Supreme Court No. 100905-4
(COA No. 82663-8)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

D.K.U.,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Statutes

Rules

Constitutional Provisions

Other Authorities

Robles-Ramamurthy, Barbara & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, J. Amer. Acad. Psychiatry Law 47, Vol. 7, Issue 1 (2019) 9, 15, 26

Rovner, Josh, The Sent'g Project, *How Tough on Crime Became Tough on Kids: Prosecuting Teenage Drug Charges in Adult Court* (2016) 12

Scott, Elizabeth & Laurence Steinberg, *Rethinking Juvenile Justice* (2008) 23

Sirleaf, Matiangai, *Disposable Lives: Covid-19, Vaccines, and the Uprising*, 121 Colum. L. Rev. F. 71 (2021) 16

The COVID Racial Data Tracker, *COVID Tracking Project at the Atlantic* 17

Washington Supreme Court, *Open Letter Calling on Judicial, Legal Community to Work Together on Racial Justice* (June 4, 2020) 7

Weiss, Giudi, *The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century*, Nat'l Campaign to Reform State Juv. Just. Sys. (2013) 12

A. IDENTITY OF PETITIONER

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

B. COURT OF APPEALS DECISION

D.K.U. seeks review of the Court of Appeals decision dated March 4, 2022, affirming his sentence, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

Juvenile courts can order children to sentencing alternatives to treat and rehabilitate youth. Here, the juvenile court declined D.K.U.'s request for an alternative sentence based on factors related to his race. This decision contributed to racial disparities in youthful sentencing. Do the Fifth and Fourteenth Amendments and article I, sections 3 and 12 require a

juvenile court to clearly explain its reasons in declining to order a sentencing alternative?

D. STATEMENT OF THE CASE

D.K.U., a Black child, pleaded guilty to second-degree robbery when he was 16 years old. CP 6. He had very few resources and moved between two households, one in Federal Way and the other in Tacoma. RP 73. He did not have a working phone between his guilty plea and his adjudication. RP 72. Because of these barriers, D.K.U. struggled to engage in services offered on this charge and a prior disposition.

D.K.U.'s plea and sentencing happened during the coronavirus pandemic, which closed schools and other community-based organizations to in-person attendance. D.K.U. found remote school very challenging. RP 73. He had technical issues, including a broken computer, which he had to go to Federal Way

to replace. *Id*. These challenges became "mentally insurmountable." *Id*.

Despite all the obstacles D.K.U. faced, he had made strides. RP 74. Although he did not complete a mental health evaluation before his first adjudication, he got it done at sentencing in this case. *Id*. His progress was slower than some might have hoped, but D.K.U. was "going in a better direction than he was before." *Id*.

Between his plea and sentence, D.K.U. was becoming more responsible. RP 76. He figured out how to get to court, including getting his aunt to give him and his mother a ride. *Id*. His housing in Tacoma had become more stable. RP 73. He found connections in

his community with Thrett Brown, who runs the Young Businessmen of Washington.[1] RP 77.

D.K.U. had also been working with Community Passageways,[2] which could help D.K.U. engage in mental health treatment. RP 75. This program met the evidence-based or research-based requirement for an Option B sentence. *Id*.

This progress was significant for D.K.U. because of the barriers his poverty created and his mistrust of the system. D.K.U.'s attorney explained this to the court, "I don't think it -- that it's, you know, any secret that the, you know, people of the Black community

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[1] Young Businessmen of Washington's "goal is to find these sparks, engage and mentor them, so that urban youth can not only succeed themselves, but also share the path to success with their peers and community, by example and by becoming mentors themselves." www.ybmw1080.org.

[2] Community Passageways works at "actively creating an alternative to today's criminal legal system." www.communitypassageways.org.

have a hard time trusting the Court, trusting services that are connected to the court." RP 79. D.K.U.'s success with community-based programs demonstrated that when D.K.U. trusted the people he was working with, he was more likely to succeed. *Id*.

Ten days before sentencing, D.K.U. was involved in a life-changing moment. He was shot during a drive-by shooting. RP 81. After that traumatic experience, D.K.U. committed to services with renewed dedication, demonstrating "nearly like a 180-degree turnaround of [D.K.U.] in terms of his contact with everyone, with his engagement, with his realization that he is not doing things the way that he should be doing them." RP 82.

At sentencing, D.K.U. asked the court for help. RP 87. He ended his request for an Option B sentence, which would suspend his sentence and allow him to receive education and treatment, by telling the court,

"And like, I would really appreciate it if I get some help. That's all I ask." *Id.*

The court tried to empathize with D.K.U. The court told D.K.U. it had relatives in prison, and while the judge could not understand what it meant to go to prison, he could understand its impact. RP 87. The court told D.K.U. how rare it was that the court sentenced a child to state imprisonment, having done it less than ten times in the past year. RP 90.

Despite learning the importance of trust and community to D.K.U.'s progress and D.K.U.'s commitment to engaging in treatment, the court determined he was not amenable to an Option B sentence. CP 19, RP 91. The court did not address the role racial bias may have played in denying D.K.U. a community-based treatment sentence.

E. ARGUMENT

The devaluation and degradation of Black lives is a persistent and systemic injustice of the criminal legal system. Washington Supreme Court, *Open Letter Calling on Judicial, Legal Community to Work Together on Racial Justice* (June 4, 2020);[3] *see also Garfield County Transp. Auth. v. State*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020). This Court asked those involved in the legal system to "develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases" and "administer justice and support court rules in a way that brings greater racial justice to our system as a whole." *Id.*

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

In deciding D.K.U.'s case, the Court of Appeals acknowledged that "bias pervades the entire legal system and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly." App. 10 (quoting *State v. Walker*, 182 Wn.2d 488 n.2, 341 P.3d 976 (2015) (Gordon McCloud, J. concurring)). The court also understood that "case law and history of racial discrimination provide ample support" to conclude a defendant's race can influence their sentence. App. 10 (quoting *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018)).

Sadly, racial disproportionality and disparity have long been characteristic of the juvenile legal system. Jessica Heldman & Hon. Geoffrey A. Gaither, *An Examination of Racism and Racial Discrimination Impacting Dual Status Youth*, 42 Child. Legal Rts. J. 21, 21-22 (2021). In Washington, Black youth are four

times more likely than white youth to be sentenced to an institutional sentence. Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, J. Amer. Acad. Psychiatry Law 47, Vol. 7, Issue 1 (2019). Multiracial youth are three times more likely to go to state custody, and Latinx youth were almost one and a half times more likely. *Id*.

In light of the overwhelming disproportionality in youthful sentencing, this Court should not look away from circumstances where trial courts perpetuate discriminatory practices. When the court refused to impose a community-based sentence for D.K.U., it continued Washington's history of over-incarcerating youth of color, particularly Black children. To remedy this error, this Court should take review.

1. The criminal legal system does not treat children of color fairly.

Before the establishment of the juvenile court system, reformers focused on "moral retraining" through institutional commitments designed to educate and reform children. Tamar R. Birckhead, *The Racialization of Juvenile Justice and The Role of the Defense Attorney*, 58 B.C. L. Rev. 379, 396 fn.62, 397 (2017).

Black children were excluded from these reforms. Many orphanages and reformatories refused to admit Black children. Birckhead, at 93. Instead, Black youth were sent to adult jails and prisons. James Bell & Laura John Ridolfi, W. Haywood Burns Inst., *Adoration of the Question: Reflections on the Failure to Reduce Racial and Ethnic Disparities in the Juvenile Justice System* 4 (Shadi Rahimi ed., 2008). To meet the needs of "convict leasing," Black youth were arrested in

large numbers. *Id.* Efforts to establish programming for Black children were met with the sentiment there was "no use trying to reform a Negro." *Id.*

Then, juvenile courts were created. Historical recitations suggest that these courts were intended to provide guidance and rehabilitation not afforded to children in the adult courts. Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 Geo. Wash. L. Rev. 1604, 1614-15 (2018).

Modern scholars paint a more accurate picture of juvenile courts. The juvenile court served "as a vehicle through which to exercise social control over Black and immigrant youth." Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 Am. U. L. Rev. 743, 764 (2020). Juvenile courts were largely designed to facilitate the assimilation of

immigrant youth and the removal of Black youth from a society that feared them. Henning, at 1616.

After the Supreme Court established procedural protections for youth, "tough on crime" policies ushered in a new approach to youth justice. Giudi Weiss, *The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century*, Nat'l Campaign to Reform State Juv. Just. Sys. 11-12 (2013). Black youth were described as "super-predators," which led states like Washington to create laws allowing juvenile courts to decline youth to adult court to stop the expected wave of adolescent violence. Josh Rovner, The Sent'g Project, *How Tough on Crime Became Tough on Kids: Prosecuting Teenage Drug Charges in Adult Court* 3 (2016).[4]

[4] https://www.sentencingproject.org/wp-content/uploads/2016/12/How-Tough-on-Crime-Became-Tough-on-Kids.pdf.

No such wave ever came. By 2000, youth crime rates returned to 1980 levels. Jeffrey Butts & Jeremy Travis, Urban Institute Justice Policy Center, *The Rise and Fall of American Youth Violence: 1980 to 2000*, 5 (2002). Nevertheless, super-predator laws enacted in Washington and elsewhere remained in effect. Matthew Razo, *Fair and Firm Sentencing for California's Youth: Rethinking Penal Code Section 190.5*, 41 W. St. U. L. Rev. 429, 430 (2014).

Racial bias continues to influence the decision-making process of juvenile justice professionals. Feld & Moriearty, at 790; Birckhead, at 412. Police officers make decisions about arrests and use of force, probation officers write intakes, prosecutors make charging decisions, and judges preside over adjudication and disposition. Bias influences every step in this process. Birckhead at 420.

These biases exist in Washington. In Seattle, the most significant disparity in the use of force by police involves Black children. Center for Policing Equity, *The Science of Justice: Seattle Police Department National Justice Database City Report*, 20 (January 2021).[5] Of 44 incidents from 2014 to 2019 in which police used force against children under 14 years old, 23 cases involved Black children. *Id*. Likewise, Black people were involved in 59 percent of incidents where force was used against young people aged 15 to 21 -- 332 of 563 incidents of force over five years. *Id*.

Racial bias also exists in how children are treated in schools and how the criminal system impacts their families. Black students are more likely to attend schools with zero-tolerance policies and law

[5] https://www.documentcloud.org/documents/21015602-spd_cityreport_final_11121-1

enforcement presence, increasing the risk of suspension, expulsion, and arrest. Robles-Ramamurthy & Watson, at 4. Children of color are also more likely to be separated from their families. *Id.*

There are also ample reasons why black youth like D.K.U. are slow to trust the governmental and rehabilitative services. RP 79. Like the legal system, the "medical establishment has a long history of mistreating Black Americans -- from gruesome experiments on enslaved people to the forced sterilizations of Black women and the infamous Tuskegee syphilis study that withheld treatment from hundreds of Black men for decades to let doctors track the course of the disease." Martha Hostetter & Sarah Klein, *Transforming Care: Understanding and Ameliorating Medical Mistrust Among Black*

Americans, Commonwealth Fund (Jan. 14, 2021).[6] Modern gynecology started by forcing Black slave women into surgery without their consent or even anesthesia. Durrenda Ojanuga, *The Medical Ethics of the 'Father of Gynecology,' Dr. J. Marion Sims*, 19 J Med Ethics 28, 29 (1993). Likewise, much modern medical research is based on cells taken from Henrietta Lacks, a Black woman, without her consent or compensation. Matiangai Sirleaf, *Disposable Lives: Covid-19, Vaccines, and the Uprising*, 121 Colum. L. Rev. F. 71, 80 (2021).

False beliefs in the medical field have led doctors to under-treat pain in Black people because they wrongly believe Black people have thicker skin and fewer nerve endings. Kelly Hoffman, et al., *Racial Bias*

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[6] https://www.commonwealthfund.org/publications/newsletter-article/2021/jan/medical-mistrust-among-black-americans

in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites, 113 Proceedings Nat'l Acad. Sci., 4296, 4297 (2016).[7] Doctors also over-diagnose Black people with schizophrenia when they should instead be finding a depressive disorder. Michael Gara, *A Naturalistic Study of Racial Disparities in Diagnoses at an Outpatient Behavioral Health Clinic*, 70 Psychiatric Services (2019).[8] These reasons for distrust have led to vaccine hesitancy for the coronavirus and a death rate from the virus that is 1.4 times higher than for white people. The COVID Racial Data Tracker, *COVID Tracking Project at the Atlantic* (viewed May 2, 2022).[9]

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[7] https://www.pnas.org/doi/epdf/10.1073/pnas.1516047113

[8] https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201800223

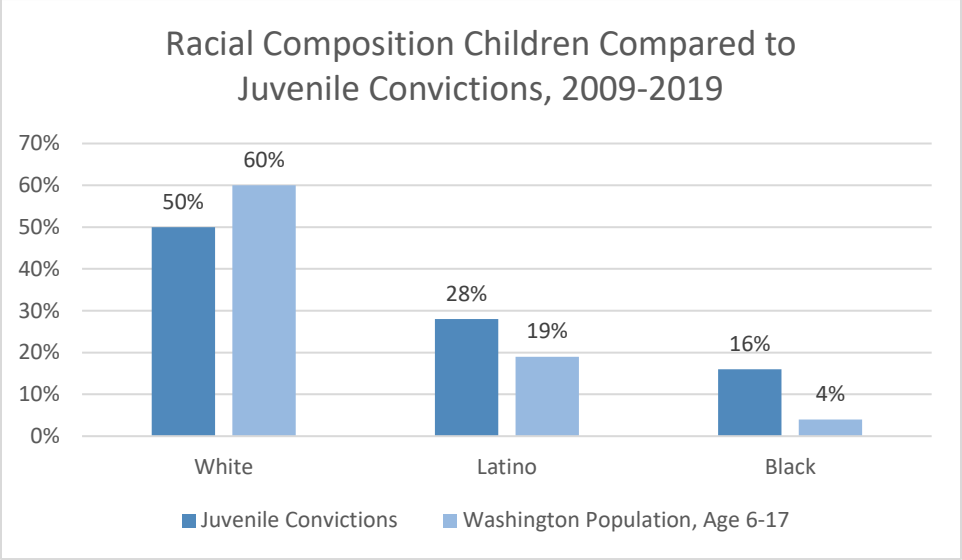
[9] https://covidtracking.com/race

These same beliefs extend to the legal system, which views youth of color differently. Judicial officials are more likely to see a white child as less threatening and more amenable to treatment. Heather D. Evans & Steven Herbert, *Juveniles Sentenced as Adults in Washington State, 2009-2019*, University of Washington, 5 (June 14, 2021).[10] Youth of color, by contrast, are commonly seen as products of broken families, more adult-like, and thus more culpable for crime, more threatening, and less amenable to rehabilitation. *Id.*; *see also State v. B.O.J.*, 194 Wn.2d 314, 332, 449 P.3d 1006 (2019) (González, J. concurring).

These observations are not merely theoretical. For children aged six to 17, white children are

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

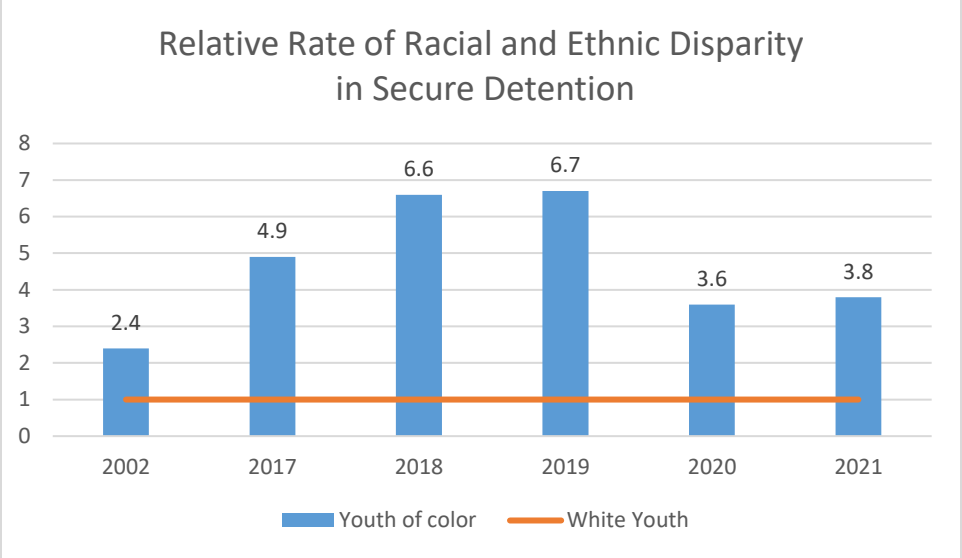
underrepresented among juvenile convictions in Washington, while Black and Latino children are overrepresented. Evans & Herbert, at 11. The chart below shows the disparity.



These statistics are stark. Latino children are 1.8 times more likely to be convicted of a crime than white children, while Indigenous children are 2.6 times more likely. Evans & Herbert, at 12. Black children are convicted 4.8 times more often than white children when compared to their community population. *Id.*

King County is not immune from the disease of racism. While King County continues to see reduced numbers of incarcerated youth, the racial disparity of those children left in jails and prisons continues to rise. King County Government, *Zero Youth Detention Data Dashboard, Leading with Race Equity* (Updated December 20, 2021).[11] In 2002, youth of color were 2.4 times more likely to be incarcerated than white youth. *Id*. The relative numbers skyrocketed to 6.7 times in 2019, only dropping during the pandemic to 3.8, although still nearly twice what the disparity was in 2002. *Id*. The chart below from King County bears out this continuing problem.

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



King County, *Zero Youth Detention*.

The Court of Appeals also acknowledged that racial disparity might impact juvenile decline. App. 8. (citing *State v. Quijas*, 12 Wn. App. 2d 363, 375, 457 P.3d 1241 (2020)). Studies conducted since *Quijas* confirm this supposition. Black children are 11.4 times more likely to be declined to adult court at a discretionary decline hearing. Evans & Herbert, at 32. For automatic decline, the numbers are worse. Black children are convicted as adults through auto decline

hearings at a rate 25.8 times higher than the rate of white children. *Id.* at 20.

The view that children of color are more culpable is even more troubling because of modern understandings of juvenile brain development. *See, e.g., State v. Houston-Sconiers*, 188 Wn.2d 1, 19 n. 4, 391 P.3d 409 (2017). The delay in the full development of 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).[12] It is also particularly concerning that youth of color are treated more harshly because 90 percent of youth involved in the legal system,

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

regardless of race, no longer commit crimes by their mid-twenties. Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice*, 52-53 (2008).

2. Failing to account for racial bias at D.K.U.'s sentencing violated his right to equal protection and due process.

While the Court of Appeals did not discount the inherent disparity in the juvenile legal system, it provided no remedy for race's disproportionate effect on juvenile sentencing in this case. App. 14. The Court of Appeals recognized its efforts to reduce disparity in decline hearings and this Court's work to eliminate racial misconduct in child placement hearings. App. 8 (citing *Quijas*, at 376-77; *Matter of Dependency of K.W.*, ___ Wn.2d ___, 504 P.3d 207, 219 (2022)). Nonetheless, the Court of Appeals found that the record below did not reveal that racial bias influenced the trial court's

decision to send D.K.U. to prison. *Id.* To address this error, this Court should take review.

Children like D.K.U., subject to standard range dispositions involving a prison sentence, may have their sentences suspended in juvenile court. RCW 13.40.0357. For an Option B sentence, the youth must comply with one or more local sanctions and any educational or treatment requirements. *Id.* An Option B sentence is not a manifest injustice sentence. *Id.*

D.K.U. met the requirements for an Option B sentence. He completed a mental health evaluation. RP 75. He was working on getting back into school. RP 73. He was trying to make his housing more stable by moving to Tacoma. *Id.* According to many, he had a renewed dedication to turning his life around since being shot. RP 82. Since the shooting, D.K.U. had re-

engaged with services and was trying to find a better path for himself. RP 87.

Notably, D.K.U.'s path included finding mentors in his community. RP 77. As his attorney told the court, people in the Black community distrust the courts. RP 79. D.K.U. found a support system he could trust and was hopeful this network would help keep him out of trouble. RP 77.

When the juvenile court sent D.K.U. to prison, it made a statistically significant decision. The juvenile court understood the rarity of sending a child to prison when it had other options, and the effect prison would have on D.K.U. RP 89-90. The court even told D.K.U. he was one of less than ten kids it had sent to prison. RP 90.

If the court's account of its sentencing practice was accurate, it made a predictable decision in sending

a Black youth to prison. As a Black child, D.K.U. was seven times more likely to be imprisoned than if he had been white. Robles-Ramamurthy, at 2. Likewise, D.K.U.'s reasons for taking him longer to engage might have been viewed differently had he been white. Evans & Herbert, at 5.

The court's decision was based on race. At the very least, the court owed D.K.U. an explanation for why race did not play a role in its sentencing decision. Many red flags show how race played a role in the court's sentencing. D.K.U. lived in poverty, barely able to sustain stable housing. RP 73. His mother was doing the best she could but struggled with other children. RP 85. D.K.U. had been exposed to extreme trauma and violence, including having been just shot. *Id*. He tried to get into school, but many poverty-based factors made it impossible for him to succeed there either. RP

73. Still, the court disregarded these symptoms of systemic racism and faulted D.K.U. for not doing more.

Despite all these barriers, D.K.U. had shown the willingness and ability necessary to move forward with his life. D.K.U. made it to court, which was no minor feat for him. RP 76. This act involved securing taxis and recruiting family members to assist. *Id.* He brought his mother with him. *Id.* He was in contact with school officials and in the process of enrolling in a school in Tacoma, which would be better for him than Federal Way. RP 73. He found mentors in the community that he could trust. RP 77. He made the turnaround few children achieve in the same circumstances.

In return, all D.K.U. asked for was help. RP 87. An Option B sentence was not a break. RP 79-80. It would have allowed D.K.U. to remain in the

community to seek treatment, but it by no means left D.K.U. without significant court obligations. RCW 13.40.0357. If D.K.U. failed to meet his responsibilities, the court retained to power to send him to prison. *Id.*

Where bias finds its way into a final judgment, it will "cast doubt on the trial court's entire ruling." *B.O.J.*, 194 Wn.2d at 332-33 (González, J. concurring). (citing *In re Marriage of Black*, 188 Wn.2d 114, 135, 137, 392 P.3d 1041 (2017)). Like D.K.U., other children of color in Washington's juvenile justice system face harsher sentencing outcomes than white children. Fred T. Korematsu Center for Law and Equity, Race and Washington's Criminal Justice System, 2021 Report to the Washington Supreme Court, 9 (2021).[13]

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

Here, the court contributed to this disparity by ordering D.K.U. to be imprisoned. Even if D.K.U. were the only youth of color in King County juvenile court imprisoned this year, he is a statistically significant number. *Gregory*, 192 Wn.2d at 20 ("We make this determination by way of legal analysis, not pure science.") Likely, he was not. Evans & Herbert, at 11. The juvenile court's failure to account for this disparity warrants review, where, as here, the juvenile court acknowledged the disparity in declaring the number of youth it had sent to prison but failed to recognize how this decision was not the result of bias.

3. This Court should grant review.

There is no dispute that Washington disproportionately sentences youth of color to harsher sentences. This Court should grant review of whether trial courts, when they choose to send children to

prison where there are other options, must make findings of how they reached that decision to account for the racial disproportionality. *See Quijas*, 12 Wn. App. 2d at 375.

Washington's constitution provides that "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Const. art. I, sec. 12. It also guarantees that "No person shall be deprived of life, liberty, or property, without due process of law." Const. art. I, sec. 3. The federal constitution provides: "No State shall ... deny ... any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

"Where the Fourteenth Amendment to the United States Constitution was generally intended to prevent

discrimination against disfavored individuals or groups, article I, section 12 was intended to prevent favoritism and special treatment for a few to the disadvantage of others." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518, 475 P.3d 164 (2020). For this reason, article I, section 12 "is more protective than the federal equal protection clause and in certain situations, requires an independent analysis." *Id*. The substance of the due process protections mandated by the Juvenile Justice Act is consistent with the requirements of the due process clause of the Fourteenth Amendment. *State v. M.S.*, 197 Wn.2d 453, 461, 484 P.3d 1231 (2021).

Consistently, this Court has held that bias at any stage of proceedings is unconstitutional. In *State v. Monday*, this Court held the right to an impartial jury was fatally undermined by appeals to racial bias. 171

Wn.2d 667, 678-79, 257 P.3d 551 (2011). In *B.O.J.*, Justice González's concurrence recognizes the danger of coded language to warrant harsher treatment of children of color. 194 Wn.2d at 332 (citing Feld, at 100 ("Code words are symbols or phrases that implicate racial themes but without directly challenging egalitarian ideals.")). In *State v. Berhe*, this Court addressed bias in jury deliberations, recognizing that because bias does not easily reveal itself, the court must inquire into the role it plays in deliberations. 193 Wn.2d 647, 661, 444 P.3d 1172 (2019).

As this Court observed about the dependency court system, the juvenile court's purpose is not to only punish children. *K.W.,* 504 P.3d at 209. Among its many obligations, juvenile courts must provide for the rehabilitation and reintegration of youths and keep them in their communities whenever that is consistent

with public safety. RCW 13.40.010(f), (h). It is impermissible to rely on factors that serve as a proxy for race to deprive a child of their ability to remain in their community. *See K.W.*, 504 P.3d at 219.

Likewise, it is impermissible for the juvenile court to rely on factors that are a proxy for race when sentencing children. D.K.U. explained his slowness in complying with the court's requirements was due to his poverty and the Black community's distrust of the courts. RP 79. Yet, the court used these factors against him, making race a factor in its sentencing decision. The court's obligation was to explain how it reached its decision to make D.K.U. one of less than ten youth the court would send to prison that year and how racial bias did not impact this decision. *Id*. The court failed in this obligation.

Due process and equal protection demand more than empathy. They require findings that the court has satisfied its burden of providing a fair sentence devoid of racial bias. In granting review, this Court should find that when the trial court fails to explain its decision in a juvenile sentencing proceeding, it violates due process and equal protection. *State v. Dhaliwal*, 150 Wn.2d 559, 581-83, 79 P.3d 432 (2003) (Chambers, J., concurring).

As the Court of Appeals recognized, courts must be vigilant in addressing the threat of explicit or implicit racial bias when it appears to undermine a youth's constitutional rights. *Quijas*, 12 Wn. App. 2d at 375. By depriving D.K.U. of the opportunity for a community-based sentence, the juvenile court denied D.K.U. his right to equal protection and due process. Because the evidence of disproportionality in juvenile

sentencing is clear and apparent, this Court should grant review to remedy the juvenile court's racially disparate decision and failure to explain its decision.

F. CONCLUSION

Based on the preceding, D.K.U. asks this Court to grant review under RAP 13.4(b).

This petition is 4,349 words long and complies with RAP 18.17.

DATED this 3rd day of May 2022.

Respectfully submitted,

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Attorneys for Appellant

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. D.K.U., Appellant.	)	No. 82663-8-I UNPUBLISHED OPINION

VERELLEN, J. — The juvenile court imposed a standard range disposition on D.K.U. after he pleaded guilty to second degree robbery. A trial court has a duty to conduct an inquiry on the record about whether implicit racial bias affected its decisions once a defendant raises the issue and provides supporting evidence. D.K.U. did not argue or present evidence to the trial court that implicit racial bias affected the juvenile court disposition.

D.K.U. suggests that if a juvenile court imposing a disposition upon a youth of color deviates from its typical approach to dispositions, then the court has a duty to explain why its disposition decision was not based upon implicit racial bias. But the evidence as to D.K.U., presented for the first time on appeal, does not reveal that implicit racial bias affected D.K.U.'s disposition. Thus, D.K.U. fails to show remand is required either for a hearing about bias or for resentencing.

We affirm.

FACTS

Lyubomirl Gural agreed online to sell a cell phone to "Chris," and they arranged to meet that evening in Kent to complete the sale.[1] Gural ended up being struck in the forehead with a pistol and robbed. One of the people who robbed Gural dropped a cell phone, and the police concluded it belonged to 15-year-old D.K.U. A security camera recording of the robbery showed D.K.U.'s face.

The State charged D.K.U. with first degree robbery while displaying a deadly weapon. D.K.U. and the State entered a plea agreement. D.K.U. would plead guilty to second degree robbery, the State would request a standard range term in Juvenile Rehabilitation Administration (JRA) custody, and D.K.U. could request an Option B alternative disposition. An Option B disposition would have suspended the term of detention on the condition that D.K.U. comply with any court-imposed sanctions and educational or treatment requirements.[2]

The State recommended that D.K.U. be placed in JRA custody for 15 to 36 weeks. It argued that D.K.U. was not a good candidate for treatment because he failed to engage with the services offered after his previous convictions for attempted second degree robbery and third degree theft. It also argued D.K.U. failed to take advantage of services offered during the pendency of the current charge and did not present evidence of his amenability to treatment. His juvenile probation officer recommended a 15 to 36 week term too, noting that D.K.U. was

[1] As part of his guilty plea, which he does not challenge, D.K.U. stipulated to the accuracy of the facts in the certificate for determination of probable cause.

[2] RCW 13.40.0357.

taking "very little responsibility" for the crime and was not attending school or engaging with treatment services.[3]

The defense proposed an Option B disposition that would suspend any detention. Defense counsel agreed D.K.U.'s engagement with services had been "sporadic" and "wish[ed] that there had been more progress than had been made so far."[4] But she said he had, "particularly in the last week," begun to seriously engage in treatment services after being injured 10 days earlier in a shooting.[5] She also argued that denying the Option B request would deprive D.K.U. of "continued support or accountability from the court" following his release.[6] D.K.U.'s mother asked that he not be placed in JRA custody and noted their struggles with housing instability. D.K.U. spoke, saying, "I just don't feel like I'm myself right now" and "I would really appreciate it if I can get some help."[7] No one discussed D.K.U.'s race beyond defense counsel's passing reference to "people of the Black community hav[ing] a hard time trusting the court, [and] trusting services that are connected to the court," which defense counsel mentioned to explain D.K.U.'s lack of engagement with service providers.[8] Defense counsel did not argue D.K.U.'s experiences as a Black youth caused him to mistrust court

[3] Report of Proceedings (RP) (Apr. 30, 2021) at 69-70.

[4] Id. at 83.

[5] Id. at 82.

[6] Id. at 83.

[7] Id. at 87.

[8] Id. at 79.

services, nor did she argue D.K.U.'s race impacted the court's sentencing decision.

The court adopted the State's recommendation and imposed a 15 to 36 week term in JRA custody. It explained that D.K.U. submitted "no real proof of amenability to treatment other than the statements made here today" and did not provide "a treatment plan of any kind" despite having had "lots of time to do that."[9] The court noted D.K.U. had not engaged in the services available prior to the disposition hearing. It was also concerned D.K.U. would be unsafe in the community because he recently had been intentionally shot. It concluded the "best, safest route" for D.K.U. was a standard range, 15 to 36 week term in JRA custody.[10]

D.K.U. appeals.

ANALYSIS

D.K.U. argues resentencing is required because the trial court did not "explain why race did not play a factor in this sentence"[11] when the sentence "had a disproportionate effect [on youth of color]," thus requiring that it "account for why the sentence is not disproportionate" as to him.[12]

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[9] Id. at 90.

[10] Id. at 91.

[11] Appellant's Br. at 22.

[12] Wash. Court of Appeals oral argument, State v. D.K.U., No. 82663-8-I (Mar. 11, 2022), at 19 min., 35 sec. through 19 min., 54 sec.; https://www.tvw.org/watch/?clientID=9375922947&eventID=2022031076&startStreamAt=1175&stopStreamAt=1194.

As a threshold matter, the State unconvincingly argues D.K.U. is barred from appealing his disposition because it was within the standard range. Although RCW 13.40.160(2) prohibits appeal of a standard range disposition, a defendant can appeal a court's failure to comply with a statutory procedural requirement or with the Constitution.[13] D.K.U. alleges for the first time on appeal that juvenile courts violate the due process rights of Black youths, like him, when imposing terms in JRA custody because of race-based implicit bias. Because D.K.U. alleges a violation of his constitutional rights, he has raised an appealable issue.[14]

As clarified at oral argument, D.K.U. concedes the Juvenile Justice Act, chapter 13.40 RCW, does not require that a court expressly find a defendant's race did not impact its sentencing decision.[15] Instead, he contends the due process clauses of the Fourteenth Amendment and of article I, section 12 require resentencing because the sentencing court failed to explain that implicit racial bias did not affect its decision. D.K.U. appears to argue his due process rights were impacted by the court's implicit racial bias or, at least, implicit bias within the

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[13] See State v. Osman, 126 Wn. App. 575, 579-81, 108 P.3d 1287 (2005) (reviewing an otherwise unappealable sentence under the Sentencing Reform Act, ch. 9.94A RCW, when the defendant alleged procedural and constitutional violations).

[14] Id.; see State v. Cho, 108 Wn. App. 315, 329, 30 P.3d 496 (2001) (allegation of a juror's implicit bias can be raised for the first time on appeal) (citing RAP 2.5(a)).

[15] Wash. Court of Appeals oral argument, State v. D.K.U., No. 82663-8-I (Mar. 11, 2022), at 19 min. 55, sec. through 20 min., 20 sec., https://www.tvw.org/watch/?clientID=9375922947&eventID=2022031076&startStreamAt=1195&stopStreamAt=1220.

judicial system that influenced the court's decision. Essentially, D.K.U. argues judicial bias affected his disposition.

Criminal defendants have a due process right to an impartial judge.[16] The appearance of fairness doctrine requires both actual impartiality and the appearance of impartiality.[17] The doctrine applies to judges and "other quasi-judicial decisionmaker[s]."[18] It does not apply to probation officers or others merely presenting information to the decisionmaker.[19]

We presume trial judges properly discharge their official duties without bias or prejudice.[20] But once a defendant presents evidence to the trial court of "'actual or potential bias,'"[21] the court is obligated to determine whether the defendant had or could have a fair and impartial hearing.[22] When a defendant alleges "no actual bias but the possibility of bias," then they must show "'not whether the judge is actually, subjectively biased, but whether the average judge in his position is

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[16] In re Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing U.S. CONST. amends. V, VI, XIV; WASH. CONST. art. I, § 22)).

[17] State v. Worl, 91 Wn. App. 88, 96, 955 P.2d 814 (1998) (citing State v. Post, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); State v. Dagenais, 47 Wn. App. 260, 261, 734 P.2d 539 (1987)).

[18] Post, 118 Wn.2d at 618 (citing Hoquiam v. Pub. Emp. Rels. Comm'n, 97 Wn.2d 481, 488, 646 P.2d 129 (1982)).

[19] Id.

[20] In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) (citing Kay Corp. v. Anderson, 72 Wn.2d 879, 885, 436 P.2d 459 (1967); Jones v. Halvorson-Berg, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)).

[21] Swenson, 158 Wn. App. at 818 (quoting Post, 118 Wn.2d at 619).

[22] Id. (quoting State v. Dominguez, 81 Wn. App. 325, 330, 914 P.2d 141 (1996)).

'likely' to be neutral, or whether there is an unconstitutional 'potential for bias' that is 'too high to be constitutionally tolerable.'"[23] If a defendant successfully challenges a discretionary decision for the first time on appeal by alleging judicial bias, the proper remedy is to remand for an evidentiary hearing about the alleged bias.[24]

In State v. Quijas, this court concluded a decline proceeding had been improperly conducted because the trial court failed to acknowledge or consider the possibility that implicit racial bias could influence its decision.[25] A teenaged gang member shot and killed a 17-year-old.[26] During the decline proceeding, the teenager presented evidence to the court that Hispanic teenagers like him were declined to adult court in a racially disproportionate manner.[27] The court granted the State's motion to decline to adult court without acknowledging either the allegation or evidence of racially disproportionate decline decisions.[28]

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[23] Id. at 822 (quoting Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed 2d 1208 (2009)) (internal quotation marks omitted).

[24] Cho, 108 Wn. App. at 329 (citing McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 552 n.3, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (plurality op.)); cf. State v. Berhe, 193 Wn.2d 647, 665-69, 444 P.3d 1172 (2019) (remanding for an evidentiary hearing about the possibility of racial bias influencing a jury verdict after the defendant presented evidence sufficient to allow an inference that bias impacted the verdict).

[25] 12 Wn. App. 2d at 365.

[26] Id. at 365-67.

[27] Id. at 367.

[28] Id. at 368.

This court concluded the trial court had a duty to consider the teenager's allegation of bias and failed to do so.[29]

> 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.[30]

Because the teenager's allegation of bias and supporting evidence triggered the trial court's duty to hold a hearing and the court failed to do so, its decision was reversed and remanded for reconsideration.[31]

Even when a party does not expressly raise the issue of judicial bias, the presumption of judicial impartiality can be overcome on appeal when the court misapplies a legal standard and the record reveals the influence of implicit racial bias.

In Matter of Dependency of K.W., our Supreme Court recently reversed a child placement decision and concluded the trial court abused its discretion because it gave "inappropriate weight to [child placement] factors that serve as proxies for race" and failed to give appropriate weight to other statutory factors.[32] The Supreme Court "condemned overreliance on similar factors in placement decisions [such as criminal history and immigration status] that can serve as

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[29] Id. at 375.

[30] Id.

[31] Id. at 376-77.

[32] No. 99301-7, slip op. at 35-36 (Wash. Feb. 17, 2022), www.courts.wa.gov/opinions/pdf/993017.pdf.

proxies for race and class."[33] It explained "that like all human beings, judges and social workers hold biases. . . . Therefore, actors in child welfare proceedings must be vigilant in preventing bias from interfering in their decision-making."[34] When making a placement decision, courts cannot rely upon "[f]actors that serve as proxies for race . . . to deny placement with relatives with whom the child has a relationship and is comfortable."[35]

The Black child in K.W. had been placed with his grandmother from age one into kindergarten when the Department of Children, Youth, and Families (DCYF) removed him from her care.[36] DCYF did so after a social worker was concerned, incorrectly and only for a matter of hours, that the grandmother was planning on leaving the child in an unapproved relative's care for six days.[37] Despite his other relatives' fitness and ability to care for him and the child's express desire to be placed with another relative or his grandmother,[38] DCYF refused. The trial court upheld DCYF's decision. Our Supreme Court concluded DCYF made an "arbitrary and improper"[39] decision that relied upon "factors that serve as proxies for race in order to deny placement with bonded relatives."[40] For

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[33] Id. at 29.

[34] Id.

[35] Id. (citing RCW 13.34.130(3)).

[36] Id. at 2-3, 5.

[37] Id. at 4-6.

[38] Id. at 30-31.

[39] Id. at 32.

[40] Id. at 28 (citing In re Custody of Smith, 137 Wn.2d 1, 20, 969 P.2d 21 (1998)).

example, DCYF denied placement with one aunt due solely to her prior involvement with a child welfare agency, which, "without more, can serve as a proxy for race or class, given that families of Color are disproportionately impacted by the child welfare system."[41] Based upon the evidence in the record and the trial court's decision supporting DCYF's placement decisions, the Supreme Court reversed because "the court relied upon impermissible factors and" misapplied the statute by "fail[ing] to give meaningful preference to the relative placements [the child] requested."[42]

Here, D.K.U. alleges, for the first time on appeal, that his race could have affected his sentence because of the presence of systemic bias in the judicial system. He does not allege actual bias by the sentencing judge.

"'[B]ias pervades the entire legal system in general and hence [minorities] do not trust the court system to resolve their disputes or administer justice evenhandedly.'"[43] "Our case law and history of racial discrimination provide ample support" to conclude a defendant's race can influence their sentence.[44] For

[41] Id. at 31-32 (citing J. Christopher Graham, Wash. State Dep't of Children, Youth & Families, 2019 Washington State Child Welfare Racial Disparity Indices Report (2020), https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf).

[42] Id. at 36.

[43] State v. Walker, 182 Wn.2d 463, 488 n.2, 341 P.3d 976 (2015) (Gordon McCloud, J., concurring) (internal quotation marks omitted) (quoting State v. Saintcalle, 178 Wn.2d 34, 42 n.1, 309 P.3d 326 (2013)).

[44] State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (citing cases); see State v. B.O.J., 194 Wn.2d 314, 332, 449 P.3d 1006 (2019) (González, J. concurring) ("There is considerable evidence that bias results in harsher dispositions for children of color, and for girls of color in particular.")

example, recent data specific to King County shows that Black youths are more likely to be placed in secure detention than Caucasian youths.[45]

Considering this history and supporting statistics, we share D.K.U.'s concern about the possibility that implicit racial bias could affect youth sentencing decisions. It is because of this history that Quijas held a court cannot ignore an allegation of bias "[w]hen confronted by such a claim, supported by some evidence in the record."[46] Similarly, a trial court is required to conduct a hearing about the possibility of racial bias influencing a jury verdict once it "becomes aware of the allegations that racial bias may have been a factor in the verdict."[47]

D.K.U. did not present a bias argument or supporting evidence to the trial court. The only mention of race was limited and not specific to D.K.U. When explaining her client's lack of engagement with services, defense counsel made a passing, general reference to how some members of the Black community feel about the justice system.

> I don't think it—that it's, you know, any secret that the, you know, people of the Black community have a hard time trusting the Court, trusting services that are connected to the court, which is why it doesn't surprise me that, you know, Ms. Haile is having, you know, more and more success in connecting with [D.K.U.] and building that—that trust, and why Mr. Brown, same thing, you know, and that—that this community of—of support people are working to step up and say, "What do you need? Let me—you know, let me

[45] King County Gov't, Zero Youth Detention Dashboard, Leading with Race Equity (updated Dec. 20, 2021), https://tableaupub.kingcounty.gov/t/Public/views/ZYD_Dashboard2021q3/Objective3-Measure2?:embed_code_version=3&:embed=y&:loadOrderID=0&:display_spinner=no&:showAppBanner=false&:display_count=n&:showVizHome=n&:origin=viz_share_link.

[46] Quijas, 12 Wn. App. 2d at 375.

[47] Berhe, 193 Wn.2d at 662.

> physically help you get the stuff that you need and get the—to get the stability that you need."
>
> So, I mean, when it comes down to, you know, an Option B versus a JRA sentence, I really—you know, the—the Court, other than like the—the amenability to treatment, you know, and like the availability of evidence-based or research-based treatment, like there's not much else that the Court has to consider when it comes to whether or not to give [D.K.U.] an Option B before. He hasn't had an Option B in the past. He hasn't had this opportunity. And, of course, it's different than something like an MI [manifest injustice] down because that 15 to 36 weeks is still there. It's still imposed. It's just suspended.
>
> And so, to me, I mean, I see it as, you know, a way for the Court to say, "Look, the—the crime that you committed was serious. It was a problem. Your—you know, your lack of engagement so far is not what we expect. But we're going to give you this opportunity with the heavy hand of the Court kind of hanging over your head to engage."[48]

Although defense counsel made a passing, implicit mention of D.K.U.'s race and how it could have impacted his engagement with court services, there was no allegation racial bias affected sentencing. Indeed, defense counsel told the court "there's not much else that the court has to consider" other than "amenability to treatment" and availability of treatment when deciding which disposition to impose.[49] Unlike Quijas, D.K.U. did not argue or present evidence of bias to the trial court.

The trial court acknowledged it rarely imposed a term in JRA custody instead of an alternative disposition. Parallel to the dependency in K.W., this arguably raised the possibility the court was imposing a sentence with a

[48] RP (Apr. 30, 2021) at 79-80.

[49] Id. at 79.

disproportionate impact for impermissible reasons related to race. But the court provided a detailed explanation for its decision that was grounded in the sentencing statute and did not rely on proxies for race.

An Option B disposition requires that a youth comply with court-ordered treatment options,[50] and, as urged by defense counsel, the trial court was concerned about D.K.U.'s amenability to and compliance with treatment. D.K.U. had been convicted years earlier of other thefts and an attempted second degree theft, and he failed to take advantage of multiple opportunities to engage in court-based services after not being placed in JRA custody. He then committed the current, "very serious charge" of second-degree robbery.[51] He failed to provide the court any "real proof of amenability [to treatment] other than the statements made here today,"[52] despite requesting an Option B alternative sentence and the court allowing him an extra 30 days after pleading guilty to prepare for the sentencing hearing. He did not provide "a treatment plan of any kind" to support his requested disposition, in part because he did not engage with the service providers that typically write such plans.[53] On this record, the trial court's decision and explanation were properly based upon the sentencing statute and do not give rise to an inference of racial bias.

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[50] RCW 13.40.0357.

[51] RP (Apr. 30, 2021) at 88.

[52] Id. at 90.

[53] Id.

Unlike Quijas, D.K.U. did not trigger the trial court's duty to inquire into the possibility of bias. And unlike K.W., the trial court's decision did not rely on impermissible proxies for race to misconstrue the applicable statute. Most importantly, we see no indicia of implicit racial bias in the trial court's thoughtful explanation of its decision.

Even assuming a duty to inquire into implicit racial bias may be triggered if a court's sentencing decision has a disproportionate impact on a person of color, the record as to D.K.U., presented for the first time on appeal, does not reveal that racial bias could have influenced the court's decision. On this record, D.K.U. fails to demonstrate a violation of his due process rights. Remand is not required for a bias hearing or for resentencing.

Therefore, we affirm.

WE CONCUR:

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 document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82663-8-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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