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No. 89689-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

A.G.S.,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. ISSUE FOR REVIEW

Under the unique dual nature of juvenile court record keeping, juvenile records are divided into two files. The “official juvenile court file” is open to public inspection and the “social file” is confidential. Must Special Sex Offender Disposition Alternative (SSODA) evaluations be filed in the “social file” and remain confidential to protect the privacy rights and best interests of children?

B. STATEMENT OF THE CASE<sup>1</sup>

On March 30, 2010, A.G.S. pleaded guilty to two counts of child molestation and two counts of rape of a child in juvenile court. CP 4-6, 7-16; 3RP 11-12.

On June 22, 2010, the juvenile court held a disposition hearing where the State and the defense presented the court with separate SSODA evaluations. 4RP 3; Supplemental CP 1. The court considered both evaluations and determined that they similarly concluded that A.G.S. was amenable to treatment, but noted that the evaluations did not discuss how damaging A.G.S.’s conduct was to the victims. 4RP 30. A.G.S. took

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<sup>1</sup> The record contains seven volumes of verbatim report of proceedings: 1RP - 02/23/10; 2RP - 03/23/10; 3RP - 03/30/10; 4RP - 06/22/10; 5RP - 06/29/10; 6RP - 07/20/10; 7RP - 08/10/10.

responsibility for his actions, admitting fault and expressing remorse that he “hurt a lot of people.” 4RP 24. He told the court that he wanted to undergo treatment to help himself and “make sure that this never happens again.” 4RP 24. The court also heard from the victims’ families and denied the SSODA disposition, imposing instead a maximum standard range of 53 to 76 weeks in confinement and 24 to 36 weeks of supervision. 4RP 5-24, 30-32; CP 17-24.

At the victims’ parents’ request, the State moved to release the defense’s SSODA evaluation to the parents. 5RP 3. Neither the court nor the attorneys could cite to any authority that allowed the court to release the evaluation to the parents. 5RP 3-8. Defense counsel argued that the evaluation is confidential and contains “extraordinarily sensitive information that doesn’t even relate to the offenses that are charged in this case.” 5RP 4. Over A.G.S.’s objection, the court ordered the defense to prepare a redacted evaluation. 5RP 5-8.

The State agreed with the redactions and the court entered an order releasing the evaluation to the parents. 6RP 3-9, 7RP 3; CP 25-26, 28. Thereafter, the court granted A.G.S.’s motion to stay the order pending his appeal and entered an order to seal the evaluation. 6RP 7, 7RP 3; Supplemental CP 1-3.

On appeal, A.G.S. argued that the trial court erred in ordering the release of the SSODA evaluation because under RCW 13.50.010 and 13.50.050, the evaluation is a confidential juvenile record which must be filed in the social file and therefore not open to public inspection. The Court of Appeals remanded for the juvenile court to determine whether the evaluation may be released under chapter 13.50 RCW by ascertaining whether it is part of the official juvenile court file or the social file. State v. A.G.S., 176 Wn. App. 365, 369-70, 309 P.3d 600 (2013).<sup>2</sup>

C. ARGUMENT

SSODA EVALUATIONS MUST BE FILED IN THE CONFIDENTIAL SOCIAL FILE AS PART OF THE RECORDS AND REPORTS OF THE PROBATION COUNSELOR TO PROTECT THE PRIVACY AND BEST INTERESTS OF CHILDREN.

Under the unique dual nature of juvenile court record keeping, juvenile records are divided into two files as defined in RCW 13.50.010. The “official court file” is the “legal file of the juvenile court containing the petition or information, motions, memorandums, briefs, findings of the

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As the Court of Appeals determined, the relevant law is chapter 13.50 RCW, not the Public Records Act. The Court noted that “because the PRA and chapter 13.50 RCW do not conflict, chapter 13.50 RCW supplements the PRA and provides the *exclusive* process for obtaining juvenile justice and care agency records.” A.G.S., 176 Wn. App. 365 at 368-69 (quoting In re Dependency of K.B., 150 Wn. App. 912, 920, 210 P.3d 330 (2009)). Furthermore, the Public Records Act expressly yields to other statutes governing the disclosure of specific information or records. RCW 42.56.070(1).

court, and court orders.” RCW 13.50.010(b). The “social file” is the “juvenile court file containing the records and reports of the probation counselor.” RCW 13.50.010(d). “Records” means the official juvenile court file, the social file, and records of any other juvenile justice or care agency in the case. RCW 13.50.010(c).<sup>3</sup>

RCW 13.50.050 governs the records relating to the commission of juvenile offenses and provides that the “official juvenile court file shall be open to public inspection” unless it is sealed. RCW 13.50.050(2). 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, 13.40.215, and 4.24.550.” RCW 13.50.050(3). Accordingly, unless an exception applies, “the contents of the social file are confidential and not available to public inspection.” State v. J.A.B., 98 Wn. App. 662, 664, 991 P.2d 98 (2000). “The policy of confidentiality is designed to protect the privacy of the juvenile’s personal and family matters.” Id.

In State v. Sanchez, 177 Wn.2d 835, 306 P.3d 935 (2013), this Court concluded that SSODA evaluations are part of the social file and confidential. 177 Wn.2d at 847. Thirteen-year-old Josh Sanchez pleaded

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<sup>3</sup> The Washington State Legislature enacted RCW 13.50.010 in 1979 pursuant to the passage of SB 2768. The bill file at the State Archives does not contain any documentation reflecting the Legislature’s intent in creating a “social file” separate from the “official court file.”

guilty to one count of child molestation in juvenile court. The court imposed a SSODA that placed him on probation in a treatment center for two years. Sanchez moved to seal his SSODA evaluation and the court initially granted his motion. After learning that SSODA evaluations are released to the sheriff's office as part of its duty to carry out risk assessments, the court vacated the order and authorized the probation department to release the evaluation to the sheriff's office. Sanchez, 177 Wn. 2d at 842.<sup>4</sup>

On review, Sanchez argued that releasing his SSODA evaluation to the sheriff's office violates his constitutional right to privacy, as well as his right to confidentiality under various state and federal statutes. Sanchez, 177 Wn. 2d at 846. This Court recognized that releasing SSODA evaluations implicates a juvenile's right to privacy:

A SSODA evaluation may contain sensitive, privileged, or embarrassing information, including details regarding a juvenile's social situation or alleged deviant behaviors. *See* RCW 13.40.162(2)(a). Therefore, indiscriminately releasing such an evaluation to the public, or to an agency without need or authority to review it, could raise legitimate privacy concerns. However, because the legislature had a rational basis for authorizing its release to local law enforcement and because the confidentiality statutes at issue allow for its release as required by law while prohibiting its disclosure to the public at large, Sanchez's rights are not violated here.

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<sup>4</sup> Based on the fact that the court authorized the probation department to release the SSODA evaluation to the sheriff's office, a reasonable inference can be drawn that SSODA evaluations are filed in the social file which contains the probation counselor's records and reports.

117 Wn. 2d at 846.

Upon undertaking an analysis of RCW 13.50.010 and 13.50.050, this Court concluded that release of Sanchez's SSODA evaluation would not violate his statutory right to privacy. This Court determined that "[b]ecause it is essentially the SSODA examiner's report, Sanchez's SSODA evaluation is part of the social file and is therefore confidential." Sanchez, 177 Wn.2d at 847.<sup>5</sup> However, this Court pointed out that RCW 13.50.050(3) provides an exception for the release of SSODA evaluations to local law enforcement for the purpose of making sex offender risk assessments, citing RCW 4.24.550(6). Id. at 848. This Court therefore held that releasing Sanchez's evaluation to the sheriff's office does not violate "the statute's confidentiality requirement." Id.

This Court's conclusion that SSODA evaluations are part of the social file, which contains the records and reports of the probation counselor, is supported by the facts in In re the Interest of T.E.C., 122 Wn. App. 31, 92 P.3d 259 (2004). T.C. was convicted of first degree child molestation and fourth degree assault with sexual motivation. While in

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<sup>5</sup> As this Court is aware, at oral argument, the State informed the Court that in King County, the court files SSODA evaluations in the social file. State v. Sanchez proceeding on February 21, 2013 is available on tww.org.

detention and awaiting disposition, T.C. underwent a sexual deviancy evaluation performed by Dr. Knoepfler. T.E.C., 122 Wn. App. at 33-34.

Knoepfler did not use the term “SSODA” in his written evaluation, but T.C.’s juvenile probation counselor stated that Knoepfler had confirmed in his conversations with her that he specifically intended a SSODA evaluation. T.E.C., 122 Wn. App. at 34 FN 1. T.C.’s probation counselor agreed with Knoepfler’s recommendation contained in his evaluation and the trial court adopted Knoepfler and the probation counselor’s recommendations at the disposition hearing. Id.

Probation counselors are appointed by the administrator of juvenile court and have powers and duties pursuant to RCW 13.04.040.<sup>6</sup> The record reflects that Mr. Geiszler, A.G.S.’s probation counselor, was present at A.G.S.’s plea hearing when the court conducted a colloquy with A.G.S. 3RP 9. After reading the terms of the plea agreement on the record, which included a SSODA evaluation of A.G.S., the court asked Mr. Geiszler, “Are you in agreement with this?” 3RP 9. Mr. Geiszler replied, “Yeah, I am.” 3RP 9. At the disposition hearing, Mr. Geiszler agreed with the examiner’s

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<sup>6</sup> Although the juvenile court here apparently did not request a predisposition study, under RCW 13.04.040(4), a probation counselor must prepare a study when asked by the court and be present at the disposition hearing to respond to questions regarding the study. Hence, under RCW 13.50.010(d), a predisposition study prepared by a probation counselor, even though it is considered and discussed in open court, is filed in the confidential social file which contains the records and reports of the probation counselor.

recommendation for a SSODA, “[T]hese are serious, serious crimes, and [A.G.S.’s] crime and his -- his -- his history is consistent with a SSODA participation.” 4RP 24. It is evident that, as in T.E.C., the examiner provided Mr. Geiszler with A.G.S.’s SSODA evaluation. Logic and common sense leads to the conclusion that SSODA evaluations are part of the probation counselor’s records maintained in the confidential social file.

State v. Holland, 30 Wn. App. 366, 635 P.2d 142, affirmed by, 98 Wn.2d 507, 656 P.2d 1056 (1983), further substantiates that SSODA evaluations must be filed in the social file. Holland was arraigned in juvenile court and charged with murder, rape, and statutory rape. A juvenile court probation counselor was assigned to Holland’s case. When the State filed a motion to decline juvenile court jurisdiction, the court ordered the probation counselor to arrange for psychological evaluations to aid the court in determining whether to decline jurisdiction. Three psychologists examined Holland and submitted written reports. Holland, 30 Wn. App. at 368-70.

The State moved to admit the psychologists’ reports in the official juvenile court file and Holland objected. The juvenile court sustained the objection because the reports were duplicated in the social file. Holland, 30 Wn. App. at 370. The court granted Holland’s motion to confine the reports to the social file and to exclude them from the official juvenile court file.

The Court of Appeals held that the juvenile court acted properly because the information gathered for the purpose of a decline hearing, a non-adversarial proceeding, “was properly confined to the social file and excluded from the legal file.” Id. at 382. The Court explained that to avoid a purely adversarial relationship between a juvenile and his probation counselor, RCW chapter 13.50 make the probation counselor’s reports and records confidential and this protection necessarily extends to the meetings or communications which spawned the records. Id. at 381-82.

Similarly, the juvenile court here, ordered a SSODA evaluation for A.G.S.’s disposition hearing. Under RCW 13.40.162(2), if the court finds the offender is eligible for a SSODA, “the court, on its own motion or the motion of the state or respondent, may order an examination to determine whether the respondent is amenable to treatment.” Like the psychological reports ordered by the juvenile court in Holland, the SSODA evaluation ordered by the juvenile court must be filed in the confidential social file.

The Court of Appeals distinguished Holland in State v. Loukaitis, 82 Wn. App. 460, 918 P.2d 535 (1996). Fifteen-year-old Barry Loukaitis was charged with three counts of aggravated murder and one count of assault. During his declination hearing, Loukaitis called a psychiatrist to testify and asked the court to close the proceedings and seal the record because it pertained to the case’s “social file.” Loukaitis, 82 Wn. App. at

462-63. The juvenile court closed the proceedings, finding that “[t]he information that the psychiatrist would testify about related to the ‘social file’ which in juvenile proceedings is confidential,” relying on Holland. Id. at 463.

The Court of Appeals reversed the juvenile court, pointing out that in Holland, the juvenile court ordered Holland’s probation counselor to arrange for a mental health evaluation and the reviewing court agreed that the juvenile court properly filed the evaluation in the social file. Loukaitis, 82 Wn. App. at 467. The Court distinguished Loukaitis from Holland where “Mr. Loukaitis will introduce testimony from his own expert witness, not a probation counselor or a mental health professional supplying opinions pursuant to court order.” Id. Noting that RCW chapter 13.50 clearly limits the confidentiality to records and reports of a probation counselor, the Court concluded that information from Holland’s own mental health expert is not part of the social file. Id.

Like the mental health evaluations ordered in Holland, and unlike in Loukaitis where he obtained the opinion of his own expert, the juvenile court here ordered a SSODA evaluation of A.G.S. Accordingly, under the Court of Appeals decisions in Holland and Loukaitis, A.G.S.’s SSODA evaluation must be filed in the social file and remain confidential.

The Legislature's creation of a confidential social file for juveniles is consistent with the policy and purpose of Washington courts as expressed in GR 31(a):

It is the policy of the courts to facilitate access to court records as provided by Article I, Section 10 of the Washington State Constitution. Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by Article I, Section 7 of the Washington State Constitution and shall not unduly burden the business of the courts.

As this Court observed in Monroe v. Soliz, 132 Wn.2d 414, 939 P.2d 205 (1997), the critical distinction between the juvenile justice system and the criminal justice system “lies in the Juvenile Justice Act of 1997’s policy of responding to the needs of juvenile offenders.” Id. at 419-20. Such a policy “is rehabilitative in nature, whereas the criminal system is punitive.” Id. at 420. Science and social science show that transient rashness, proclivity for risk, and inability to assess consequences lessen a child’s “moral culpability” and enhance the prospect that, as the years go by and neurological development occurs, the child’s “deficiencies will be reformed.” Miller v. Alabama, 132 S. Ct. 2455, 2464-65, 183 L. Ed. 2d 407 (2012). “[A] child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievable depravity.” Id. at 2464.

Public disclosure of the highly personal and sensitive information revealed in SSODA evaluations, especially in this age of the internet, would undermine the goals of reform and rehabilitation. SSODA evaluations must therefore remain in the confidential social file to protect the privacy rights and best interests of children.

D. CONCLUSION

For the reasons stated, this Court should reaffirm its decision in State v. Sanchez and hold that SSODA evaluations, which are part of the probation counselor's records and reports, must be filed in the confidential social file.

DATED this 23<sup>rd</sup> day of May, 2014.

Respectfully submitted,

/s/ Valerie Marushige  
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WSBA No. 25851  
Attorney for Petitioner, A.G.S.

**DECLARATION OF SERVICE**

On this day, the undersigned sent by e-mail, a copy of the document to which this declaration is attached, to Brian Wasankari, appointed as special deputy prosecuting attorney, at [bwasank@co.pierce.wa.us](mailto:bwasank@co.pierce.wa.us).

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

DATED this 23<sup>rd</sup> day of May, 2014.

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law

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Please find attached Petitioner A.G.S.'s Supplemental Brief and Declaration of Service.

Thank you very much,  
Valerie Marushige  
Attorney for Petitioner