded that the statute was not clear as to whether the court had authority to extend an Option B disposition past the 12-month period, but indicated it did not need to resolve the issue because it had decided to revoke rather than extend it. It reasoned:

> I looked a lot at the principles of the Juvenile Justice Act. . .. There's kind of two principles in play. One is [to] make the juveniles accountable for the criminal behavior. And the second is this urge and goal that it be handled in the community when possible.
>
> What I've concluded in this situation is that it just has not been possible. It has not been possible to have an accountability piece in the community. Over a year now, we've tried. We've tried to do that. And I think the failure just demonstrates that it's not workable. And when I look back and ask myself what happened with the option B, what happened, where are we today versus where we were a year ago in February, perhaps the biggest weakness is the finding that [K.J.B.] was amenable to treatment in the community. I guess I learned at the hearing yesterday that, in negotiating this, the parties did have some concern that it might not work. Still, though, I think it was important to try. That is the goal of the Juvenile Justice Act.

The court also made it clear that K.J.B.'s lack of performance "was not on small items, and it was not hiccups." The court stated that it did not intend to hold K.J.B. "to the letter of some small requirement and based on that find that he didn't comply." It found that "[w]hat we really have here is a total failure over the course of a year to do an option B that really was pretty minimal in its requirements," tailored to meet K.J.B.'s needs.

The court acknowledged the mitigating evidence before it:

> [K.J.B.] in particular has done really well becoming a father. And his parents talk a lot about the work that he's done there with his daughter. And I recognize that. I heard that. I'm proud of [K.J.B.]

> for that. Still, I can't change the circumstances in which we find ourselves. The option B was urged on the court by [K.J.B.], and he had an obligation to complete it to avoid JRA.

The court ultimately concluded that K.J.B. was "just not amenable to meeting these objectives and responsibilities in the community" and reluctantly concluded that revocation was the appropriate outcome. K.J.B. appeals.

ANALYSIS

K.J.B. argues that the juvenile court abused its discretion when it revoked his suspended disposition for "technical violations" and failed to meaningfully consider mitigating factors, its own potential implicit racial bias or the history of racial disparities in JRA custodial dispositions, and the preference for sanctions other than incarceration to remedy these racial disparities.

Juvenile Justice Act Disposition Alternatives to Incarceration

The Juvenile Justice Act, ch. 13.40 RCW, has "the dual purpose of holding juveniles accountable and fostering rehabilitation for reintegration into society." *State v. Garza*, 200 Wn.2d 449, 460, 518 P.3d 1029 (2022) (quoting *State v. S.J.C.*, 183 Wn.2d 408, 421, 352 P.3d 749 (2015)). The act gives juvenile courts several tools to accomplish both goals, including imposing a deferred disposition under RCW 13.40.127, which allows a youth to plead guilty to a charged crime, to spend time under "community supervision" with the requirement that they fulfill certain court-imposed conditions and, if necessary, to obtain mental health or substance abuse assessments and treatment. RCW 13.40.127(5). At the conclusion of the specified period of supervision, if the court determines that the youth has complied with the terms of the deferment, the court dismisses the

disposition and vacates the youth's conviction. RCW 13.40.127(9); *State v. M.S.*, 197 Wn.2d 453, 459, 484 P.3d 1231 (2021).

A deferred disposition option is not available for youths who have been charged with a violent offense, who have a criminal history that includes any felony, or who have had a prior deferred disposition or adjudication. RCW 13.40.127(1)(a)-(c). K.J.B., on community supervision for a deferred disposition at the time he committed the robbery at issue in this appeal, was ineligible for that type of community-based disposition again.

The Juvenile Justice Act, however, provides other tools for courts to avoid imposing a custodial disposition, even for a youth with a prior criminal history. RCW 13.40.0357, the provision setting out juvenile offender sentencing standards, gives courts the discretion to impose what is known as an Option B Suspended Disposition as an alternative to incarceration.[10] An Option B disposition involves the imposition of a standard range disposition, but the court suspends it "on condition that the offender comply with one or more local sanctions and any educational or treatment requirement." RCW 13.40.0357(Option B (1)). "Local sanctions" can include a period of confinement of 30 days or less, community supervision of 12 months or less, community restitution of 150 hours or less, or a fine of $500 or less. RCW 13.40.020(19). If a youth is placed into "community supervision," a "mandatory condition" of that supervision is refraining from

[10] RCW 13.40.0357 was amended in 2022 to replace the term "marijuana" with the term "cannabis." LAWS OF 2022, ch. 16, § 8. These amendments do not affect the analysis here.

committing new offenses and complying with mandatory school attendance provisions of ch. 28A.225 RCW.[11] RCW 13.40.020(5).

Willfully failing to comply with the conditions of a deferred or suspended disposition exposes the youth to sanctions under RCW 13.40.200 or revocation of the disposition. RCW 13.40.127(7); RCW 13.40.0357(Option B (2)). RCW 13.40.200 specifies two types of sanctions: detention for a period of up to 30 days, or for nonpayment of financial obligations, conversion of the monetary amount to some amount of community restitution. RCW 13.40.200(3), (4).

The parties here agreed and the court consented to placing K.J.B. on an Option B suspended disposition on the condition that he attend school and obtain drug treatment if an assessment recommended it. The juvenile court, when it revoked the disposition, found that K.J.B. had not complied with either condition at any time during the 12-month suspension period.[12]

Standard of Review

Because the decision to impose sanctions or revoke the suspended disposition is squarely within the discretion of the juvenile court, we review this decision for an abuse of that discretion. *See State v. McMillan*, 152 Wn. App. 423, 426-27, 217 P.3d 374 (2009) (citing *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 165, 97 P.2d 628 (1940)) (When the legislature uses the word "may" in a statute, it is generally considered to be permissive and "operates to confer

[11] RCW 28A.225.010(1) provides that all children between the ages of 8 and 18 must attend a public school in the district in which the child resides, unless attending an approved private school, receiving home-based instruction, or attending an education center authorized by ch. 28A.205 RCW.

[12] K.J.B. has not assigned error to any of the juvenile court's findings and we accept them as true on appeal. *State v. Avila,* 102 Wn. App. 882, 896, 10 P.3d 486 (2000).

discretion."). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A decision is based on untenable reasons if it "'is based on an incorrect standard or the facts do not meet the requirements of the correct standard'" and is manifestly unreasonable if it "'is outside the range of acceptable choices given the facts and applicable legal standard.'" *Id.* at 127 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

K.J.B. raises three arguments in this appeal. First, he argues that revocation was unduly harsh for the "mere technical violations" K.J.B. committed. Second, he contends the juvenile court did not meaningfully consider the mitigating circumstances K.J.B. confronted during the period of his suspended sentence. Third, K.J.B. maintains the juvenile court failed to consider its own potential implicit racial bias or the history of racial disparities in JRA custodial dispositions and the preference for sanctions other than incarceration as a way to remedy these racial disparities. We address each in turn.

Characterization of K.J.B.'s Violations as "Mere Technicalities"

K.J.B. contends that, at most, he committed "technical violations" of the disposition order that were insufficiently serious to warrant revocation of the suspended disposition. We disagree.

RCW 13.40.020(5) makes school attendance mandatory for any youth on community supervision. And the juvenile court told K.J.B. at every hearing that it was important for him to engage with school in order to avoid being sent to a JRA

facility. The court similarly warned K.J.B. that a failure to undergo a substance abuse assessment and then to participate in the recommended treatment would be a "deal breaker," emphasizing that his engagement in treatment was an essential requirement. The juvenile court did not consider K.J.B.'s noncompliance with these conditions to be mere "technical violations."

Nor did the juvenile court require "full and total" compliance with every condition of the suspended sentence, as K.J.B. argues on appeal. To the contrary, the record shows the court amended its expectations at each review hearing in light of the barriers or obstacles to compliance that K.J.B. and his JPC identified. When K.J.B.'s mentor—with whom he had developed a relationship—left to take another job, the court did not sanction K.J.B. for refusing to reengage with a different mentor or mentorship program. When K.J.B.'s mother reported having problems getting a school to accept K.J.B. and when she later reported that the online schooling options necessitated by the COVID-19 pandemic were difficult for K.J.B. to navigate, the court did not sanction K.J.B. for not attending school. It recognized the barriers that K.J.B., like many youth, was experiencing during the pandemic. But ultimately, after the JPC offered K.J.B. different opportunities to overcome each of the identified barriers to compliance, the court found K.J.B. still made no effort.

Meaningful Consideration of Mitigation

K.J.B. argues the juvenile court did not consider the mitigation evidence he provided. He points out that he did not commit any new offenses while on community supervision, that he "stabilized his residence," and that he became a

responsible father to his infant daughter. K.J.B. also argues that his poverty, lack of access to technology, and his challenges in accessing school work online during the pandemic factored into his inability to comply with the conditions of his disposition. He urges us to conclude that the trial court did not meaningfully consider these facts before revoking his suspended disposition.

We recognize that when a trial court has the discretion to revoke a deferred or suspended disposition, there are limits to that discretion—the court should meaningfully consider any "uncontradicted evidence of rehabilitation and mitigation" and not rely solely on the seriousness of the underlying crime in making a revocation decision. *State v. Hawkins,* 200 Wn.2d 477, 497, 519 P.3d 182 (2022) (court abused discretion in denying motion to vacate felony conviction under RCW 9.94A.640 by not giving meaningful consideration to uncontradicted evidence of rehabilitation). But the evidence of K.J.B.'s efforts at rehabilitation was not uncontradicted and the record shows that the court gave meaningful consideration to the mitigation evidence K.J.B. presented.

For example, K.J.B. and his mother testified at the revocation hearing that he had experienced barriers to accessing the Youth Source education programs online. The State disputed this evidence. JPC McKinney reported to the court that "[t]here's always a discrepancy [between] what the family says versus what the school says. I have to go by the records provided by the school. Both Truman and Youth Source have provided me with records that show little to no engagement in the school process." She testified that she talked with K.J.B. repeatedly about how to reach the Youth Source case worker, but K.J.B. did not contact him until he

learned of the State's intention to revoke the suspended sentence. McKinney also disputed the suggestion that K.J.B.'s difficulty accessing schoolwork online was an actual barrier because the school required students to appear in person at least two days a week. Yet, McKinney said, K.J.B. failed to meet the attendance requirement.

The record also shows that K.J.B.'s attorney brought several mitigating factors to the juvenile court's attention at the revocation hearing. Counsel pointed out that K.J.B. had never lost contact with his JPC and had stayed out of trouble while learning to take care of his daughter. Counsel further argued that the school issues were not K.J.B.'s fault because he lacked the authority to enroll himself in school and had to rely on his parents, who acted as gatekeepers and "to some extent prevented him" from doing what the court asked him to do.

The court seriously considered these arguments, discussing many of them in its oral ruling. For example, the court congratulated K.J.B. on becoming a father and putting in the effort to be there for his daughter. And the court recognized that between October and December 2021, it had narrowed the conditions it asked K.J.B. to work on to "really emphasize the school and the substance use counseling." The court said that it had signaled "very clearly" that if he could focus on just those two expectations, "he could pull it off. He could course correct." The court ultimately concluded, however, that K.J.B. was not amenable to a "course correction" in the community.

While K.J.B. may disagree with the weight the juvenile court gave to what he identified as mitigating factors, we will not reweigh the evidence and substitute

our judgment for that of the juvenile court. *See State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017) ("A reviewing court may not find abuse of discretion simply because it would have decided the case differently.").

Racial Disparity in JRA Dispositions and Revocation Decisions

K.J.B. next argues the court abused its discretion in revoking the suspended sentence without addressing the possibility that its own potential implicit racial bias may be affecting the court's judgment and without understanding the history of racial disparities in JRA custodial dispositions and the need for sanctions other than incarceration to remedy these racial disparities.

We first take judicial notice of implicit and overt racial bias against Black offenders in this state and recognize that we are permitted to consider "historical and contextual facts" of this bias when deciding cases, even when an individual defendant presented no such evidence in the trial court. *Hawkins*, 200 Wn.2d at 501.

K.J.B. points to studies showing that "Black and Latinx children are disproportionately over-represented among youth convictions, discretionary decline, and auto decline cases." Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State, 2009-2019*, at 4 (2021).[13] And as Justice Stephen Gonzàlez noted in his concurrence in *State v. B.O.J.*, 194 Wn.2d 314, 332, 449 P.3d 1006 (2019), "[t]here is considerable evidence that bias results in harsher dispositions for children of color, and for girls of color in particular." (citing Wendy S. Heipt, *Courts Igniting Change: Girls' Court: A Gender Responsive*

[13] https://www.opd.wa.gov/documents/00866-2021_AOCreport.pdf.

Juvenile Court Alternative, 13 SEATTLE J. SOC. JUST. 803, 816 (2015)). Even after being sentenced, members of communities of color are "disproportionately subject to discretionary decisions concerning their eligibility for release to community supervision, dependent on services designed to aid in their reentry, and impacted by collateral consequences of their incarceration." Task Force 2.0 Research Working Group, *Race and Washington's Criminal Justice System: 2021 Report to the Washington Supreme Court*, at 41 (2021).[14] While none of the studies cited by K.J.B. directly evaluated racial disparities in discretionary revocation decisions, we accept that implicit racial bias is so common and pervasive that it inevitably exists "at the unconscious level, where it can influence our decisions without our awareness." *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019).

The more difficult question is how to address it. In *Henderson v. Thompson*, 200 Wn.2d 417, 434, 518 P.3d 1011 (2022), our Supreme Court applied the two-step inquiry from *Berhe* to determine whether racial bias affected a civil jury verdict. Drawing on GR 37, it held that, to ensure that a litigant has had the benefit of an unbiased and unprejudiced jury, the first step was for a trial court to ascertain whether an objective observer who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State, could view race as a factor in the verdict. *Id*. at 435. If such a prima facie showing is made, then the party benefitting from the alleged racial bias has the burden of proving that race did not affect the verdict. *Id.*

[14] https://digitalcommons.law.seattleu.edu/korematsu_center/116/.

This two-step *Berhe* inquiry can be extended to K.J.B.'s argument that race affected the decision to revoke his suspended disposition. But based on the limited record we have here, we cannot conclude that K.J.B. has established a prima facie case. Unlike *Henderson*, there is no record that the judge, any attorney, JPC, or service provider used language that could evoke harmful stereotypes of Black children. To the contrary, the record suggests that every participant at every hearing sought to help K.J.B. avoid incarceration and considered that sanction as the absolute last resort.

The juvenile court in this case was confronted with a young individual who had been given not one, but two chances in two separate cases to avoid incarceration, to remain in the community, to live with his parents, and to help raise his child with the support of mentorship services, educational programming, and drug treatment. The court, over several hearings, explained its expectations and the consequences of not meeting these expectations. When the court realized K.J.B. was struggling to comply, it reduced its expectations in light of his personal circumstances. In December 2021, it told K.J.B. that to avoid a revocation and thus incarceration, all he had to do was start educational programming with Youth Source—a program his mother had identified and supported—and connect with a service provider to obtain counseling about his use of cannabis.

Yet, despite the efforts of the court, the JPC assigned to this case, and service providers who were willing to help him, K.J.B. did not start the Youth Source program and did not participate in the counseling services the JPC arranged for him. Based on this record, K.J.B. has not established that an

objective observer aware of implicit, institutional, and unconscious bias could view his race as a factor in the court's decision to revoke his suspended sentence.

K.J.B. cites to this court's decision in *State v. Quijas*, 12 Wn. App. 2d 363, 373, 457 P.3d 1241 (2020), to argue that "[w]hen a juvenile court sentences a youth of color, it must be aware of how its sentence will impact disproportionate punishment." Although the argument is not altogether clear, he appears to suggest that the juvenile court must make some statement on the record to the effect that its disposition decision will not result in racial disparities in sentencing youth of color.

While we see the benefit of putting this analysis on the record, *Quijas* imposes no such requirement. In that case, Quijas was charged with second degree murder at the age of 15. *Id*. at 365. When the State moved the juvenile court to decline jurisdiction so that Quijas could be prosecuted in adult court, he presented evidence that juvenile court jurisdiction is declined, both in Skagit County and statewide, in a racially disproportionate manner. *Id.* at 367.

The juvenile court granted the State's motion without addressing Quijas's claim of discriminatory practices. *Id.* at 368. This court held that the juvenile court was required to rule on Quijas's claim that the declination process was tainted by racial prejudice. *Id.* at 373. In addressing Quijas's equal protection claim under article I, § 12 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, we held that

> Our Supreme Court has made clear that trial courts must be vigilant in addressing the threat of explicit or implicit racial bias that affects a defendant's right to a fair trial. We hold that equal vigilance is required when racial bias is alleged to undermine a criminal

> defendant's constitutional rights at any stage of a proceeding. When confronted by such a claim, supported by some evidence in the record, the trial court must rule.

Id. at 375.

Quijas is distinguishable in that K.J.B. did not raise an equal protection claim below and the juvenile court did not refuse to address any argument he did raise. The holding in *Quijas* is not applicable to this case.

Availability of Less Severe Sanctions

K.J.B. next argues that the juvenile court abused its discretion in imposing the "harshest remedy possible"—incarceration—without seriously considering less severe sanctions. We reject this argument for two reasons. First, while the Juvenile Justice Act permits progressive discipline, it does not mandate it. The juvenile court could have set more regular review hearings to ensure that K.J.B. understood the consequences of noncompliance. And the court certainly did not need to wait until the eve of the disposition's expiration to take corrective measures when a pattern of noncompliance began to emerge. Earlier intervention and earlier imposition of sanctions may have helped K.J.B. realize that the choices he was making had serious consequences. But the juvenile court, with the ability to speak directly to the youth and his parents and to observe them as they interacted with counsel, the JPC, and the court itself, is in the best position to decide if a less severe sanction before or in lieu of revocation would have convinced K.J.B of the need to act to avoid incarceration.

Second, the juvenile court did consider a less severe sanction at K.J.B.'s request. He asked for an extension of the suspended sentence with additional

reporting requirements and the court took that request under consideration. Ultimately, the court concluded that any lesser sanction would be futile. It was not an abuse of discretion, based on this record, for the juvenile court to conclude that giving K.J.B. another opportunity to demonstrate compliance was unlikely to achieve any different outcome.

Finally, K.J.B. contends that the court "conflated accountability with punishment" and impermissibly concluded that it had to imprison K.J.B. in order to hold him accountable. He argues that the word "accountability" as used in the Juvenile Justice Act does not require punishment in a JRA facility. But this is somewhat of a "straw man" argument—the juvenile court did not say that the only way K.J.B. could only be held accountable was through incarceration. What the juvenile court actually said was that it had tried a community-based alternative to incarceration and it had not worked because K.J.B. was not amenable to treatment in the community.

Because the revocation was not based on untenable reasons or outside the range of acceptable choices given the facts and applicable legal standard, there was no abuse of discretion. We affirm.

Andrus, J.P.T.

WE CONCUR:

Birk, J.

Smith, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 83765-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: May 10, 2023

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