

69154-6

69154-6

NO. 69154-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

S.J.C.,

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
CLERK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA A. MACK

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by entering an order sealing S.J.C.'s entire superior court file without an individualized inquiry into the propriety of sealing the file.

B. ISSUE

Does Article I, § 10 of the Washington Constitution apply to juvenile adjudications such that a court must weigh any asserted interest in closure against the strong presumption that court records should be open?

C. FACTS

S.J.C. committed a sex offense at the age of 13 against a younger child. CP 1. Upon learning of the offense his parents obtained counseling and the offense was reported to police. S.J.C. was charged and ultimately entered a guilty plea to two counts of assault in the fourth degree with sexual motivation. CP 4-9. He agreed to abide by a stringent set of requirements, including sex offender treatment. CP 23-25. He was adjudicated guilty and disposition was imposed on January 28, 2008. CP 26-32. The dispositional order included numerous probationary conditions. CP 32.

On December 28, 2011, S.J.C. moved for an order vacating his conviction and sealing the entire court file. CP 37-38. The court granted S.J.C.'s motion after additional briefing and a short hearing. CP 46-54 (Legal Memorandum); 39-45 (State's Response); RP (4/25/12) 1-14. The Court's order concluded that the legislature did not intend to give trial courts the authority to deny a motion to seal once the juvenile had met the statutory criteria for sealing. CP 65. The court also ruled that art. I, § 10 of the Washington Constitution did not apply to juvenile court records. CP 66. The effect of the trial court's order has been to completely hide from public view the fact that S.J.C. ever had a case in the juvenile court of King County, and all details about the case that appear in the court file.

D. ARGUMENT

The trial court in this case sealed an entire juvenile court file without using the constitutional standard to balance the interest in public access to court records against the interests of the juvenile. It ruled that constitutional standards for sealing court records do not apply to juvenile records, and that juvenile court records must be sealed whenever statutory requirements have been met. The State respectfully disagrees. Although juvenile court files may be sealed to protect compelling interests that are imminently threatened, a trial court must first consider the relevant

constitutional analysis and seal only what is required to protect those interests. The trial court's decision necessarily involves the exercise of discretion; statutory requirements cannot mandate closure.

1. ART. I, §10 PRESUMES THAT COURT RECORDS
WILL BE OPEN UNLESS COMPELLING
CIRCUMSTANCES REQUIRE OTHERWISE.

Article I, Section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” In a series of decisions over recent decades the Washington Supreme Court has made clear that this provision presumes that court proceedings and records should be open unless compelling circumstances warrant closure, and unless the court makes detailed findings to document the need for closure. *See e.g. Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).¹

This analysis applies to motions to close proceedings and records. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.3d 1182 (2005) (documents

¹ The factors to consider have been summarized as follows: 1) The proponent of closure must make some showing of compelling interest, 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; 2) anyone present when the closure 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; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009).

This analysis applies to motions to close proceedings and records. Rufer v. Abbott Labs., 154 Wn.2d 530, 114 P.3d 1182 (2005) (documents filed with trial court are presumptively open; sealing is permitted only when compelling interests override public's interest in open administration of justice); Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861 (2004) (motion to terminate derivative suit could not be sealed without showing of compelling need); State v. Waldon, 148 Wn. App. 952, 958, 202 P.3d 325 (2009) (interest in future employment was not a compelling interest that overcomes presumption of openness).

No type of record is categorically exempt from the requirements of art. I, § 10, even if the record concerns sensitive matters or vulnerable persons, and even if a court rule or a statute seems to authorize closure. Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) (statute unconstitutional where it required courts to redact identifying information of child victims of sexual assault made public during the course of trial or contained in court records); In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) (court rule for involuntary commitment proceedings unconstitutional to the extent that it presumed closure instead of openness); State v. Chen, No. 87350-0, slip op. at 2, 2013 WL 4758248 (Wash. Sept. 5, 2013) (notwithstanding statutory provisions that arguably suggest competency reports are private,

“once a competency evaluation becomes a court record, it also becomes subject to the constitutional presumption of openness, which can be rebutted only when the court makes an individualized finding that the Ishikawa factors weigh in favor of sealing.”). *See also State v. DeLauro*, 163 Wn. App. 290, 258 P.3d 696 (2011) (competency reports relied upon by court are presumed open).

The rationale for openness has been described in case after case. Allied Daily Newspapers, 121 Wn.2d at 211 (“Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”); Dreiling, 151 Wn2d at 908 (“The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history.”); D.F.F., 172 Wn.2d at 40 (“The open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary.”).

A document that never becomes part of judicial decision-making, however, is not a court record and is not subject to the constitutional analysis. *See Bennett v. Smith Bunday Berman Britton, PS*, 176 Wn.2d

303, 291 P.3d 886 (2013) (proprietary documents submitted to, but not considered by, the trial court were not “court records” and not subject to presumption of openness); State v. McEnroe, 174 Wn.2d 795, 279 P.3d 861 (2012) (defendant may submit documents for preliminary review and then withdraw those documents if the trial court refuses to seal them); Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 61, 256 P.3d 1179 (2011) (neither article I, section 10 nor the First Amendment was violated by the trial court’s ruling that a discovery deposition never used at trial was not open to the public).

The authorities cited above do not forbid the sealing of any record or the closure of any proceeding. Rather, they hold that records may be sealed after an individualized determination that compelling reasons outweigh the presumption of openness.

Both Allied Daily Newspapers and D.F.F. recognize that court records ... are presumptively open and can be closed only when a trial court makes an individualized finding that closure is justified. ...

... This is not to say that sealing is inappropriate in all cases but only that trial courts should recognize the important constitutional interests and follow the analysis outlined in the Ishikawa line of cases.

State v. Chen, No. 87350-0, slip op. at 6-7. *See also* Federated Publ’ns, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980) (closure was justified in

murder trial to protect defendant's right to a fair trial where newspaper repeatedly published details of inadmissible evidence).

The "individualized determination" must not, however, rely on overly broad generalizations, or it will simply create a *de facto* categorical exception to art. I, § 10. In a recent case, this Court held:

Here, the trial court's order grants extraordinary relief based upon ordinary circumstances. Were the relief afforded by the trial court deemed appropriate, it would be similarly available to all similarly-situated litigants—defendants in unlawful detainer actions who were not ultimately evicted. This effectively precludes the case-by-case analysis required by article I, section 10, creating a *de facto* "automatic limitation" that discounts the significance of the public's right to the open administration of justice. Such would be contrary to the presumption of openness of court records required by our state's constitution.

Hundtofte v. Encarnacion, 169 Wn. App. 498, 508, 280 P.3d 513 (2012), review granted, 176 Wn.2d 1019 (2013) (argued 6/13/2013).

The trial court's order in this case creates a categorical exception to art. I, § 10 for records of juvenile adjudications. Such a categorical approach is not permitted under art. I, § 10 and the Washington Supreme Court decisions interpreting the constitution. Courts have steadfastly refused to permit categorical closure of court proceedings even when a child victim of sexual assault is forced to testify. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)

(striking down a Massachusetts statute that mandated closure of the courtroom for testimony of victim of child sexual abuse); Allied Daily Newspapers, supra. It would seem inappropriate to have a standard for sealing that is more favorable to the juvenile offender than to his victim. The offender's "privacy" is at issue because he committed a crime; the victim's privacy is threatened because he or she happened to encounter the offender.

For these reasons, the trial court necessarily should have exercised discretion to balance interests. The failure to do so requires reversal of the order.

2. NEITHER EXPERIENCE NOR LOGIC REQUIRES THAT JUVENILE RECORDS BE CATEGORICALLY EXEMPT FROM ART. I, § 10.

S.J.C. will likely argue to this Court that juvenile records are historically and logically different than other court records, such that juvenile court records must be routinely sealed without making an individualized consideration of the competing interests, as long as statutory requirements are met. The State respectfully suggests that juvenile court records are not categorically exempt from art. I, § 10. Statutes may influence, but they may not categorically determine, a trial court's decision on whether a court record should be sealed.

In a recent decision, the Washington Supreme Court adopted the “experience and logic” test for determining whether a certain proceeding or category of records should be subject to the constitutional presumption of openness.

Recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding, in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (Press II), the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated. The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” Press II, 478 U.S. at 8. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If the answer to both is yes, the public trial right attaches and the Waller² or Bone-Club factors must be considered before the proceeding may be closed to the public. Press II, 478 U.S. at 7-8. We agree with this approach and adopt it in these circumstances.

State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715, 722 (2012)

(footnotes omitted).³ The proponent of closure must show that both history and logic require closure. Sublett, 176 Wn.2d at 73-74. The core question is whether “openness will ‘enhance[] both the basic fairness of the criminal trial and the appearance of fairness so essential to public

² Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

³ Although the lead opinion was signed by only four justices, Chief Justice Madsen concurred in the opinion, meaning that five justices of the court have adopted the “experience and logic” test. Sublett, 176 Wn.2d at 90 (“I agree with the court’s decision and concur in the result reached by the court.”) (Madsen, C.J. concurring).

confidence in the system.” Id. (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I)).

a. History Does Not Establish That Juvenile Records Are Exempt From Art. I, § 10.

As numerous authorities recognize, juvenile court records have been both open and closed over the course of our nation’s history. See William McHenry Horne, The Movement to Open Juvenile Courts: Realizing the Significance of Public Discourse in First Amendment Analysis, 39 Ind. L. Rev. 659 (2006) (“History sheds little light on whether juvenile court proceedings should be open”); Stephan E. Oestreicher, Jr., Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings, 54 Vand.L.Rev. 1751, 1758-68 (2001) (discussing history of juvenile courts and arguing that “...as the United States Supreme Court suggested ... if a person’s liberty is at stake, public scrutiny is the only tolerably efficient check against potential abuse or malfunction of the adjudicative process.”) (internal quotation marks omitted); Emily Bazelon, Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed, 18 Yale. & Pol’y Rev.

155, 168-80 (1999) (summarizing history of closure versus openness); Jan L. Trasen, Note, Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or The System?, 15 B.C. Third World L.J. 359, 369-74 (1995).

The full historical perspective reveals that openness of juvenile courts and records resembles more a sine curve than a simple arc. Supporters of open courts begin their historical analysis in a time when juveniles were prosecuted in the same courts as adults, whereas closure advocates limit their historical analysis to approximately the last century, after the first juvenile specialty courts were created in Chicago in 1899. Id. at 668. Proponents of closure also tend not to acknowledge the more recent backlash against closed juvenile courts. Id. at 675-79. In truth, juveniles were originally prosecuted in open adult courts, attitudes shifted in the 20th century toward closed specialty courts, but most recently attitudes have shifted back towards openness, largely due to abuses that have occurred in juvenile courts with little or no public oversight. Id. Thus, the general course of history does not establish a clear rule that juvenile courts or records must be closed.

In Washington, the issue of closing juvenile delinquency proceedings arose 55 years ago in In re Lewis, 51 Wn.2d 193, 316 P.2d 907 (1957). Lewis was subjected to proceedings under former

RCW 13.04.090, a statute that presumed closure of juvenile delinquency proceedings.⁴ Lewis argued that the juvenile court judge violated art. I, § 10 when he excluded the public from his trial. The Washington Supreme Court rejected the argument.

The purpose of excluding the public from proceedings such as these is, of course, to protect the child from notoriety and its ill effects. This court, along with by far the majority of other courts in the United States, early recognized that the purpose of statutes such as ours is not to punish the child, but to inquire into his welfare where reasonable cause exists, and to provide an environment which will enable him to grow into a useful and happy citizen, where his parents have failed in that regard.

Lewis, 51 Wn.2d at 198 (citing In re Lundy, 82 Wash. 148, 143 P. 885 (1914)). The court's analysis was limited, however, to restating the purposes of the current juvenile justice laws, and the purposes behind art. I, § 10 were barely mentioned. In essence, the court in Lewis assumed that the rehabilitative character of juvenile proceedings made normal constitutional protections inapplicable.

Earlier, the court had taken a similar approach when faced with the question whether an officer could be sued for unlawful imprisonment for arresting a juvenile, the court held that

⁴ That statute was repealed by Laws of 1961, ch. 302, § 17. The statute now provides that "[t]he general public and press shall be permitted to attend any hearing unless the court, for good cause, orders a particular hearing to be closed. The presumption shall be that all such hearings will be open." RCW 13.40.140(6).

‘Neither proceedings according to common law, nor judicial proceedings in a formal court for the trial of actions, are essential to due process. . . . There being no imprisonment or restraint of liberty in the constitutional sense, the state, in the exercise of its prerogative or sovereign right, may take a child from a parent when the parent is unworthy, or if it appear that the child’s interest may be best served by so doing. The right may be exercised by warrant, or, if not, it may be adjudged by subsequent proceedings.

Weber v. Doust, 84 Wash. 330, 337-38, 146 P. 623 (1915).

Like in Lewis, the court in Weber assumed that juveniles had only minimal due process rights under the constitution. That general view was rejected by the Supreme Court about one decade after Lewis was decided. In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Much more consistent with proper constitutional analysis is the relatively recent decision in State v. Loukaitis, 82 Wn. App. 460, 466, 918 P.2d 535 (1996), wherein the court held that the public has the same right to access in a juvenile declination hearing as in other pretrial criminal proceedings.

Thus, the Lewis decision appears to be a product of its times; it proceeds from the fundamentally flawed premise that juvenile law operates outside of normal constitutional strictures. Because the decision

fails to discuss or appreciate the importance of open court principles enunciated in art. I, § 10, and in light of In re Gault, Lewis has limited precedential value, and it is not a sufficient basis on which to nullify art. I, § 10 with regard to juvenile proceedings or records.

For these reasons, history does not compel the conclusion that juvenile records are not subject to art. I, § 10. Since the proponent of closure must establish that both history and logic support sealing, S.J.C.'s argument to except juvenile adjudications from art. I, § 10 fails. The trial court's order was erroneous.

b. Logic Recommends That Juvenile Court Records Should Be Subject To Art. I, § 10.

The trial court's ruling also fails the logic prong of the "history and logic" test. That prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, supra at 73 (citing Press II, 478 U.S. 8-10). Although closed juvenile courts were created with the purest of motives – to protect children from the stigma of criminal prosecutions and convictions – the need for public access to juvenile court proceedings and records has been

made apparent. Too often closure has allowed neglectful practices to linger in delinquency and dependency cases.⁵

Those difficulties are discussed at great length in a number of law review articles. Juvenile courts in Georgia, for example, have been noted to “reflect a lack of systemic accountability.” Sarah Gerwig-Moor and Leigh S. Schrope, Hush Little Baby, Don’t Say a Word: How Seeking the ‘Best Interests of the Child’ Fostered a Lack of Accountability in Georgia’s Juvenile Courts, 58 Mercer L. Rev. 531, 533 (2007).

“A number of observers and academics have amassed much unsettling evidence indicating that juvenile judges, at best, have unevently exercised their discretion and, at worst, have shamelessly abused it.” Oestreicher, supra, at 1770 (citing, among others, Barry C. Field, The Transformation of the Juvenile Court – Part II: Race and the ‘Crack Down’ on Youth Crime, 84 Minn. L. Rev. 327, 373 n. 147 (1999)). Secrecy prevent abuses from coming to light. “[T]he very confidentiality intended to protect children, in effect, serves to protect social service agencies and the courts themselves from accountability to the public.” Trasen, supra, at 377.

⁵ Although there are differences between dependencies and delinquencies, for purposes of examining the propriety of open delinquency records, the difference does not benefit the proponent of closure. One would think that the juvenile who was brought into court for a dependency proceeding through no fault of his or her own would be entitled to no less privacy than the juvenile who lands in juvenile court after committing a crime. Thus, to the extent openness is demanded in dependencies, it should be demanded in delinquencies, too.

Confidentiality rules in juvenile courts “help prop up a malfunctioning bureaucracy by shielding courts from accountability. Bazelon, supra, at 191. Access to records and proceedings can also help to curtail racism in court practices. Donna M. Bishop & Charles E. Frazier, Race Effects in Juvenile Justice Decision-Making: Findings of Statewide Analysis, 86 J. Crim. L. & Criminology 392, 405 (1996). *See also* Veena Srinivasa, Note, Sunshine for D.C.’s Children: Opening Dependency Court Proceedings and Records, 18 Geo. J. on Poverty and Law and Policy 79-80 (2010) (“For fifteen years, the child welfare system in D.C. has consistently failed to comply with a court-ordered reform plan to increase transparency in the system . . . The judges and lawyers [who determine a child’s fate] operate with limited oversight.”).

Moreover, several authors have argued that access to proceedings and records is necessary to permit reporters and observers to develop a story with real characters that will resonate with the public and with readers in a way that faceless, aggregated statistics or data cannot. Horne, supra, at 676 (remarking on how some judges come to appreciate “the importance of story-telling in shaping and reflecting public awareness and debate” and the importance of “public discourse—that thread of values perspectives, and experiences that helps define who we are.”). “News stories from the courtroom resonate because of the story lines that touch

upon common values, ideas, or concerns ... Stories resonate when they evoke images, emotions, or memories in readers. They do this through detail, not generalities.” Bazelon, supra, at 687-88.

S.J.C. may respond that because juvenile court proceedings in Washington are open, access to records of convictions is of relatively low import. This argument should be rejected. Deficient practices often come to light only *after* the proceeding has occurred. Determining whether the abuse is an isolated incident or a pattern of misconduct requires close inspection of numerous past cases.

But when a court seals an entire file and removes all trace of the case from public indices, it deprives watchdogs and the public of the ability to know that the case ever existed at all. This makes it exceedingly difficult if not impossible to systemically analyze practice to see how matters are being handled in our juvenile courts. Even if people knew a particular case existed, an order sealing the entire file seals each and every document in that file, including the charging document, motions, orders, briefs, sentencing memoranda. Without such documents an interested member of the public would be unable to assess or compare any given case with any other case. When sealing occurs routinely, the workload of the court becomes an inscrutable collection of blanks.

For these reasons, logic does not support claim that closure of juvenile court records is divorced from the reasons courts are traditionally open. In fact, because children are less equipped to defend themselves from an abusive bureaucracy, logic would seem to require greater openness in juvenile courts than in adult courts.

c. The Concern For Open Courts And Records Is Not Merely Academic Or Historical.

There is perhaps a tendency for honest, well-meaning, earnest, and hardworking lawyers and judges to believe, at least subconsciously, that the concerns of open courts proponents are overstated, and that in the modern era the chance of abuse within our juvenile courts is small. Experience teaches otherwise. In the last few decades there have been a number of well-publicized scandals that evaded public detection for long periods of time due, at least in part, to the fact that court records were routinely sealed.

The most notorious recent example is the disturbing situation in Pennsylvania involving two judges who routinely sentenced juvenile offenders to incarceration at a private juvenile prison in exchange for payments from the prison owner, a lawyer and friend of the judges. *See* Interbranch Commission on Juvenile Justice Report (<http://www.pacourts>).

us/assets/files/setting-2032/file-730.pdf?cb=4beb87) (“He ran the courthouse like a personal sovereignty, placing friends and relatives on the payroll, sealing records at will and personally assigning cases.”). *See also* Final Report on Implementation on Recommendations of the Interbranch Commission on Juvenile Justice.⁶ In Pennsylvania, judges sitting on juvenile courts have more discretion to close proceedings and records than do judges in Washington. *See* 42 Pa.C.S.A. § 6336(d) (stating that “[o]nly the parties, their counsel, witnesses, the victim and counsel for the victim, other persons accompanying a party or a victim for his or her assistance, and any other person as the court finds have a proper interest in the proceeding or in the work of the court shall be admitted by the court.”); In re J.B., 39 A.3d 421, 437 (Pa. Super. Ct. 2012) (finding no right of the media to attend delinquency proceeding or intervene).

Local courts have not been immune to scandals involving sealed records. As exposed by the Seattle Times recently, a so-called “expert” witness on child custody and visitation testified repeatedly over decades in Washington superior courts, fabricating information in reports that were used to deprive good parents of custody of their children. *See* Seattle

⁶ <http://www.pacourts.us/assets/files/setting-2032/file-2570.pdf?cb=9e7037> (accessed 10/1/13).

Times Special Report: Twisted Ethics of An Expert Witness.⁷ The witness avoided detection for so long in part because most of his reports were sealed, so a pattern of misconduct was nearly impossible to detect.⁸ And, of course, there was the tragic case of a King County Superior Court judge who abused juveniles under his supervision.⁹ Efforts to expose the judge's misconduct depended at least in part on gathering information about aberrant sentencing patterns.¹⁰ Although these instances of misconduct are unusual, their impact on victims is incalculable, and the offender is more sure of escaping notice if records or proceedings are sealed.

These instance show that problems associated with closing superior court conviction files can plague even courts that, as a whole, function at a high level. The wholesale or automatic sealing of criminal adjudications should not be permitted under art. I, § 10.

⁷ http://seattletimes.com/html/localnews/2015427070_greenberg26m.html (accessed 10/1/13).

⁸ Id. (“To uncover the secrets Stuart Greenberg had buried, The Seattle Times got court files unsealed in the superior courts of King and Thurston counties.”).

⁹ http://www.astonisher.com/archives/gary_little.html (accessed 10/1/13).

¹⁰ Id. (“Complaints by lawyers prompted the office of the King County prosecutor to prepare a 107-page report detailing irregularities in the sentences Judge Little handed out to physically favored young men.”).

3. JUVENILE STATUTES THAT PERMIT SEALING OF RECORDS SHOULD BE RECONCILED WITH ART. I, § 10.

The lack of any express reference to constitutional standards in the statutes that permit sealing of juvenile records has created confusion as to what standards apply to a motion to seal. RP (4/25/13) 10 (“Court: So here’s my struggle: How do you reconcile Ishikawa with the amended statute? They don’t fit.”). This Court should clarify, as it did in Waldon and as the Washington Supreme Court did in D.F.F., that statutes and court rules must be read in light of art. I, § 10. An order to seal can be entered only where the trial court has expressly balanced the competing rights to openness versus the interest in closure.

GR 15 establishes procedures for the sealing of juvenile court records. It provides in relevant part.

(c) Sealing or Redacting Court Records¹¹

(1) ... In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a

¹¹ GR 31 provides: “(4) ‘Court record’ includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding. Court record does not include data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.”

criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. . . .

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted *if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.*

Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. *Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:*

- (A) The sealing or redaction is permitted by statute; or
- (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
- (C) A conviction has been vacated; or
- (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or
- (E) The redaction includes only restricted personal identifiers contained in the court record; or
- (F) Another identified compelling circumstance exists that requires the sealing or redaction.

(3) A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.

(4) Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action in civil cases and the cause of action or charge in criminal

cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

* * *

(6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions. In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notation “DV” if the case involved domestic violence, the adult or juvenile’s name, and the notation “vacated.”

(italics added).

The requirement in this rule that the trial court seal only where it finds “that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record” is consistent with Ishikawa, even if it is not as specific. The weighing process under Ishikawa clearly presumes that records will remain open. Additionally, although the rule lists “[s]ufficient privacy or safety concerns that may be weighed against the public interest include findings,” the listed concerns do not automatically call for sealing, they are simply factors sufficient to justify a *weighing* of interests against the presumption of openness. Thus, GR 15 can be

reconciled with Ishikawa but, as this Court held in Waldon, it must be read in light of Ishikawa

The statute, too, can be largely reconciled with Ishikawa.

RCW 13.50.050 provides that a juvenile court record may be sealed. The most pertinent sections are set forth below.

(2) The official juvenile court file of any alleged or proven juvenile offender *shall be open to public inspection*, unless sealed pursuant to subsection (12) of this section.

(3) All records other than the official juvenile court file are confidential and may be released only as provided in this section, RCW 13.50.010,¹² 13.40.215 [notice of release of juvenile who has committed violent or sex offense or stalking], and 4.24.550 [public notice of sex offenders].

* * *

(11) In any case in which an information has been filed pursuant to RCW 13.40.100 or a complaint has been filed with the prosecutor and referred for diversion pursuant to RCW 13.40.070, the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to

¹² RCW 13.50.010 provides: (1) For purposes of this chapter: (a) "Juvenile justice or care agency" means any of the following: Police, diversion units, court, prosecuting attorney, defense attorney, detention center, attorney general, the legislative children's oversight committee, the office of the family and children's ombuds, the department of social and health services and its contracting agencies, schools; persons or public or private agencies having children committed to their custody; and any placement oversight committee created under RCW 72.05.415; (b) "Official juvenile court file" means the legal file of the juvenile court containing the petition or information, motions, memorandums, briefs, findings of the court, and court orders; (c) "Records" means the official juvenile court file, the social file, and records of any other juvenile justice or care agency in the case; (d) "Social file" means the juvenile court file containing the records and reports of the probation counselor.

subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

(12) [establishing the types of cases that cannot be sealed]

(13) The person making a motion pursuant to subsection (11) of this section shall give reasonable notice of the motion to the prosecution and to any person or agency whose files are sought to be sealed.

(14)(a) *If the court grants the motion to seal made pursuant to subsection (11) of this section, it shall, subject to subsection (23) of this section, order sealed the official juvenile court file, 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. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual. . . .

(15) Inspection of the files and records included in the order to seal may thereafter be permitted only by order of the court upon motion made by the person who is the subject of the information or complaint, except as otherwise provided in RCW 13.50.010(8) and subsection (23) of this section.

RCW 13.50.050.

This statute does not, as the trial court ruled, mandate sealing of juvenile adjudications. The clause described by the court that says “the court ‘shall not’ grant the motion ‘unless’ the requirements of RCW 13.40.050(12)(b) are met,” CP 65, describes a necessary but not a sufficient condition for sealing. Later, the statute plainly provides, “[i]f the court grants the motion to seal made pursuant to subsection (11) of this section...” RCW 13.50.050(14)(a). The use of the condition form makes it clear that a court is not required to seal.¹³

Additionally, it should be noted that in 2001, the legislature amended the statute to change its mandatory language. The statute used to say that “a court *shall* grant a motion to seal records . . . *if* certain conditions were met. This language appeared to be mandatory. State v. Webster, 69 Wn. App. 376, 848 P.2d 1300 (1993). The new language provides, however, that “The Court shall not grant any motion to seal records . . . *unless*” certain conditions are met. Laws of 2001, ch. 49, § 2.

Thus, the trial court erred in ruling that a juvenile court lacks discretion under the statute to reject a sealing motion.

¹³ This language should be contrasted with the provision that plainly mandates sealing of deferred dispositions. RCW 13.50.050(12)(c). The constitutionality of that provision is not raised by this appeal.

The greatest tension between the statute, the rule, and Ishikawa comes from the nature and duration of the sealing that is authorized under the statute. To the extent that the statute does not expressly adopt the constitutional requirement that openness is presumed unless compelling circumstances require otherwise, it is at odds with art. I, § 10. However, as in Waldon, the statute may be read with the constitutional overlay, and thus the two can be reconciled.

Moreover, the statute suggests that a person who's record is sealed can tell everyone that the crime never happened. RCW 13.50.050(14)(a) (after sealing, "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. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual. . . ."). Ishikawa and GR 15 would seem to only rarely permit a court to forever erase all trace of a conviction. Ishikawa requires that sealing orders be limited in scope and duration to the narrowest closure needed to effectuate the stated interest. And, GR 15 provides that a defendant's name appear in the court indices and that the sealing order be left open. Thus, it is difficult to reconcile this part of the statute with Ishikawa and GR 15.

Moreover, the strategy of the statute is counterproductive to the person with a juvenile record because, if the person claims not to have been previously arrested or convicted, court indices, public records, press accounts, Facebook trails, and Twitter feeds can reveal his or her claim to be untrue. *See* Carrie T. Hollister, The Impossible Predicament of Gina Grant, 44 UCLA L. Rev. 913, 914 (1997) (noting that Ms. Grant's invitation to attend Harvard was revoked when the school learned about her criminal past not from her and "not from her juvenile record or the trial transcript, but rather from local press accounts of the incident and the subsequent proceedings.").

In sum, considering the constitutional analysis, the statute, and GR 15, a trial court may consider a motion to seal a juvenile adjudication but the decision to seal must be individualized, it may not rely on overly-general criteria that create a *de facto* categorical sealing of a record, it should presume openness unless compelling circumstances require otherwise, and it should not tell juveniles to deny the existence of the conviction unless the court has found that total and perpetual closure is warranted under the constitutional analysis.

E. CONCLUSION

For the foregoing reasons, the trial court's sealing order should be reversed and the matter should be remanded for an individualized inquiry into the propriety of sealing this criminal file.

DATED this 2nd day of October, 2013.

Respectfully submitted,

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By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
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Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, a properly stamped and addressed envelope directed to

Kristina Louise Selset
Attorney at Law
119 1st Ave S Ste 320
Seattle WA 98104-3424

attorney of record for respondent, containing a copy of the Brief of Appellant in STATE V. S.J.C., Cause No. 69154-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



10-02-13

Name

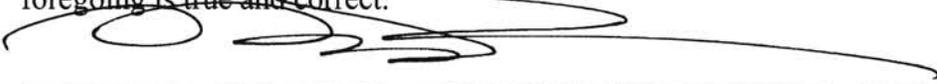
Date

Done in Seattle, Washington

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, a properly stamped and addressed envelope directed to David Stanley Marshall, Attorney at Law, 1001 4th Ave Fl 44, Seattle, WA 98154-1192, attorney of record for respondent, containing a copy of the Brief of Appellant in STATE V. S.J.C., Cause No. 69154-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



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Name

Date

Done in Seattle, Washington