Supreme Court No. 99773-0
(COA No. 80345-0-1)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRE FRANKLIN JR,

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 AND DECISION BELOW

Andre Franklin, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision dated March 15, 2021, for which the Court denied Mr. Franklin's request for reconsideration on April 14, 2021.

B. ISSUES PRESENTED FOR REVIEW

1. The State's decision to charge 16-year-old Andre Franklin— a Black teenager— as an adult likely reflected the systemic racial bias that this Court has recognized permeates the criminal justice system. After the charge was ultimately adjudicated and sealed in juvenile court where it belonged, he moved to seal the most damaging part of this criminal history—the original adult charge for a class A offense—which hindered his ability to find housing and employment. The trial court applied Article I, section 10's presumption of open records and denied his motion to seal, even knowing he had successfully completed probation and sealed his juvenile offense.

This Court should accept review of the Court of Appeals opinion that affirmed the trial court's denial of Mr. Franklin's motion to seal. A child's adult criminal charge that is later

reduced and adjudicated in juvenile court should not be subject to the presumption of open courts, or alternatively, the interest of protecting a juvenile's confidentiality mandates sealing under *Ishikawa.*[1] RAP 13.4(b)(1)&(3).

2. The Court of Appeals refused to consider whether the trial court erred in applying Article I, section 10 to Mr. Franklin's motion to seal, finding this was a statutory question, rather than a "manifest error affecting a constitutional right" subject to review for the first time on appeal under RAP 2.5(a)(3). This interpretation of the applicability of Article I, sec. 10 to the State's adult criminal charge against a child is contrary to the plain language and logic of RAP 2.5(a), meriting review by this Court. RAP 13.4(b)(3).

3. The Court of Appeals also erroneously determined that Mr. Franklin's appeal of the trial court's denial of his motion to seal was moot based on the State's new allegation about a subsequent pending criminal charge in an unrelated case. This Court should accept review of the Court of Appeals decision that

[1] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

disregarded the well-established rule of appellate procedure that a record on appeal may not be supplemented by material that is not part of the trial court record. RAP 13.4(b)(1)-(4).

4. Alternatively, even if technically moot, this Court should find the question of whether the presumption of open courts applies to the adult criminal charge against a child whose case was adjudicated in juvenile court is a matter of public interest that warrants review. RAP 13.4(b)(1)-(4).

C. STATEMENT OF THE CASE

In 2016, when Andre Franklin was 16 years old, he was charged as an adult with robbery in the first degree because of mandatory auto-decline laws. RP 7; CP 12-13. This charge was ultimately dismissed and resolved in juvenile court. RP 6; CP 13. By 2019, Mr. Franklin had successfully completed the terms of the probation in juvenile court, and his juvenile court record was sealed. RP 6.

However, the State's original decision to charge him as an adult with robbery in the first degree remained unsealed. RP 6. At age 21 years old with a new family, Mr. Franklin had difficulty finding housing and employment because of this mark

on his adult record. RP 7. He was so far unable to qualify for anything other than temporary jobs because of the robbery charge. RP 10. He wanted to find a job with better pay and benefits to support his young family. RP 10-11.

Mr. Franklin asked the court to seal this remaining record related to his juvenile offense. RP 6-7. The State did not object to Mr. Franklin's request because it was a juvenile offense RP 6, 15. The trial court deemed Mr. Franklin's description of his challenges finding employment to be unverified "anecdotal information." RP 10. The trial judge stated he hears from other defendants with felony records on an "almost daily basis" telling the court "they were employed and are seeking, for example, work release." RP 10-11.

The trial court applied the *Ishikawa* factors and found Mr. Franklin did not identify "compelling privacy or safety concerns" that outweighed the public's interest in access to the court record that reflected the State's decision to charge him has an adult for an offense he committed when he was 16 years old. CP 16 FF 2.

On appeal, Mr. Franklin argued that court should not apply the presumption of open courts to an adult criminal charge against a juvenile, and alternatively, that the trial court erred in finding that the public's interest outweighed the rehabilitative goals of sealing in Mr. Franklin's case under *Ishikawa.* Appendix A (Op. at 2).

After Mr. Franklin filed his opening brief, the State designated court records from a different case that were not considered by the trial court in this case, and moved to dismiss Mr. Franklin's appeal as moot. Op. at 3, fn. 3. Mr. Franklin opposed the State's motion, and the commissioner passed the issue onto the Court Panel. Appendix B (august 2020 order). The court clerk also ruled Mr. Franklin could oppose the State's designation of additional documents from a different case in his reply brief, which Mr. Franklin did, arguing that there was no authority permitting the State to add documents of its choosing from a different criminal case to this appeal. Appendix C (September 2020 order); D (App. Reply Br.).

The Court of Appeals decided Mr. Franklin's appeal was moot based on the State's allegations that were not part of this

trial court record, without addressing Mr. Franklin's objection and without addressing the fact that the status of Mr. Franklin's juvenile court file does not control the trial court's decision in this motion to seal made pursuant to GR 15. Op. at 3-8.

D. ARGUMENT

As a matter of first impression, Article I, section 10 should not apply to the charging documents filed in adult court against a juvenile whose case is later adjudicated and resolved in juvenile court.

a. A juvenile's records are not subject to article I, section 10's presumption of open courts, which logically extends to all related proceedings.

Article I, section 10's presumption of open courts does not apply to juvenile offense records. *State v. S.J.C.*, 183 Wn.2d 408, 422, 352 P.3d 749 (2015). The trial court here presumed the State's initial decision to charge a 16-year-old child as an adult should remain open to the public, even when the charge was reduced and the case returned to juvenile court.

The presumption of open records that applies to adult proceedings "is directly contrary to this court's entire history regarding juvenile courts, in addition to every available indication of legislative intent." *S.J.C.*, 183 Wn.2d at 423. For rehabilitated former juvenile offenders, "the stigma of

permanently wearing the label of juvenile delinquent" is not appropriate. *Id.* at 429 (citing T. Marcus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records,* 29 U. Mich. J.L. Reform 885, 891, 905 (1996)).

"A publicly available juvenile court record has very real and objectively observable negative consequences, including denial of housing, employment, and education opportunities." *S.J.C.,* 183 Wn.2d at 432. Juvenile courts are intended to prevent adult recidivism, but lack of housing, employment, and education all increase the likelihood of recidivism. *Id.* at 432-33. The need for confidentiality is substantial, "both for the subject of the juvenile court record and for the juvenile courts' purpose of preventing adult recidivism." *Id.*at 432.

Accordingly, the legislature has "provided for distinctive treatment and enhanced confidentiality of juvenile court records." *Id.* at 422. Chapter 13.50 RCW governs records relating to the commission of juvenile offense. RCW 13.50.050(1). RCW 13.50.260(1)(a) requires the juvenile court to

hold regular sealing hearings where it shall administratively seal eligible juvenile records, including

> … the social file, and other records relating to the case as are named in the order. Thereafter, **the proceedings in the case shall be treated as if they never occurred,** and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed.

RCW 13.50.260(6)(a)(emphasis added).

A prosecutor's decision to charge a juvenile with a crime subject to auto-decline laws is a discretionary decision and tool that has been wielded disproportionately against children of color. Brief of Creative Justice, et al., as Amici Curiae, 2018 WL 1002075, at *10, *State v. Watkins*, 191 Wn.2d 530, 423 P.3d 830 (2018). The State's charging decision here likely reflects this systemic racial bias that results in Black teens being treated more harshly than their white counterparts, as the State first charged Mr. Franklin as an adult when he was 16 years old, but ultimately reduced the charge and his case was resolved in juvenile court where it belonged.

After successfully completing probation, Mr. Franklin's juvenile record was sealed. RP 7. However, the State's initial decision to charge him with robbery as an adult, rather than as

a juvenile, remained open to the public. RP 7. This record of the State's charging decision should have been presumptively sealed because Mr. Franklin was entitled to have the proceedings in the case shall be treated as if they never occurred." RCW 13.50.260(6)(a).

The court erroneously applied the *Ishikawa* factors to this initial adult charge that was ultimately adjudicated in juvenile court. *S.J.C.,* 183 Wn.2d at 435 (the individualized showing under the *Ishikawa* factors is not applied when sealing juvenile records). Instead of proceeding in light of the presumption in favor of sealing a juvenile offense records, the court denied Mr. Franklin's motion to seal based on the "strong presumption in favor of the openness to the courts and not sealing," RP 11.

The court thus failed to treat the "sealing, expunging, or destroying juvenile court records" as "the norm, rather than the exception." *S.J.C.*, 183 Wn.2d at 426. Applying the wrong presumption of openness to the State's charging decision against a 16-year-old, the trial court erroneously determined that sealing was not justified by "identified compelling privacy or

safety concerns that outweigh the public interest in access to the court record." CP 16 FF 2.

S.J.C. recognized the "very real and objectively observable negative consequences" on employment and housing that follows a criminal record. 183 Wn.2d at 432. But the trial court here denied this reality, instead finding Mr. Franklin's limited employment opportunity that was insufficient to support a family and move ahead in his life was less important than the public's right to view the State's mistaken decision to charge him as an adult when he was 16 years old. CP 16-17 FF 2.

This Court should accept review and hold the principles that underlie the court's treatment of a juvenile offense records apply to the State's adult criminal charge against a child when those charges are later dismissed or adjudicated in juvenile court. RAP 13.4(b)(1)&(3).

b. Even under an *Ishikawa* analysis, the public's interest in open records cannot outweigh a child's interest in privacy and rehabilitation.

In adult criminal proceedings, justice "shall be administered openly." Const. art. 1, § 10; *Ishikawa*, 97 Wn.2d at 36. However, the public's right of access is not absolute, and may

be limited to protect other interests. *Id.* When a court restricts access to criminal hearings or the records from hearings, the court follows the steps laid out in *Ishikawa.*[2] *Id.* at 37.

The court's application of the *Ishikawa* factors to Mr. Franklin's motion to seal was flawed because at no time did the court give any weight to the fact that his offense was committed when he was a child, adjudicated and sealed in juvenile court, and that he had a significant interest in privacy and rehabilitation. RP 11-12; *S.J.C.* 183 Wn.2d at 432.

In applying the first *Ishikawa* factor, the trial court found Mr. Franklin failed to show sealing "is justified by identified compelling privacy or safety concerns." CP 16 FF 2. Mr. Franklin told the court he applied for jobs and was told he would not be hired because of the robbery charge on his record. RP 10.

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[2] The factors are: (1) the proponent of the sealing must make some showing of a "serious and imminent threat to some other important interest;" (2) anyone present when the sealing motion is made must be given an opportunity to object; (3) the court, proponents, and objectors must "carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened;" (4) "[t]he court must weigh the competing interests of the defendant and the public;" (5) "[t]he order must be no broader in its application or duration than necessary to serve its purpose." 97 Wn.2d at 38-39.

The court mistook Mr. Franklin's ability to find only temporary, low pay work as evidence that Mr. Franklin could find employment, and thus found there was no "imminent threat" to an "other important interest." CP 16 FF 2. The trial court failed to consider Mr. Franklin's age and the goals of juvenile court, which are to promote rehabilitation and avoid precisely the damage of a criminal record Mr. Franklin experienced. RP 10-11; *S.J.C.*, 183 Wn.2d at 432.

As to the second *Ishikawa* factor, the court noted there was no objection from the State or public to this motion to seal. RP 9, 12. The State specified that oftentimes it will object to sealing an adult record, but here did not because Mr. Franklin's case was adjudicated in juvenile court. RP 15.

The court's failure to consider Mr. Franklin's interest and right to rehabilitation resulted in a flawed consideration of the third through fifth factors. The court found Mr. Franklin had not shown the proposed sealing would be "the least restrictive means" available and "effective in protecting the interests threatened." CP 17 FF 3. The court did not specifically identify the interest that is threatened by this adult charge against a

child remaining public information. The court found under the proposed sealing, his name and charge would remain public information under GR 15(c)(4) and so Mr. Franklin's goals would not be met through sealing. CP 17 FF 3. The court also concluded that "Franklin has not shown why redaction, versus sealing, would not be sufficient." CP 17 FF 5.

Regardless of the particular language of GR 15, this rule is not "interpreted to circumvent or supersede constitutional mandates." *State v. Waldon*, 148 Wn. App. 952, 965, 202 P.3d 325 (2009). Thus, if under an *Ishikawa* analysis, Mr. Franklin's interest in privacy and rehabilitation justify sealing or redacting a court record, any constitutional requirements must be met regardless of what is required by court rule. The court could have considered whether redaction would accomplish the request made by sealing; it is not a basis to simply deny the motion and keep the damaging record public. *See, e.g., Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6, 330 P.3d 168 (2014) (an order to redact a court record is treated as an order to seal). Finally, even if GR 15 limited the amount of information that

could be sealed, Mr. Franklin believed it "is better to have first degree robbery not appearing on his adult record." RP 17.

The court failed to consider the context of Mr. Franklin's adult charge, which alleged conduct that belonged in juvenile court. This adult record tied to this juvenile adjudication is "deserving of more confidentiality than other types of records." *S.J.C.*, 183 Wn.2d at 417. This Court should accept review and hold that a court's failure to consider this interest in light of the *Ishikawa* factors was error. RAP 13.4(b)(1)-(3).

c. The Court erred in ruling RAP 2.5(a)(3) did not apply, as the court's denial of Mr. Franklin's motion turned on the misapplication of article I, section 10.

Whether sealing is required under article I, section 10 is a constitutional question subject to review under RAP 2.5(a)(3).

The Court of Appeals' statement of facts in the opinion establish that the application of Article I, section 10 was central to the trial court's ruling: "the superior court reminded the parties that Washington State Constitution article I, section 10 establishes a presumption of openness and Washington courts disfavor sealing court records." Op. at 2. Mr. Franklin's appeal challenges the court's misapplication of this constitutional

provision. The question of the applicability of article I, section 10 affects a constitutional right. RAP 2.5(a).

Still, the Court of Appeals determined that because Mr. Franklin argued this constitutional principle should *not* govern the trial court decision, it is not subject to review under RAP 2.5(a). Op. at 5-6. Paradoxically, in refusing to consider Mr. Franklin's challenge to the application on art. I, § 10, this Court conclusively applied the very constitutional mandate Mr. Franklin challenges: "In fact, the state constitution article I, section 10 does the opposite, and the proponent of sealing has the burden of overcoming the presumption of openness through the *Ishikawa* analysis." Op. at 5-6.

This Court also inaccurately reframed the question on appeal, denying Mr. Franklin's claim because "the basis to seal juvenile court records is statutory, not constitutional." Op. at 6. This mischaracterizes Mr. Franklin's argument. Mr. Franklin was clear that he was *not* moving to seal the adult criminal charge under the juvenile sealing statutes, nor could he, where a juvenile court is a court of limited jurisdiction. *See, e.g., State v. D.V.K.*, ___ Wn. App.2d ____, ¶ 8, 483 P.3d 813 (2021) ("The

provisions of chapters 13.04 and 13.40 RCW . . . [are] the exclusive authority for the adjudication and disposition of juvenile offenders except where otherwise expressly provided").

Had the Superior Court granted Mr. Franklin's motion to seal, his adult criminal charge filed in Superior Court would have been sealed pursuant to GR 15, not RCW 13.50.260. Even if it were true that Mr. Franklin's juvenile record is now unsealed under RCW 13.50.260(8)(a), this does not control the issue on appeal, which pertains only to the record of the State's decision to charge him as an adult.

d. The Court of Appeals found Mr. Franklin's appeal was moot based on allegations that were not part of the trial court record, in violation of this Court's well-established case law and rules governing appellate procedure.

Over Mr. Franklin's objection, the Court of Appeals considered documents from a different criminal case that were not considered by the trial court in this case. Op. at 3.

A "record on appeal may not be supplemented by material which has not been included in the trial court record." *Snedigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990). The Court of Appeals relied on documents the State added to this

appeal from a separate criminal case that were not considered by the trial court. Op. at 3. The Court's opinion states that Mr. Franklin was able to oppose the State's reliance on documents outside the appellate record in his brief, but does not address the substance of his opposition to this unauthorized procedure. Op. at 3, fn 1; Reply Br. of App. Mr. Franklin opposed the State adding select documents from subsequent different cases because there was simply no authority that permits the State to designate whatever documents it wishes about events that occur *after* the court's decision in an effort to render the appeal moot. *Hoddersen*, 114 Wn.2d at 164.

The Court of Appeals did not address this improper procedure, but simply relied on these allegations of new charges that were not part of the trial court record. Op. at 6. This Court should grant review of the Court of Appeals decision that failed to follow the well-established limits of appellate review. RAP 13.4(b)(1)-(3).

e. Alternatively, this is a matter of continuing and public interest warranting review by this Court.

This Court may still review an issue is technically moot when the matter is of "continuing and substantial public interest." *State v. B.O.J.,* 194 Wn.2d 314, 321, 449 P.3d 1006 (2019). Courts consider the following criteria in determining whether a sufficient public interest is involved: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur. *Id.*

Constitutional questions are public in nature. *State v. Beaver,* 184 Wn.2d 321, 331, 358 P.3d 385 (2015). Mr. Franklin raises an unresolved constitutional question involving the application of article I, § 10, and whether the privacy protections of juvenile records apply when the State elects to charge a child as an adult, but the child is ultimately afforded the protections inherent in juvenile court prosecution.

The Court of Appeals did not provide a rationale for finding this was not a matter of substantial public interest. Op. at 8. Many children are charged under mandatory decline laws, but not convicted of the charged offense. Because of auto-decline

laws, which broadly encompass children who should be tried in juvenile court but are charged as adults, this will be a recurring issue. This is a general problem, not a set of specific facts unique to Mr. Franklin.

Finally, even though the status of Mr. Franklin's juvenile records after an alleged arrest and criminal charge does not control this issue on appeal, these allegations should not be used to deny him the right to appeal. This Court vowed to combat "racialized policing and the overrepresentation of Black Americans in every stage of our criminal and juvenile justice systems."[3] RCW 13.50.260(8)(a), which unseals a juvenile's record based on an arrest, will disproportionately harm young people of color like Mr. Franklin, who is Black. An arrest and criminal charge for which Mr. Franklin is presumed innocent should not be used to deprive him of his right to appeal the court's erroneous denial of his motion to seal an adult criminal

[3] Letter from The Washington State Supreme Court, to Members of the Judiciary and the Legal Community (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

charge under auto-decline laws which themselves are rooted in the racist criminalization of Black children.

The issues raised in Mr. Franklin's appeal are a matter of public interest, and should be decided by this Court even if technically moot.

E. CONCLUSION

Based on the foregoing, petitioner Andre Franklin respectfully requests that review be granted pursuant to RAP 13.4(b)(1)-(4).

DATED this 14th day of May, 2021.

Respectfully submitted,

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APPENDIX

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APPENDIX A

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Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ANDRE FRANKLIN JR, Appellant.	No. 80345-0-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — In 2016, the State charged Andre Franklin Jr., then 16-years-old, as an adult with robbery in the first degree and possession of a stolen vehicle in King County Superior Court. The matters were eventually resolved in juvenile court and those juvenile records were later sealed. Franklin unsuccessfully moved to seal the records of the adult charges he received as a juvenile and now appeals. After filing his notice of appeal, Franklin was charged with three new serious violent felonies and his juvenile records of the 2016 incident are no longer sealed. The State argues his appeal is moot because this court can no longer provide effective relief. We agree and dismiss.

FACTS

On January 10, 2016, then 16-year-old Franklin and three of his friends took Uber driver Joseph N. Atak's Dodge Stratus at gunpoint. Under Washington's auto-decline laws, the State charged Franklin as an adult for the

crime of robbery in the first degree and possession of a stolen vehicle. After plea negotiations, the superior court dismissed the case and the State refiled the matters in juvenile court where Franklin pleaded guilty to attempted robbery in the second degree and unlawful possession of a firearm in the second degree.

In September 2018, Franklin successfully moved to seal his juvenile court records under RCW 13.50.260. In April 2019, Franklin moved to seal the superior court records of the adult charges filed for the same matters. The State did not object to the motion but requested a hearing for the superior court to weigh the five factors articulated in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) and GR 15. During the hearing, the superior court reminded the parties that Washington State Constitution article I, section 10 establishes a presumption of openness and Washington courts disfavor sealing court records. The superior court considered the Ishikawa factors and denied Franklin's motion to seal.

Franklin appeals arguing state constitution article I, section 10's presumption of openness, and thus, the Ishikawa factors, does not apply to superior court records of adult charges for matters involving juveniles when those matters were ultimately resolved and sealed in juvenile court. In the alternative, Franklin argues that the superior court's "application of each of [the Ishikawa] factors was flawed because at no time did the court give any weight to the fact that Mr. Franklin's offense was committed when he was a child, adjudicated and sealed in juvenile court, and that he had a significant interest in privacy and rehabilitation."

Four months after Franklin filed his notice of appeal, Franklin allegedly committed robbery in the second degree and two counts of robbery in the first degree. The State filed charges in March 2020. The State obtained a court order confirming the nullification of the motion to seal Franklin's juvenile court records under RCW 13.50.260(8)(b).[1]

DISCUSSION

We review a superior court's decision to seal or nullify a previous order to seal records for abuse of discretion. State v. Richardson, 177 Wn.2d 351, 357, 302 P.3d 156 (2013).

Article I, section 10 of the state constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." We commonly refer to this section as establishing a constitutional presumption of openness. We apply this presumption to keep court records open to review by the general public. To determine whether the moving party has overcome the presumption and is entitled to seal their court records—thereby restricting public access to the records—a superior court will apply the following five Ishikawa factors:

> 1. The proponent of closure [and/]or sealing must make some showing of the need for doing so, and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.

[1] The State filed a motion to designate records of Franklin's subsequent felony charges and the order nullifying the previous order sealing his juvenile court records. A commissioner of this court granted the State's motion. Franklin requests this court strike reference to those documents. We deny that request because the records are the basis of the State's mootness argument and Franklin was given an opportunity to brief that issue. RCW 13.50.260(8)(b) states that "[a]ny charging of an adult felony subsequent to the sealing [of the juvenile records] as the effect of nullifying the sealing order."

> 2. Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Parvin, 184 Wn.2d 741, 765-66, 364 P.3d 94 (2015) (alteration in original) (quoting Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993) (citing Ishikawa, 97 Wn.2d at 36-39)).

Our legislature treats juvenile court records "as different from adult criminal court records and [juvenile court records] have been subject to legislation providing increased confidentiality for them." State v. S.J.C., 183 Wn.2d 408, 430, 352 P.3d 749 (2015); See RCW 13.50.260, RCW 13.50.250. As the Supreme Court explained:

> [W]e have always recognized that the legislature is in the unique and best position to publicly weigh the competing policy interests raised in the juvenile court setting, particularly as it pertains to the openness of juvenile court records. As discussed above, from the time of this state's first juvenile court legislation, statutes have consistently provided for distinctive treatment and enhanced confidentiality of juvenile court records. Our own precedent holds a presumption of openness is not constitutionally required because of the fundamental differences between a juvenile offender proceeding, which seeks to rehabilitate the juvenile, and an adult criminal proceeding, which seeks to deter and punish criminal behavior.

S.J.C., 183 Wn. 2d at 422.

Waiver

Franklin argues the presumption of openness does not apply to court records involving a juvenile charged as an adult and ultimately convicted in juvenile court. The State argues that because Franklin did not raise this argument below, Franklin waived this argument and we should deny consideration. Franklin does not deny he failed to make this argument before the superior court but argues he raises a manifest constitutional error that is reviewable for the first time on appeal under RAP 2.5(a)(3).

Generally, we will not consider issues raised for the first time on appeal. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019). We recognize an exception to that rule where the appellant raises a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). To establish a manifest error affecting a constitutional right, the appellant must identify a constitutional error and show how the error likely prejudiced their rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). "It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." Id. at 927 (citing State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). "Thus, a court previews the merits of the constitutional argument first raised on appeal to determine if it is likely to succeed." State v. Reeder, 181 Wn. App. 897, 912, 330 P.3d 786 (2014).

Franklin has not raised a manifest constitutional error for two reasons. First, Franklin does not have a constitutional right to seal his records. In fact, the state constitution article I, section 10 does the opposite, and the proponent of

sealing has the burden of overcoming the presumption of openness through the Ishikawa analysis. 97 Wn.2d at 37-38. Second, the basis to seal juvenile court records is statutory, not constitutional. Thus, Franklin waived this argument.

Mootness

In the alternative, Franklin argues that the superior court abused its discretion because its application of the Ishikawa factors was flawed "because at no time did the court give any weight to the fact that Mr. Franklin's offense was committed when he was a child, adjudicated and sealed in juvenile court, and that he had a significant interest in privacy and rehabilitation." The crux of Franklin's argument during the motion to seal was that Franklin's "juvenile court record has now been sealed." As Franklin's counsel articulated,

> So I'd argue that not only the fact that he was 16 years old when this happened but the fact that it's already been sealed by another department of the superior court. Both of those weigh towards defeating the presumption of not sealing.

The State contends Franklin's argument became moot when the superior court nullified the previous order sealing Franklin's juvenile court records after the State charged Franklin as an adult with new felonies.

Generally, we do not consider moot issues. State v. T.J.S.-M., 193 Wn.2d 450, 454, 441 P.3d 1181 (2019). "A case is moot if we can no longer provide effective relief on appeal." Id. at 454.

Franklin argues that this court could still provide effective relief because the adult charges Franklin received as a juvenile would be removed from public view regardless of what happens in the future with his juvenile court file. We

disagree. We can no longer provide effective relief because the juvenile court records related to the same adult charges filed in superior court are no longer sealed. As the State and lower court noted, even if the records of the adult charges Franklin received as a juvenile were to be sealed, the existence of a court file sealed in its entirety is available for viewing by the public on court indices, which includes the case number, names of parties, case type, and charges in criminal cases. GR 15(c)(4).

Franklin argues that even if this issue is technically moot, we should review it because it "involves 'matters of continuing and substantial public interest.' " State v. B.O.J., 194 Wn.2d 314, 321, 449 P.3d 1006 (2019) (citations omitted). We consider three criteria in determining whether "a sufficient public interest is involved: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." Id. at 321. "The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are sufficiently important to the appellate court. This exception is not used in cases that are limited to their specific facts." State v. Beaver, 184 Wn. 2d 321, 331, 358 P.3d 385, 390 (2015). In considering mootness, appellate courts also "consider the likelihood that the issue will never be decided by a court due to the short-lived nature of the case." B.O.J., 194 Wn. 2d at 321 (quoting Philadelphia II v. Gregoire, 128 Wn.2d 707, 712, 911 P.2d 389 (1996)).

Franklin argues that even if his appeal to seal is moot, his case "raises a constitutional question about the presumption of open courts in relation to adult records created for juvenile offenders." Despite Franklin's attempt to frame the issue as a constitutional question, Franklin is actually asserting the statutory right to sealing juvenile court records extends to the records of his charges filed in adult court when he was a juvenile. That is not a constitutional right.

Also, Franklin has not persuaded us that individuals who have had their juvenile records sealed will not be able to seal related records of their adult charges in superior court as long as they satisfy the Ishikawa factors.[2] This also is not a circumstance where the short-lived nature of the case would prevent it from being decided by a court. Franklin's argument that we should disregard the mootness of this case because the issue concerns matters of continuing and substantial public interest is unpersuasive.

We dismiss the appeal as moot.

Colum, J.

WE CONCUR:

Brennan, J.

Chun, J.

[2] As the lower court found, "Franklin asserts in his unsworn Brief that '[h]aving applied for numerous positions at various companies, [Franklin] has not been successful in gaining employment." Yet at the June 26 hearing, Franklin said that he has obtained 'temp service jobs.' " The first Ishikawa factor requires the proponent of sealing to make some showing of the need for doing so, and where that need is based on a right, the proponent must show a 'serious and imminent threat' to that right. Ishikawa, 97 Wn.2d at 36-38.

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

STATE OF WASHINGTON, Respondent, v. ANDRE FRANKLIN JR., Appellant.	)	No. 80345-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Andre Franklin Jr., having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

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State of Washington

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CASE #: 80345-0-I
State of Washington, Respondent v. Andre Franklin, Appellant

Counsel:

The following notation ruling by Commissioner Jennifer Koh of the Court was entered on August 31, 2020, regarding respondent's motion to dismiss as moot:

The State has filed a motion to dismiss Andre Franklin's appeal as moot. Franklin opposes the motion, arguing that his appeal is not moot and, even if viewed as moot, should be decided as a matter of public interest. Because it appears that the question of whether any issue in this case is moot may be tied up with the merits of the appeal, the motion is passed to the panel. The parties may address mootness in the Brief of Respondent and the Reply Brief of Appellant.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

APPENDIX C

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 80345-0-I
State of Washington, Respondent v. Andre Franklin, Appellant

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on September 9, 2020, regarding Respondent's Motion to Allow Designation of Records from Different Cases Pertaining to the Same Appellant:

> The State's motion is granted as follows. The State may designate records from related cases for consideration by the panel. If appellant believes some of the documents are not properly before this Court, he may include argument to that effect in his reply brief.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

APPENDIX D

No. 80345-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDRE FRANKLIN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. This Court should strike the State's reference to documents from a different criminal case that were not considered by the trial court in this case.

As a preliminary matter, because the additional documents designated by the State on appeal are from a different criminal case pertaining to matters that were not considered by the trial court in this case, this Court should strike the State's brief that references these other proceedings throughout.

A "record on appeal may not be supplemented by material which has not been included in the trial court record." *Snedigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990). The State cites no rule of appellate procedure or other authority that permits the State to select documents of its choosing from a separate criminal case to supplement another record on appeal. The State cites to RAP 9.10 in a footnote, but this rule pertains only to additions to the record of earlier trial court proceedings. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593, 849 P.2d 669 (1993).

Adding information to the appellate record is allowed under RAP 9.10 only if this Court concludes the existing record "is not sufficiently complete to permit a decision on the merits of the issues presented for review." *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wn. App. 859, 891, 251 P.3d 293 (2011), *as amended* (July 11, 2011). In *Diversified,* the materials the party sought to supplement the record with were not before the trial court at the time of the trial because they were generated two years after the trial. *Id.* They were thus not "necessary to reach a decision on the merits of the trial rulings at issue in this appeal." *Id.* The same is true here. Because the documents the State has selected from a different criminal case occurred after the trial court's decision in this case, they did not, and could not, have any bearing on the trial court's decision at issue in this appeal.

RAP 9.11 is a limited remedy under which this court may direct that additional evidence may be taken if six enumerated criteria are met. *Id.* The State does not cite to this rule as a basis for admission, as these criteria for supplementing the record are not present here.

By the State's logic and its method of litigating this case on appeal, it could select any filings from subsequent litigation in a different criminal case, designate these documents, and argue they control the earlier issue on appeal, even though this information was not known to the trial court and thus had no bearing on the trial court's ruling on appeal. It is telling that the State cites no legal authority permitting it to proceed in this manner, as it is fundamentally contrary to the purpose and procedure of appellate review. This court should strike the State's brief and order it to refiled after excluding reference to the documents that are not part of this trial court record. RAP 10.4, 10.7. Br. of Resp. at 4, 5, 6, 8, 9, 10, 16, 18.

2. **Mr. Franklin's appeal of his motion to seal is not moot; even if it were moot, Mr. Franklin's case raises a constitutional question about the presumption of open courts in relation to adult records created for juvenile offenders—an issue of first impression in need of decision by this Court.**

    a. The possible unsealing of Mr. Franklin's juvenile record does render this appeal moot.

The State's argument that this case is moot turns on documents that were not part of the trial court record, and as discussed in section 1, *supra,* these allegations are not part of

this record and should not be considered by this Court. Additionally, as the State points out, unsealing of his juvenile record can only occur by court order, and there is no evidence this has occurred in Mr. Franklin's case. Br. of Resp. at 4.

But even if this Court were to consider the State's submission of documents from another proceeding, they are not dispositive, because their purported effect on Mr. Franklin's juvenile record does not control the issue here, which is whether an adult criminal record for a juvenile whose case was ultimately resolved in juvenile court is subject to the presumption of open courts under article I, § 10, which our Supreme Court has deemed otherwise inapplicable to children charged in juvenile court, like Mr. Franklin.

The mootness doctrine does not apply here, because this Court can provide effective relief in Mr. Franklin's case. *State v. T.J.S.-M.*, 193 Wn.2d 450, 454, 441 P.3d 1181 (2019). Appellate relief in this case would result in the court properly considering Mr. Franklin's motion to seal the State's *adult* criminal charge, removing from public view a very damaging portion of Mr.

Franklin's criminal history, regardless of what happens in the future with his juvenile court file.

Mr. Franklin's right to have the adult charge that resulted in a juvenile adjudication sealed does not hinge on whether at this moment his juvenile court file may or may not be sealed. Rather, when a court decides whether to seal an adult criminal charge that was adjudicated as a juvenile offense, article I, § 10 does not control. He is entitled to the presumption in favor of sealing and privacy of juvenile records because the State's charging decision falls into the category of records that are presumptively sealed, or "treated as if they never occurred" in respect to his juvenile offense under RCW 13.50.260(6)(a). Br. of Appellant at 5-10.

Mr. Franklin's citation to the juvenile sealing statute supports his argument for sealing the adult criminal charge; however had the Superior Court granted Mr. Franklin's motion to seal, his adult criminal charge would have been sealed pursuant to GR 15, not RCW 13.50.260(6)(a). Thus, even if it were true that his juvenile record is now unsealed under RCW 13.50.260(8)(a), this does not control the issue on appeal, which

pertains only to the record of the State's decision to charge him as an adult for conduct he committed as teenager.

Ultimately the status of Mr. Franklin's juvenile records is separate from the question at issue here, which is whether he is entitled to seal the State's decision to charge him as an adult for a more serious offense than the one he was adjudicated for in juvenile court pursuant to GR 15, and whether article I, § 10 applies to this decision. An adult criminal charge—more serious than the reduced offense in juvenile court— carries a particular onus distinct from a juvenile adjudication, whether sealed or unsealed. Mr. Franklin is entitled to have this adult charge sealed regardless of whether his juvenile record is sealed. This issue is not moot.

Mr. Franklin's second argument is not moot either, because the purported effect of an arrest on Mr. Franklin's juvenile court records has no bearing whatsoever on whether the court erred in its application of the *Ishikawa*[1] factors in refusing to seal Mr. Franklin's adult criminal record.

[1] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

The State suggests that a new criminal allegation compels unsealing of his adult criminal record. Br. of Resp. at 8. It does not. Under GR 15(e)(2), there must proof of "compelling circumstances" for a record to be unsealed, and this will occur "only upon motion and written notice." The State does not explain what compelling reasons require unsealing a child's adult criminal charge, but unsealing is by no means automatic under these circumstances: "'compelling circumstances' for unsealing exist when the proponent of continued sealing fails to overcome the presumption *of openness* under the five-factor *Ishikawa* analysis. In either case, the trial court must apply the factors and enter findings supporting the decision." *State v. Richardson*, 177 Wn.2d 351, 363, 302 P.3d 156 (2013).

This Court should reject the State's effort to deprive Mr. Franklin of relief in this appeal based on allegations outside of this record and presuppositions based on mere possibilities that are not determinative of the issue on appeal in this case.

b. Whether the presumption of openness applies to a child's adult criminal record raises a question of substantial public interest in need of decision by this Court.

This Court may still review an issue is technically moot when the matter is of "continuing and substantial public interest." *State v. B.O.J.,* 194 Wn.2d 314, 321, 449 P.3d 1006 (2019). Courts consider the following criteria in determining whether a sufficient public interest is involved: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur. *Id.* Mr. Franklin's case meets all three criteria.

Constitutional questions are public in nature. *State v. Beaver,* 184 Wn.2d 321, 331, 358 P.3d 385 (2015). Mr. Franklin raises two claims about article I, § 10 which involve a substantial public interest to juveniles who are charged with crimes in adult court but later adjudicated of lesser crimes in juvenile court.

The State claims that Mr. Franklin's case is fact specific and not "an ongoing and regularly occurring legal question." Br. of Resp. at 10. However, many children are charged under mandatory decline laws, but not convicted of the charged offenses. *See, e.g.,* Keri-Anne Jetzer, *Washington State Office of Financial Management, Juveniles Sentenced As Adults and Juvenile Decline Hearings*, Research Br. no. 72., p. 3 (finding that between 2007 and 2013, the total number of charged offenses for mandatory declines was 122 and the total number of convicted offenses was 97) (Appendix). Because of auto-decline laws, which broadly encompass children who should be tried in juvenile court but are charged as adults, this will be a recurring issue.

Our courts' and society's recent recognition and concern for "racialized policing and the overrepresentation of Black Americans in every stage of our criminal and juvenile justice systems" further supports finding this is a matter of public interest. [2] Young Black men like Mr. Franklin are more likely to

[2] Letter from The Washington State Supreme Court, to Members of the Judiciary and the Legal Community (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/

be burdened by the State's charging decisions that disproportionately criminalize Black children, which makes this a matter of substantial public interest.

The effects of a criminal conviction as barriers to employment and housing— just as Mr. Franklin informed the court he was experiencing as a result of his criminal charge— are so severe that they have been labeled a form of "civil death." *Utah v. Strieff*, 579 U.S. ___, 136 S. Ct. 2056, 2070, 195 L. Ed. 2d 400 (2016) (Sotomayor, J., dissenting) (anyone who is arrested "will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check.").

This legalized exclusion from the work force, housing, and civil society disproportionately affects Black people. Where about 8.6 percent of the total adult population has a criminal conviction, the proportion of Black people with a criminal conviction is much greater: "approximately one-third of the adult

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Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

African-American population" has a criminal conviction. David J. Norman, *Stymied by the Stigma of A Criminal Conviction: Connecticut and the Struggle to Relieve Collateral Consequences,* 31 Quinnipiac L. Rev. 985, 989 (2013).

This is a general problem, not a set of specific facts unique to Mr. Franklin, and it is a question that will disproportionately affect youth of color, not just Mr. Franklin. This Court should decide whether article I, § 10 applies to a courts' decision to seal the most damaging part of a juvenile's record—the State's original decision to charge a child as an adult for a more serious offense than what he is ultimately adjudicated for in juvenile court.

Even if this Court considered the State's assertion of facts outside this record related to Mr. Franklin's alleged subsequent conduct after the court refused to remove a barrier to Mr. Franklin's access to meaningful employment and housing opportunities, in the end this underscores the need for this Court to review the legal issues in Mr. Franklin's case, not deny him review because of it. Courts recognize "participation in pro-social behaviors like employment, education and civic

engagement—the very things that people with criminal records are often barred from participating in—actually reduce recidivism." *Doe v. United States*, 168 F. Supp. 3d 427, 429 (E.D.N.Y. 2016) (internal citation omitted). The barriers that a criminal record has on employment and housing opportunity are well known. *Id.* The court's denial of Mr. Franklin's motion to seal his adult criminal record even though his case was adjudicated in juvenile court denied him this fundamental access to civil society, which in turn, increased his risk of recidivism.

This unresolved constitutional question involving the application article I, § 10, and whether the privacy protections of a juvenile conviction extend to this portion of a child's criminal record meets all three criteria for review even if deemed technically moot.

3. The trial court's error of law was manifest constitutional error that is fully developed for review under RAP 2.5(b)(3).

Mr. Franklin's claim on appeal that article I, §10's presumption of openness does not apply to criminal charges

brought against a child that are ultimately resolved in juvenile court easily satisfies the RAP 2.5(a)(3) criteria.

An error is manifest if it is of constitutional magnitude and results in "practical and identifiable consequences at trial." *State v. A.M.*, 194 Wn.2d 33, 39, 448 P.3d 35 (2019). A court first looks to whether the asserted claim implicates a constitutional interest as compared to another form of trial error. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Whether article I, § 10 applies to the statutory sealing of juvenile court records is a constitutional question. *State v. S.J.C.*, 183 Wn.2d 408, 412, 352 P.3d 749 (2015). The court next considers whether this error "had practical and identifiable consequences at trial." *A.M.*, 194 Wn.2d at 40.

In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99. The facts necessary to adjudicate the error must be apparent from the record on appeal. *State v. McFarland,* 127 Wn.2d. 322, 333, 899 P.2d 1251 (1995).

Mr. Franklin's argument that the presumption of open courts should not apply to his juvenile history in adult court is a question of law for which all necessary facts are developed for consideration on appeal. The trial court applied article I, § 10's presumption of open courts, but it was also well aware that this presumption did not apply to juvenile proceedings. Mr. Franklin pointed out to the court that his juvenile record had been sealed, which his attorney argued, as a matter of logic and fairness, should control the court's decision to seal the remaining, unsealed portion the criminal record. RP 7-8. Mr. Franklin specifically argued that the presumption of open records should not apply the same as if this were an adult criminal record. RP 18 ("I would argue that because he ended up momentarily in adult court because he was 16 when the offense occurred and that the case was, in fact, ultimately resolved in adult court, that the presumption against sealing is—is reduced").

Even though the trial court did not specifically rule on the legal and constitutional raised on appeal, this Court reviews the legal issue here de novo. *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 217, 444 P.3d 1235 (2019), *review denied,* 195 Wn.2d

1013, 460 P.3d 183 (2020) (questions of constitutional and statutory interpretation are reviewed de novo). This Court should review Mr. Franklin's first issue because is a constitutional question of law that requires no additional facts to resolve.

4. The same concerns for privacy and juvenile rehabilitation that applied to Mr. Franklin's juvenile offense apply to the State's initial decision to charge him as an adult.

To the extent that State believes that Mr. Franklin's argument is that he is entitled to have his records sealed based on the authority of the juvenile code, the State misconstrues his argument. Rather, his argument applies the reasoning and holding of *S.J.C.,* which does not apply article I, § 10's requirements when a court seals a juvenile court conviction. 183 Wn.2d at 412. Whether *S.J.C.*'s interpretation of article I, § 10 applies to the State's decision to charge him as an adult when the court decides a motion to seal under GR 15 is a legal question for this Court, not as claimed by the State, a policy argument for the legislature. Br. of Resp. at 15.

S.J.C. recognized that juveniles enjoy the added protections of juvenile court "[s]o long as the juvenile court retained the case," 183 Wn.2d at 416, which applies in Mr. Franklin's case, because the juvenile court gained jurisdiction over his criminal charge. He should not be subject to adult treatment simply because the State elected to charge him with a more serious offense than he was ultimately adjudicated of in juvenile court.

The juvenile sealing statutes do not limit the juvenile court's file to only records created by the juvenile court. RCW 13.50.260(1)(a) requires administrative sealing with the goal of ensuring "the proceedings in the case shall be treated as if they never occurred." RCW 13.50.050(13) specifically excludes from sealing "identifying information held by Washington State Patrol." This exclusion "does not include information regarding criminal activity, arrest, charging, diversion, conviction or other information about a person's treatment by the criminal justice system or about the person's behavior." *Id.* Thus the juvenile statutes' concern for a juvenile's record recognizes there is an interplay with other agencies and courts, and recognizes the

goal in sealing the juvenile record is to treat the proceeding as if it never occurred. The initial adult charge in criminal court must necessarily be entitled to the same presumption of closure given to a juvenile record to logically achieve this purpose. *S.J.C.'s* rationale should apply to all parts of the juvenile record, even those maintained in the adult criminal court when the charged crime is ultimately adjudicated in juvenile court, because of the specific protections that apply to the child in juvenile court.

4. **The court abused its discretion in denying Mr. Franklin's motion to seal because the court failed to consider Mr. Franklin's youth.**

Washington courts recognize that youthful offenders are generally less culpable than adults due to fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015).

Given the differences between adult and juvenile offenders, sentencing courts are required to consider the "mitigating qualities of youth." *State v. Houston-Sconiers*, 188

Wn.2d 1, 21, 391 P.3d 409 (2017). The same consideration must be given when courts consider a motion to seal under GR 15.

Mr. Franklin explained to the trial court that it should consider he was only 16 years old when charged with an adult offense in applying the *Ishikawa* factors under GR 15. RP 7-8. The court made no findings related to Mr. Franklin's youth. CP 16-18. Where courts are mandated to consider youth at sentencing, and criminal courts recognize the significance of youth in criminal offending, the court's failure to consider this was an abuse of discretion.

The State also argues that court did not abuse its discretion by requiring Mr. Franklin to provide more than his own testimony to prove he experienced barriers to meaningful employment based on this criminal charge. This should be deemed an abuse of discretion, because, as discussed in section 2(b), there is no dispute that the effects of a criminal conviction affect a person's ability to find employment and housing. *See, e.g., Henderson v. Corelogic Nat'l Background Data, LLC*, 161 F. Supp. 3d 389, 400 (E.D. Va. 2016)("criminal record data . . is the paradigmatic example of information that is "likely adverse" to a

consumer's employment prospects"); Miriam J. Aukerman, *The Somewhat Suspect Class: Towards A Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. Society 18, 21 (2005) ("the research unequivocally demonstrates that having a criminal record greatly reduces one's employment opportunities"). It was an abuse of discretion for the court to require more evidence of Mr. Franklin's difficulty finding meaningful employment and housing with a robbery in the first degree charge on his record, given what courts now know about the effects of a criminal charge on employment, especially for a young Black men like Mr. Franklin. The court's ruling was manifestly unreasonable and untenable.

B. CONCLUSION

This Court should reject the State's effort to deny Mr. Franklin his right to appeal the trial court's erroneous denial of his motion to seal under GR 15. This Court should hold that article I, § 10 does not apply to adult criminal charges that are ultimately adjudicated in juvenile court, or alternatively that

the court abused its discretion in not considering Mr. Franklin's youth when deciding his motion to seal.

DATED this 23rd day of November, 2020.

Respectfully submitted,

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APPENDIX

WASHINGTON STATE STATISTICAL ANALYSIS CENTER

Juveniles Sentenced As Adults and Juvenile Decline Hearings

Research Brief No. 72
October 2013

By Keri-Anne Jetzer

Over the past several years, increased attention has been paid to juveniles who were sentenced as adults, both nationally and in Washington state. Until now, no single agency or organization in the state tracked juveniles who had been through the declination process and/or juveniles who have been sentenced as adults from the time they are charged to the time of sentencing on through their confinement. Decline hearings are held when a youth is pending juvenile court proceedings and the juvenile court decides to either retain jurisdiction or remand the youth to adult court[1]. In 2012, the Washington State Statistical Analysis Center received funding from the Bureau of Justice Statistics to create a dataset[2] of juveniles who had been sentenced as adults and of juveniles who had received a decline hearing but were sentenced in juvenile court for calendar years 2007 through 2011. This research brief provides the first comprehensive look at these populations.

JUVENILES SENTENCED AS ADULTS[3]

Table 1 - Demographics

	2007	2008	2009	2010	2011
Total	145	158	169	159	136
Gender					
Female	9%	6%	4%	6%	7%
Male	91%	94%	96%	94%	93%
Race					
Asian/Pacific Islander	3%	10%	2%	5%	5%
Black	27%	20%	26%	31%	32%
Native American	7%	7%	4%	2%	4%
White	58%	53%	57%	41%	46%
Unknown	5%	9%	11%	21%	14%
Ethnicity					
Hispanic	14%	17%	25%	27%	31%
Non-Hispanic	35%	32%	37%	33%	24%
Unknown	50%	51%	37%	40%	45%
Age At Charge					
14 and under	1%	1%	2%	2%	1%
15	1%	3%	4%	4%	4%
16	32%	32%	36%	42%	24%
17	66%	64%	59%	52%	71%
Rate per 100,000 10-17 year olds*	20.13	22.06	23.78	22.34	19.26

* OFM Intercensal Estimates of April 1 2007-2011

According to the Revised Code of Washington, there are three ways a juvenile can be sent to Superior Court for sentencing: Exclusive Adult Jurisdiction[4], Mandatory Decline[5] and Discretionary Decline[6]. The decline type is not tracked in any data. Determination of the type of decline was based on the portions of the respective statutes that are tracked in the data, such as the age at charging, the offense type and the offender's offense history. The decline types were assigned based on a hierarchy, (1) exclusive adult jurisdiction, (2) mandatory decline and (3) discretionary decline.

Data in Table 1 shows that juveniles sentenced as adults are primarily seventeen-year-old White males.

[1] Caseload Forecast Council. (2012). 2012 Washington State Juvenile Disposition Guidelines Manual (Rev. 20130625). Olympia, WA.
[2] Dataset created with data from Administrative Office of the Courts, the Department of Corrections, the Caseload Forecast Council and the DSHS - Juvenile Justice and Rehabilitation Administration.
[3] The data is based on convictions per year. It is possible that offenders could be represented more than once if convicted in more than one year.
[4] RCW 13.04.030(1)(e)(v)
[5] RCW 13.40.110(2)
[6] RCW 13.40.110(1)

Convictions for White youth decreased by 20 percent between 2007 and 2011, while convictions for Black youth increased by 18 percent during the same time. The percentage of convictions for Hispanic youth increased over 120 percent between 2007 and 2011. Part of that maybe due to better reporting and tracking of ethnicity, however, the percentages of Non-Hispanic records did also decrease by 30 percent during that same time.

Chart 1 – Convictions by Decline Type

Sentencing data, which is necessary to determine decline type, was unavailable for 59 records so there are slightly fewer records per year than shown in Table 1 for which a decline type was determined. Chart 1 shows that, since 2008, discretionary declines were more frequent than those in the exclusive adult jurisdiction category.

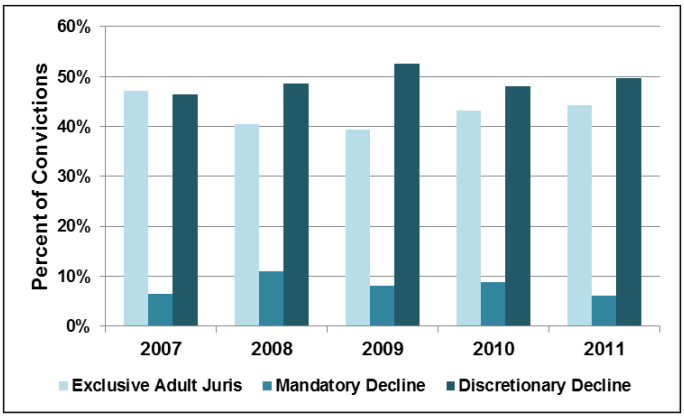
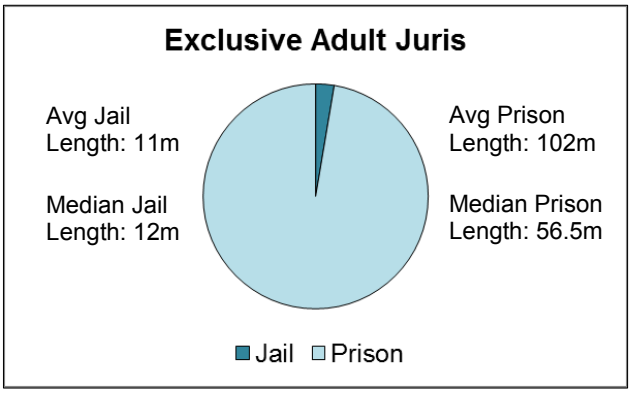


Chart 2 – Confinement – Exclusive Adult Jurisdiction



Charts 2 - 4 show where confinement was spent for juveniles sentenced as adults between 2007 and 2011. A jail sentence is defined as a confinement time of 12 months or less. A prison sentence is defined as a confinement term of more than 12 months. A non-confinement sentence refers to community supervision only. Ninety-seven percent of sentences under exclusive adult jurisdiction received a prison sentence.

The average prison sentence length issued was 102 months. The most violent and serious offenses fall under this category so it is expected that such sentences would have longer terms of confinement. Sentences under mandatory decline received a prison sentence 79 percent of the time. Those prison sentence lengths averaged 69 months.

Chart 3 – Confinement – Mandatory Decline

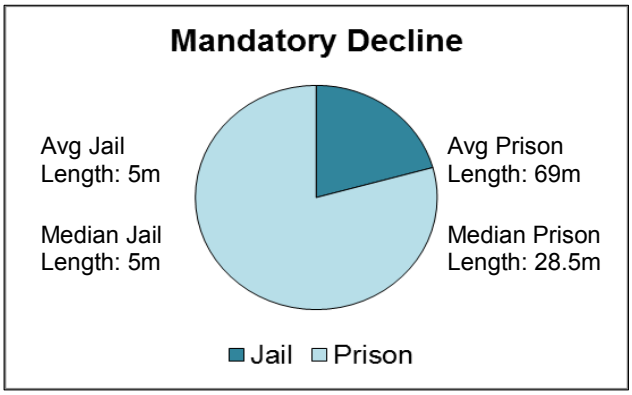
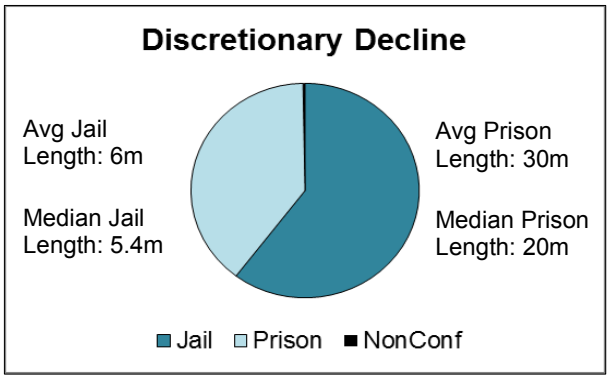


Chart 4 – Confinement – Discretionary Decline



Only 39 percent of discretionary decline sentences had a prison sentence, with an average length of 30 months, and one record received a non-confinement sentence of 18 months of community supervision.

Charts 5 – 7 show the five most frequently charged offenses and convicted offenses found on the court records. Charged offenses are the offenses the prosecution is charging against the offender prior to any plea agreements and court trial. Convicted offenses are the offenses the offender was found guilty by the court or jury of committing. This data includes *all* charged offenses and *all* convicted offenses found on the court documents.

The total numbers of charged offenses and convicted offenses for exclusive adult jurisdiction were 654 and 548, respectively. Chart 5 shows that the ranking of the top five charged offenses and convicted offenses is the same. The number of convictions compared to the charged offenses is slightly lower for each of those offenses, however. This difference likely indicates some plea agreements by the offender.

Chart 5 – Offenses - Exclusive Adult Jurisdiction

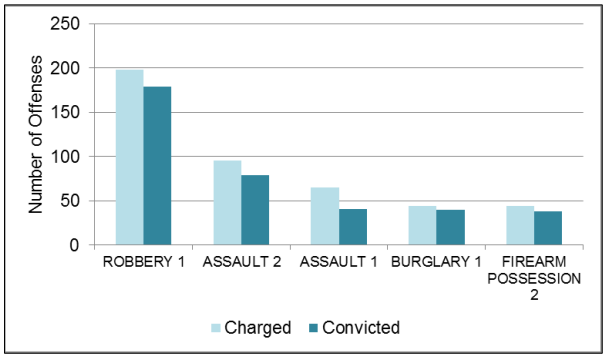
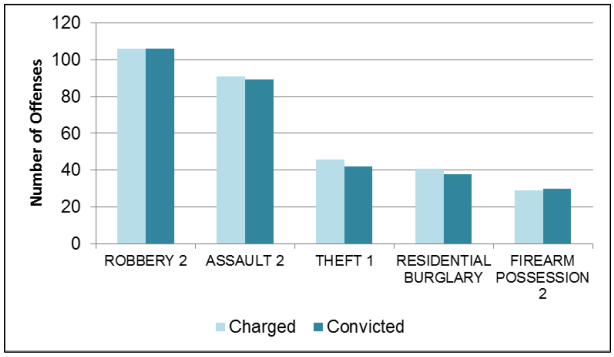


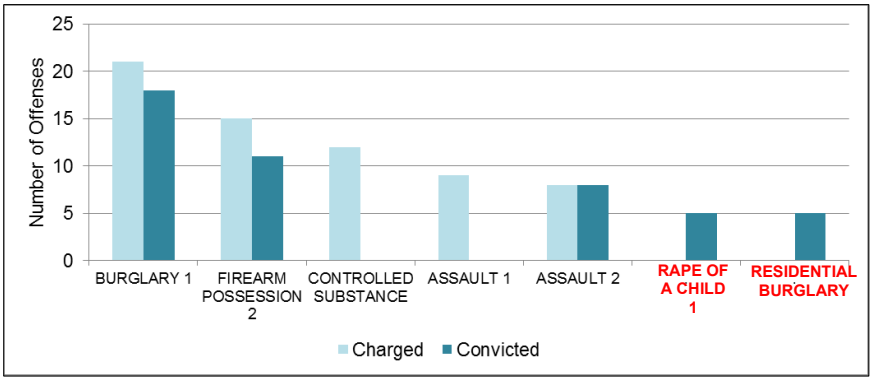
Chart 6 – Offenses – Discretionary Decline



For discretionary declines, the total number of charged offenses was 577, and the total number of convicted offenses was 511. As with exclusive adult jurisdiction, the ranking of the top five charged and convicted offenses under discretionary declines is also the same (Chart 6). The number of charged vs. convicted offenses differs by less than a handful of offenses for this decline category.

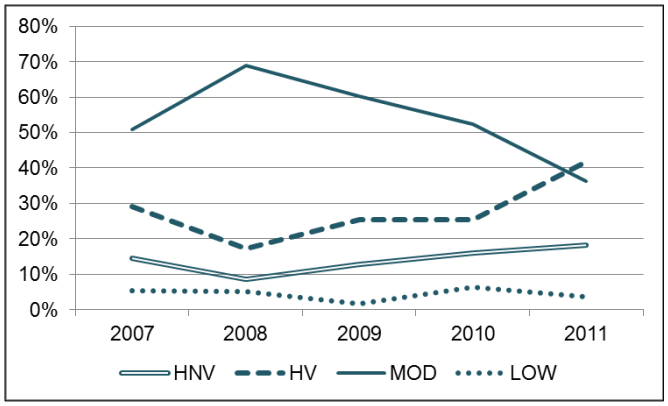
The total number of charged offenses for mandatory declines was 122 and the total number of convicted offenses was 97. The top five charged offenses differs from the top five convicted offenses under this decline type. Offenses for Controlled Substance and Assault 1 rank under charged offenses but do not place in the top five of convicted offense. Rape of a Child 1 and Residential Burglary are in the top five of convicted offenses but not under charged offenses.

Chart 7 – Offenses – Mandatory Decline



Charts 8 – 10 show offenders' initial level of risk to reoffend as tracked by the Department of Corrections. The risk categories are: High Non-Violent (HNV), High Violent (HV), Moderate (MOD) and LOW.

Chart 8 – DOC Initial Risk Level – Exclusive Adult Jurisdiction



As defined in statute, offenders who fall under exclusive adult jurisdiction were most often charged with violent or serious violent offenses or had extensive criminal history. Until 2011, at least half of the juveniles sentenced as adult under exclusive adult jurisdiction fell under the MOD risk category. Since 2008, the percent of offenders in the HV category increased by 147 percent and the percent in the HNV category increased by 100 percent. During that same time, the percent in the MOD category decreased by 48 percent.

Chart 9 – DOC Initial Risk Level – Mandatory Decline

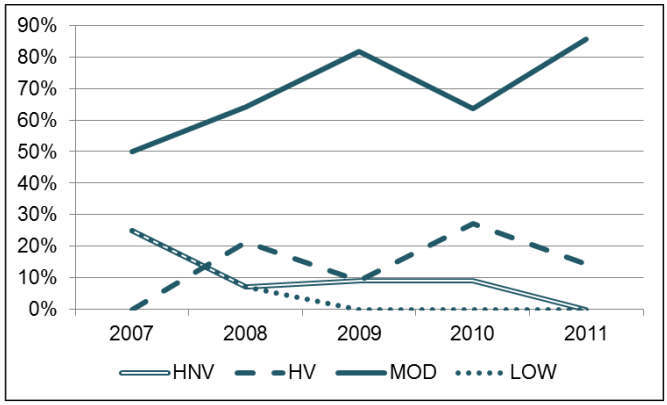
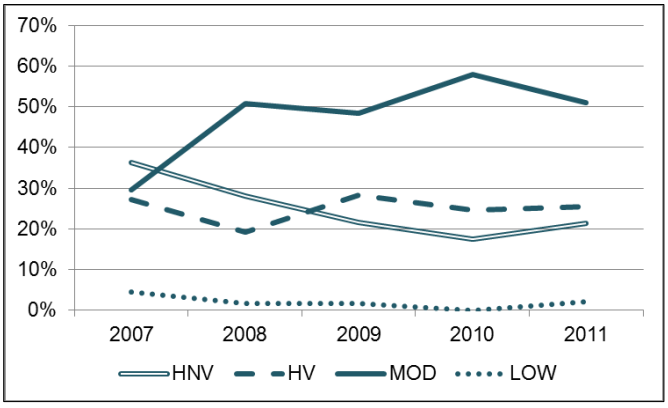


Chart 9 shows that well over half of the offenders who fall under mandatory decline had an initial risk level of MOD. Between 2007 and 2011, the percentage in the MOD risk category increased by 72 percent. Those in the LOW risk category decreased from 25 percent in 2007 down to 0 in 2009 and stayed there.

Chart 10 – DOC Initial Risk Level – Discretionary Decline



Like the prior decline categories, the majority of discretionary decline offenders were categorized as MOD risk. Between 2007 and 2011, the MOD risk category increased by 70 percent, while the HNV risk category decreased by 42 percent.

Altogether, there are very few offenders categorized as LOW in any of the decline categories. It would appear that the decline process is capturing more of the higher risk offenders.

YOUTH WITH A DECLINE HEARING AND SENTENCED AS JUVENILES

Two of the three types of declines, mandatory and discretionary, require a decline hearing to occur. Table 2 displays the demographics for sentences where there was a decline hearing and the youth were sentenced in juvenile court instead of Superior Court. Due to the lack of data, it is not possible to determine if the decline hearings were for mandatory or discretionary declines.

Similar to the exclusive adult jurisdiction, the youth who received decline hearings and were sentenced as juveniles are primarily seventeen-year-old White males. The percentage of females is higher, however, in this population than it is in the population of juveniles sentenced as adults. Distribution of race categories is comparable to that of the juveniles sentenced as adults.

The rates of youth with decline hearings and sentenced in juvenile court has been more volatile over the last five years than the rate of juveniles sentenced as adults.

Table 2 – Demographics

	2007	2008	2009	2010	2011
Total	109	139	151	103	95
Gender					
Female	14%	9%	12%	11%	6%
Male	86%	91%	88%	89%	94%
Race					
Asian/Pacific Islander	7%	4%	5%	4%	3%
Black	16%	28%	28%	32%	21%
Native American	9%	3%	5%	5%	3%
White	56%	55%	48%	36%	57%
Unknown	12%	10%	14%	23%	16%
Ethnicity					
Hispanic	24%	16%	20%	29%	33%
Non-Hispanic	33%	21%	21%	22%	35%
Unknown	43%	63%	59%	49%	33%
Age At Decline Resolution					
14 and under	6%	0%	3%	2%	2%
15	3%	10%	16%	5%	5%
16	16%	17%	21%	23%	16%
17	70%	54%	52%	48%	52%
18	6%	19%	8%	22%	23%
19	0%	0%	0%	0%	1%
Rate per 100,000 10-17 year olds*	15.13	19.41	21.25	14.47	13.46

* OFM Intercensal Estimates of April 1 2007-2011

The purpose of this research brief was to provide general descriptive statistics on these two populations. Additional research briefs providing further analysis will be published in the future.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 80345-0-I
v.	)	
	)	
ANDRE FRANKLIN,	)	
	)	
Appellant.	)	

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Washington Appellate Project
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[ian.ith@kingcounty.gov]
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☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 14, 2021
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