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IN THE SUPREME COURT
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STATE OF WASHINGTON,

Appellant,

v.

S.J.C.,

Respondent.

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AMICI CURIAE BRIEF OF THE CENTER FOR CHILDREN &
YOUTH JUSTICE AND JUVENILE LAW CENTER

IN SUPPORT OF RESPONDENT

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 ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI*.....1

INTRODUCTION1

STATEMENT OF THE CASE.....2

ARGUMENT.....2

 I. Washington’s Recognition that Youth Deserve Special Protections,
 and Thus That Their Juvenile Court Records Should Be Sealed, is
 Consistent with United States Supreme Court Precedent Requiring
 Deferential and Protective Treatment of Youth.....2

 II. The Sealing of Juvenile Records Comports with the Rehabilitative
 Purpose of the Juvenile Justice System11

CONCLUSION17

TABLE OF AUTHORITIES

Page(s)

Washington Supreme Court Cases

In re Lewis,
51 Wn.2d 193, 316 P.2d 907 (1957).....1, 9, 11, 16

Seattle Times Co. v. Ishikawa,
97 Wn.2d 30, 640 P.2d 716 (1982).....1, 2, 9

Washington Court of Appeal Cases

State v. Waldon,
148 Wash.App. 952 (2009).....11

Washington State Constitutional Provisions

Wash. Const. art. I, § 101, 2, 17

Federal Cases

*Denver Area Educational Telecommunications
Consortium, Inc. v. FCC*,
518 U.S. 727 (1996).....10

Gallegos v. Colorado,
370 U.S. 49 (1962).....9

In re Gault,
387 U.S. 1 (1967).....9, 12

Ginsburg v. New York,
390 U.S. 629 (1968).....10

Graham v. Florida,
560 U.S. 48 (2010).....3, 4, 6, 10

Haley v. Ohio,
332 U.S. 596 (1948).....9

<i>Hazelwood School Dististrict v. Kuhlmeier</i> , 484 U.S. 260 (1988).....	10
<i>J.D.B. v. North Carolina</i> , 131 S. Ct. (2011).....	3, 9
<i>Lee v. Weissman</i> , 505 U.S. 577 (1992).....	10
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528 (1971).....	11, 12
<i>Miller v. Alabama</i> , 132 S. Ct. 2455 (2012).....	<i>passim</i>
<i>Powell v. Alaska</i> , 287 U.S. 45 (1932).....	9
<i>Prince v. Massachusetts</i> , 321 U.S. 158 (1944).....	10
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	3, 4, 6, 7
<i>Smith v. Daily Mail Publishing Co.</i> , 443 U.S. 97 (1979).....	12
Federal Statutes	
Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251	14
Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105	14
Other State Cases	
<i>In re J.V.R.</i> , No. 81 MM (Pa Mar. 26, 2009)	16
<i>In re J.V.R.</i> , No. 81 MM (Pa Oct. 29, 2009)	16, 17

Other State Statutes

Cal. Rules of Court, Rule 5.552..... 15
N.C. Gen. Stat. § 7B-3000..... 15
N.D. Cent. Code § 27-20-52..... 15
N.M. Stat. § 32A-2-32 15
Ohio Rev. Code Ann. § 2151.18..... 15
Ohio Rev. Code Ann. § 2151.356..... 15
Ohio Rev. Code Ann. § 2151.357..... 15
Ohio Rev. Code Ann. § 2151.358..... 15
R.I. Gen. Laws § 14-1-30 15
R.I. Gen. Laws § 14-1-64 15
Vt. Stat. Title 33 § 5117..... 15

Federal Constitutional Provisions

U.S. Const. amend. I..... 10
U.S. Const. amend. VII..... 3

Other Authorities

Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOYOLA UNIVERSITY OF CHICAGO LAW JOURNAL 349 (1996) 12
B.J. Casey *et al.*, *Imaging the Developing Brain: What Have We Learned about Cognitive Development?*, 9 TRENDS IN COGNITIVE SCIENCES, 104, 106-107 (2005) 5, 6
Brief of the American Psychological Association, *et al.* as *Amici Curiae* in Support of Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646) 8, 9

D. Wayne Osgood <i>et al.</i> , <i>Vulnerable Populations and the Transition to Adulthood</i> , 20 THE FUTURE OF CHILDREN 209 (Spring 2010)	14
David S. Tanenhaus, <i>The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction</i> , in A CENTURY OF JUVENILE JUSTICE (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002)	11, 12
Elizabeth S. Scott & Laurence Steinberg, <i>Adolescent Development and the Regulation of Youth Crime</i> , 18 THE FUTURE OF CHILDREN 15 (2008)	4
Elizabeth S. Scott & Laurence Steinberg, RETHINKING JUVENILE JUSTICE (2008)	8
Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND (2002).....	6
Juvenile Proceedings: Part II, 15 CRIM. JUST. MAG. (Fall 2000), <i>available at</i> http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Collateral%20Effects%20-%20Criminal%20Justice%20Magazine.pdf	14
Kara E. Nelson, <i>The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises</i> , 81 MARQ. L. REV. 1101 (1998)	12, 13
Kristin Henning, <i>Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?</i> , 79 N.Y.U. L. REV. 520 (2004)	13
Laurence Steinberg, <i>A Dual Systems Model of Adolescent Risk-Taking</i> , 52 DEVELOPMENTAL PSYCHOBIOLOGY 216 (2010).....	5, 6

Laurence Steinberg & Elizabeth S. Scott, <i>Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty</i> , 58 AM. PSYCHOLOGIST 1 (2003), available at http://www.youthadvocacydepartment.org/jdn/resource/docs/less-guilty-by-adolescence.pdf	6, 7
Laurence Steinberg <i>et al.</i> , <i>Age Differences in Future Orientation and Delay Discounting</i> , 80 CHILD. DEV. 28 (2009).....	5
Marsha Levick <i>et al.</i> , <i>The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence</i> , 15 U. PA. J. L. & SOC. CHANGE 285 (2012)	8
Martin Gugenheim, <i>Graham v. Florida and Juveniles Right to Age-Appropriate Sentencing</i> , 47 HARV. C.R.-C.L. L. REV. 457 (2012)	10
<i>Myths and Realities About Juvenile Records and Expungements</i> , MODELS FOR CHANGE (July 15, 2010), available at http://www.modelsforchange.net/newsroom/152	13
Nitin Gogtay, <i>et al.</i> , <i>Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood</i>	5
Report to the House of Delegates, American Bar Association, Criminal Justice Section, Committee on Homelessness and Poverty, Standing Committee on Legal Aid and Indigent Defense (2010), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midear2010_102a.authcheckdam.pdf	15
Richard J. Bonnie, <i>et al.</i> , eds. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH (2013)	5, 6, 7, 8

Riya Shah, <i>et al.</i> , <i>Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement</i> (forthcoming September 2014) (on file with authors)	15
Sentencing Project, <i>State Recidivism Studies</i> (2010) available at http://sentencingproject.org/doc/publications/inc_State_RecidivismFinalPaginated.pdf	14
Stephan E. Oestreicher, Jr., <i>Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings</i> , 54 VAND. L. REV. 1751 (2001)	13

IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici curiae* are set forth in the accompanying Motion for Leave to File an *Amici Curiae* Brief.

INTRODUCTION

This Court has repeatedly held that juvenile court records may be sealed, and has rejected the argument that Article I, Section 10 of the Washington Constitution applies to juvenile records. *In re Lewis*, 51 Wn.2d 193, 198, 316 P.2d 907 (1957); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (en banc) [hereinafter *Ishikawa*]. The unique status of adolescents, and the unique rehabilitative purposes of the juvenile justice system, weigh in favor of protecting juvenile records. *Lewis*, 51 Wn.2d at 198. The parties have presented the arguments under Washington law.

Amici write separately to emphasize that this Court's recognition of the distinct characteristics of youth, and the importance of sealing juvenile records, is further supported by the United States Supreme Court jurisprudence on children and national research on the importance of confidentiality of juvenile court records.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case set forth by Respondent S.J.C.

ARGUMENT

I. Washington’s Recognition that Youth Deserve Special Protections, and Thus That Their Juvenile Court Records Should Be Sealed, is Consistent with United States Supreme Court Precedent Requiring Deferential and Protective Treatment of Youth

The State asks this Court to apply Article I, Section 10 of the Washington Constitution, and the *Ishikawa* factors, to the analysis of the sealing of a young person’s juvenile records, and thus to create the same sealing standard for children and adults. The State argues that permitting the sealing of juvenile records “seems starkly at odds with the last few decades of precedent from the United States Supreme Court.” Court of Appeals Appellant’s Reply Br. at 1. In fact, the opposite is true. The U.S. Supreme Court’s decisions over the past decade have repeatedly emphasized that the distinctions between teenagers and adults must be taken into account in applying constitutional principles and that children deserve special protection under the law.

Over the last decade, the U.S. Supreme Court has issued four decisions emphasizing that adolescent development is constitutionally relevant. *See Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding that a mandatory sentence of life without possibility of parole for minors violates the Eighth Amendment); *Graham v. Florida*, 560 U.S. 48 (2010) (holding that the imposition of life without the possibility of parole for non-homicide crimes violates the Eighth Amendment); *J.D.B. v. North Carolina*, 131 S. Ct., 2394, 2402-03 (2011) (holding that age is a significant factor in determining whether a youth is “in custody” for *Miranda* purposes); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that the imposition of the death penalty on juvenile offenders violates the Eighth Amendment).

These decisions emphasize that teenagers are different and require protective treatment under the law. As the U.S. Supreme Court has explained, a youth’s age “is far more than a chronological fact”; “[i]t is a fact that generates commonsense conclusions about behavior and perception” that are “self-evident to anyone who was a child once himself....” *J.D.B.*, 131 S. Ct. at 2403 (citations and internal quotation marks omitted). They are “what any parent knows—indeed, what any person knows—about children generally.” *Id.* (citations and internal quotations omitted). The U.S. Supreme Court’s decisions about

adolescents don't rest on common sense alone; they are supported by a significant body of developmental research and neuroscience demonstrating psychological and physiological differences between youth and adults. *See, e.g., Graham*, 560 U.S. at 48, 68 (“developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”).

The Court's decisions, and the underlying science, emphasize three categorical distinctions between youth and adults to explain why children must be treated differently under the law: youth are more impulsive, more susceptible to outside pressure, and more capable of change than adults. These distinctions all support the sealing of juvenile records.

The U.S. Supreme Court has underscored that “children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking.” *Miller*, 132 S. Ct. at 2464 (internal citations and quotation marks omitted); *Accord Graham*, 560 U.S. at 67; *Roper*, 543 U.S. at 569. Psychological research demonstrates that adolescents, as compared to adults, are less capable of making reasoned decisions, particularly in stressful situations. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILDREN 15, 20 (2008) (“Considerable evidence supports the conclusion that children and

adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.”). This may stem from the fact that changes in brain structure that occur “around puberty” are likely to increase reward seeking behavior.” Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 217 (2010) [hereinafter “Steinberg, *A Dual Systems Model*”]. Greater levels of impulsivity during adolescence may also stem from adolescents’ weak future orientation and their related failure to anticipate the consequences of decisions. Laurence Steinberg *et al.*, *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD. DEV. 28, 29-30 (2009). Richard J. Bonnie *et al.*, eds. REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH at 91, 97 (2013) [hereinafter “Bonnie, REFORMING JUVENILE JUSTICE”].

Neuroscience confirms the weaker decision-making capacities of youth as compared to adults. The parts of the brain controlling higher-order functions— such as reasoning, judgment, inhibitory control (the brain’s “CEO”)—develop after other parts of the brain controlling more basic functions (*e.g.*, vision, movement), and do not fully develop until individuals are in their early- to mid-20s. Nitin Gogtay *et al.*, *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT’L ACAD. SCI. 8174, 8177 (2004);

Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND, 24, 141 (2002); *see also* B.J. Casey *et al.*, *Imaging the Developing Brain: What Have We Learned about Cognitive Development?*, 9 TRENDS IN COGNITIVE SCIENCES, 104, 106-107 (2005). Because these higher order functions are not developed, adolescents lack complex reasoning and decision making abilities that may influence their undesirable behavior – risk-taking, impulsivity, and poor judgment. Steinberg, *A Dual Systems Model* at 216-217; Bonnie, REFORMING JUVENILE JUSTICE at 97.

The U.S. Supreme Court has also recognized that youth are distinct from adults because of their susceptibility to outside pressures. As the Court explained, “children are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller*, 132 S. Ct. at 2464 (citation and internal quotation marks omitted). *Accord Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 569. That teenagers are more susceptible than adults to peer pressure is widely confirmed in social science literature. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1,

4 (2003) [hereinafter “Steinberg & Scott, *Less Guilty by Reason of Adolescence*”]; Bonnie, REFORMING JUVENILE JUSTICE at 91. Even without direct coercion, adolescents’ desire for peer approval – and fear of rejection – affect their choices indirectly. Steinberg & Scott, *Less Guilty by Reason of Adolescence* at 4.

Recent brain imaging studies confirm the observation that adolescent behavior is greatly affected by peer influences. For example, researchers using brain imaging techniques to study risky driving decisions by teenagers have shown that when peers are present, teenagers, unlike adults, show heightened activity in the parts of the brain associated with rewards. Bonnie, REFORMING JUVENILE JUSTICE at 98. This means that in the presence of peers, reward centers of the brain may hijack less mature control systems in adolescents, causing teens to make decisions based on peer approval as opposed to logic. *Id.*

Finally, the U.S. Supreme Court has recognized that children are different from adults because adolescence is a transitional phase. “[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 irretrievabl[e] deprav[ity].” *Miller*, 132 S. Ct. at 2464 (quoting *Roper*, 543 U.S. at 570). As a result, “a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper*, 543 U.S. at 570.

Developmental research reaches the same conclusions. It is well known that “[adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships.” Elizabeth S. Scott & Laurence Steinberg, *RETHINKING JUVENILE JUSTICE*, 31 (2008) [hereinafter “Scott & Steinberg, *RETHINKING JUVENILE JUSTICE*”]. The research confirms that “many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.” Marsha Levick *et al.*, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through The Lens of Childhood and Adolescence*, 15 *U. PA. J. L. & SOC. CHANGE* 285, 297 (2012) (citations omitted). “[T]he period of risky experimentation does not extend beyond adolescence, ceasing as identity becomes settled with maturity. Only a small percentage of youth who engage in risky experimentation persist in their problem behavior into adulthood.” Bonnie, *REFORMING JUVENILE JUSTICE* at 90 (citations omitted). *See also* Scott & Steinberg, *RETHINKING JUVENILE JUSTICE* at 53 (explaining that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.”). “Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults.” *Br. of the Am.*

Psych. Ass'n., *et al.* as *Amici Curiae* in Supp. of Pet'ers at 22, 24, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646).

These three characteristics – the immaturity of youth, their susceptibility to outside pressures, and the transience of adolescence – all support sealing juvenile records.¹ Adolescents are both less culpable and more likely to grow out of offending behavior than adults. Allowing a young person to seal his or her juvenile record, without adding extra barriers or hurdles, supports the rehabilitative goals of the juvenile system and responds to the reality that teenagers are not simply “miniature adults.” *J.D.B. v. N. Carolina*, 131 S. Ct. at 2394, 2397. The juvenile court must remain a court of second chances, allowing youthful offenders the opportunity to put their delinquent misconduct behind them.

This Court’s conclusions in both *Lewis* and *Ishikawa* recognize that juvenile records deserve distinct protections, and thus comport with U.S. Supreme Court jurisprudence. As Professor Martin Guggenheim has

¹ While recent United States Supreme Court cases brought a new scientific lens and a heightened attention to protections for youth, they also built upon the Court’s long history of recognizing that constitutional standards must be distinctly applied to protect youth in a wide variety of legal contexts. The Court has identified the importance of protecting youth’s unique needs in cases regarding criminal and juvenile procedure. *See, e.g., Haley v. Ohio*, 332 U.S. 596 (1948) (holding unconstitutional the statement of a fifteen-year old defendant); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding a juvenile statement inadmissible because a teenager “cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.... Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.”); *In re Gault*, 387 U.S. 1, 36 (1967) (a child has a particular need for the “guiding hand of counsel at every step in the proceedings against him.” (quoting *Powell v. Alaska*, 287 U.S. 45, 69 (1932))).

explained, “[s]tates are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults.” Martin Guggenheim, *Graham v. Florida and Juveniles Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. REV. 457, 490 (2012). Instead, states must consider the particular attributes and nature of youth when they assess their statutory schemes. Moreover, a state’s consideration of youth in its laws and policies need not be limited to sentencing or criminal procedures. The U.S. Supreme Court has long held, in a variety of civil contexts, that youth deserve more protections than adults.² That developmentally-appropriate treatment of youth is precisely what this Court applied in *Lewis*, and should continue to apply today.³

² The U.S. Supreme Court has held, as a matter of First Amendment law, that different obscenity standards apply to children than to adults, *Ginsburg v. New York*, 390 U.S. 629, 637 (1968), and that the state has a compelling interest in protecting children from images that are harmful to minors. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996). See also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that public school authorities may censor school-sponsored publications). The developmental status of youth has played a role as well in the Supreme Court’s school prayer cases. In holding that prayers delivered by clergy at public high school graduation ceremonies violate the Establishment Clause of the First Amendment, the Court recognized developmental research relating to youth susceptibility to pressure, and observed that “there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools.” *Lee v. Weissman*, 505 U.S. 577, 593-94 (1992). Similarly, the U.S. Supreme Court has upheld a state’s right to restrict when a minor can work, guided by the premise that “[t]he state’s authority over children’s activities is broader than over the actions of adults.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

³ That the Court of Appeals has applied a different test to *adults* in *State v. Waldon*, 148 Wash.App. 952 (2009) should have no bearing on this Court’s treatment of juveniles.

II. The Sealing of Juvenile Records Comports with the Rehabilitative Purpose of the Juvenile Justice System

The confidentiality of records is central to the rehabilitative purpose of the juvenile justice system; this centrality of confidentiality has been recognized by this Court and it is further supported by United States Supreme Court precedent.

The juvenile court system was founded upon the belief that children are particularly capable of rehabilitation and, though they should be held accountable for their misdeeds, they should receive care and treatment rather than punishment. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* at 42 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002). The U.S. Supreme Court has clearly recognized the importance of procedures that support the rehabilitative purposes of state juvenile justice systems. In *McKeiver v. Pennsylvania*, for example, the Court declined to find a right to jury trial in juvenile court, holding that this would “remake” the juvenile court into an adversarial proceeding. 403 U.S. 528, 547 (1971). The Court emphasized the importance of protecting the juvenile justice system’s “rehabilitative goals” and its focus on “fairness,” “concern,” and “sympathy.” *McKeiver*

at 547, 550. *See also Gault*, 387 U.S. at 38 n.64 (1967) (noting that the provision of counsel for juveniles “can play an important role in the process of rehabilitation”).

From the inception of the juvenile justice system, confidentiality has been a key element of the rehabilitative model. Keeping records confidential shields youth from the stigma that ordinarily accompanies the publicity of criminal proceedings and allows them a chance at rehabilitation and growth. Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 368-69 (1996). *See also Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring) (without confidentiality, the public would brand a child as a criminal and reject him for his behavior, making a healthy readjustment to society difficult); David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE at 65 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002); Kara E. Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1101-02 (1998) (identifying confidentiality as one of central goals of traditional juvenile justice systems); 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, 1776 (2001) (noting the tradition of closed juvenile proceedings).

Sealing juvenile records supports teenagers who have made mistakes when they try to return to school, look for a job, seek housing, and productively reintegrate into their communities following involvement with the juvenile justice system. In contrast, when records are left open to the public or burdens are placed on youths' ability to seal their records, young people are put at risk of being stigmatized and excluded. Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 526-527 (2004). Records of juvenile adjudications can limit access to financial aid for college,⁴ interfere with a young person's efforts to obtain employment or housing,⁵ and result in ineligibility for public benefits, including Temporary Assistance for Needy Families (TANF) and

⁴ Judge Kim Clark, *What Happens in Juvenile Court, Doesn't Always Stay in Juvenile Court - The Myths and Realities About Juvenile Records and Expungements*, MODELS FOR CHANGE (July 15, 2010), available at <http://www.modelsforchange.net/newsroom/152>.

⁵ See Robert Shepard, *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. MAG. (Fall 2000), available at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Collateral%20Effects%20-%20Criminal%20Justice%20Magazine.pdf>

food stamps.⁶ Moreover, youth are more likely to recidivate if they are unable to obtain employment, pursue their educational objectives, or secure housing. See The Sentencing Project, *State Recidivism Studies* (2010) at http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf.

Ensuring that records are sealed is particularly important as youth approach adulthood. At this pivotal time, young people make decisions about their education, careers, life style, and values that will likely shape the course of their adult lives. See, e.g., D. Wayne Osgood *et al.*, *Vulnerable Populations and the Transition to Adulthood*, 20 THE FUTURE OF CHILDREN 209 (Spring 2010). The obstacles posed by juvenile records can be especially damaging at this age.

The commitment to juvenile rehabilitation has led almost all states to provide protections for juvenile records that are not available for adults⁷ and has led many states to ensure that juvenile delinquency information

⁶ Federal Welfare Reform Law, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, as amended by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251.

⁷ Riya Shah, *et al.*, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 1, 7 (forthcoming September 2014) (on file with authors)

can never be disclosed.⁸ Moreover, in recent years the legal community has given heightened attention to the problem of collateral consequences of juvenile adjudications. *See, e.g.*, Report to the House of Delegates, Am. Bar Ass'n, Criminal Justice Section, Committee on Homelessness and Poverty, Standing Committee on Legal Aid and Indigent Defense (2010) at 14, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midear2010_102a.authcheckdam.pdf (recognizing U.S. Supreme Court jurisprudence holding that children are different from adults under the law and recommending that states enact laws and policies to limit reliance on juvenile records by schools and employers).

Protecting the rehabilitative nature of juvenile proceedings, *Lewis*, 51 Wn.2d at 198, this Court's determination that juvenile records should be eligible to be sealed without applying further burdens or barriers is in keeping with the purpose of the juvenile justice system, with U.S. Supreme Court precedent, and with national trends to allow juvenile offenders the opportunity to overcome their youthful mistakes.

⁸ *See, e.g.*, California (Cal. Rules of Court, Rule 5.552); New Mexico (N.M. Stat. § 32A-2-32); North Carolina (N.C. Gen. Stat. § 7B-3000); North Dakota (N.D. Cent. Code § 27-20-52); Ohio (Ohio Rev. Code Ann. § 2151.18; Ohio Rev. Code Ann. § 2151.356; Ohio Rev. Code Ann. § 2151.357; Ohio Rev. Code Ann. § 2151.358); Rhode Island (R.I. Gen. Laws § 14-1-64; R.I. Gen. Laws § 14-1-30); Vermont (Vt. Stat. tit. 33 § 5117).

Finally, the State argues that sealing records actually places youth at risk of harm by allowing judicial corruption to go unchecked. Court of Appeals Appellant Br. at 18-19. This argument is specious.⁹ Keeping a juvenile record open for all purposes or creating further burdens to seal erects barriers for youth seeking employment, education, housing and other opportunities and is not how the system protects youth from corruption. Indeed, in the Pennsylvania judicial corruption scandal highlighted by the State, the young plaintiffs fought successfully to have their records expunged as a key remedy to redressing the harms they suffered. *See* Exhibit A, *In re J.V.R.*, No. 81 MM, at 2 (Pa Mar. 26, 2009) (per curiam) (ordering the court-appointed Special Master to identify and correct “miscarriages of justice in the underlying criminal consent decrees and adjudications as quickly as possible” and promptly enter “orders of vacatur and expungement”); *see also* Exhibit B, *In re J.V.R.*, No. 81 MM, at 7 (Pa Oct. 29, 2009) (per curiam) (“[t]his [c]ourt approves of [the investigating special master’s] further recommendation that adjudications of delinquency and consent decrees be reversed and dismissed with prejudice, and that expungement of records proceed”). It wasn’t public access to the juvenile records of the youth involved in these matters that

⁹ There are ample mechanisms to address incidences of judicial misconduct: parties have the right to appeal; the Judicial Conduct Commission investigates complaints and takes disciplinary action when appropriate; and counsel, community groups, and/or the media conducts investigations that can reveal misdeeds.

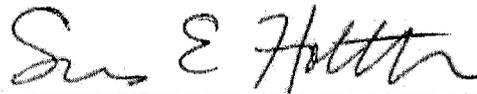
brought the atrocities to light. Pennsylvania's expungement process actually assisted these young people in erasing their records and giving them the opportunity to move on without their past being used against them. The State has cynically converted a tragedy for many of Pennsylvania's youth into a justification for inflicting other harms on youth in Washington State.

CONCLUSION

We respectfully urge this Court to reinforce its own precedent, abide by United States Supreme Court jurisprudence providing for more generous protection of youth's rights, and continue to follow sound public policy, which all recognize the unique vulnerabilities of youth and the importance of the rehabilitative mission of the juvenile justice system. Therefore, we request that the Court distinguish the sealing of juvenile records from the sealing of adult criminal records and hold that Article I, Section 10 of the Washington Constitution does not apply to juvenile records.

Respectfully submitted, this 11th day of August, 2014.

By:



SERENA E. HOLTHE, WSBA NO. 46877
Center for Children & Youth Justice
Counsel of Record for Amici Curiae

DECLARATION OF DOCUMENT FILING AND SERVICE

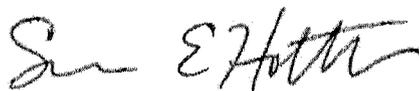
I, Serena E. Holthe, declare that on the 11th day of August, 2014, I caused the original **AMICI CURIAE BRIEF OF THE CENTER FOR CHILDREN & YOUTH JUSTICE AND THE JUVENILE LAW CENTER** to be filed by email in the Supreme Court of the State of Washington, and a true copy of the same to be served by email on the following:

Gregory C. Link
Washington Appellate Project
Attorneys for Respondent
Email: greg@washapp.org

Daniel T. Satterberg
James M. Whisman
King County Prosecuting Attorney and
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
Email: Jim.Whisman@kingcounty.gov

Signed in Seattle, Washington this 11th day of August, 2014.

By:



SERENA E. HOLTHE, WSBA NO. 46877
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Exhibit A

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: J.V.R.; H.T., A MINOR THROUGH: No. 81 MM 2008
HER MOTHER, L.T.; ON BEHALF OF :
THEMSELVES AND SIMILARLY :
SITUATED YOUTH :

ORDER

PER CURIAM

AND NOW, this 26th day of March, 2009, this Order acknowledges the Court's receipt of the Special Master's First Interim Report and Recommendations, which was prepared in pursuit of this Court's directive to investigate "the alleged travesty of juvenile justice in Luzerne County ... [and] to identify the affected juveniles and rectify the situation as fairly and swiftly as possible." 81 MM 2008, order dated 2/11/2009. A copy of the First Interim Report and Recommendations is attached to this Order.

The Special Master's First Interim Report proposes procedures to identify in an expeditious fashion a certain class of Luzerne County juvenile cases where the Master believes that summary relief should be afforded in the form of vacating the underlying adjudications or consent decrees, and ordering expungement of the records of such consent decrees or adjudications. The Special Master requests authorization to grant such relief. This Court hereby specifically authorizes the Special Master to grant such relief as expeditiously as possible. Furthermore, we **ADOPT AND APPROVE** the entirety of the Special Master's First Interim Report and Recommendations, subject only to the following two qualifications.

(1) The Special Master has noted that some of the affected juveniles or their counsel may wish to delay expungement until they can collect records and information for

use in pending civil lawsuits. This Court's primary concern remains with identifying and correcting miscarriages of justice in the underlying criminal consent decrees and adjudications as quickly as possible. Accordingly, once appropriate cases are identified according to the criteria the Special Master has set forth, orders of vacatur and expungement shall be entered promptly. This directive in no way shall affect the discretion of the Special Master to provide reasonable advance notice to affected juveniles, and to entertain specific, supported requests to delay the effect of the expungement aspect of such orders.

(2) In order to promptly identify the affected juveniles, the Special Master requests that this Court authorize the Luzerne County Probation Office to release copies of the Luzerne County Juvenile Court daily case lists from January 1, 2003 to May 31, 2008 ("daily lists") to the District Attorney of Luzerne County and an attorney for the Juvenile Law Center ("JLC"). Since this Court's prior order of February 11, 2009, appointing the Special Master, we are aware that the JLC has filed a federal civil law suit seeking monetary damages and attorneys' fees arising from the underlying Juvenile Court adjudications and consent decrees. Notwithstanding the JLC's adversarial role, this Court recognizes that the JLC has been of assistance to the Special Master in addressing the situation in Luzerne County and remains fairly positioned to represent the interests of those juveniles with whom it has specific representation agreements in the proceedings below. However, the Special Master's authorized task is singular: to identify every affected juvenile for purposes of recommending immediate appropriate relief from his or her criminal consent decree and adjudication. Accordingly, the Court directs that the release of these lists is for the sole purpose of identifying those juveniles - whether they are presently represented or not - who fit the criteria for the accelerated disposition proposed by the Special Master, and not for purposes of collateral litigation. The release shall be subject to the security provisions identified by the Special Master, with discretion remaining in the Special Master to modify

or expand those procedures as implementation of this amendment and subsequent events may require.

This Order specifically recognizes that the Special Master's First Interim Report and Recommendations concerns itself only with one class of cases of the many subject to review. See Report and Recommendations at 8, ¶ B(1). Recommendations as to other cases are to follow in due course.

Jurisdiction is retained.

Exhibit B

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

IN RE: EXPUNGEMENT OF JUVENILE RECORDS AND VACATUR OF LUZERNE COUNTY JUVENILE COURT CONSENT DECREES OR ADJUDICATIONS FROM 2003-2008

RELATED TO:

IN RE: J.V.R.; H.T., A MINOR THROUGH: No. 81 MM 2008
HER MOTHER, L.T.; ON BEHALF OF :
THEMSELVES AND SIMILARLY :
SITUATED YOUTH :

ORDER

PER CURIAM

AND NOW, this 29th day of October, 2009, upon consideration of the Third Interim Report and Recommendations of the Special Master, the Commonwealth's Objections to the Third Report and Recommendations of the Special Master, the Juvenile Law Center's Reply to Objections to the Third Report and Recommendations of the Special Master, and the Commonwealth's Sur-Reply, it is hereby ordered as follows:

(1) The Commonwealth requests that this matter be "remanded" to the Court's Special Master, the Honorable Arthur E. Grim, so that specific factual findings underlying the Third Report and Recommendations can be set forth, and for a determination of whether additional evidentiary proceedings should be conducted based on the withdrawal of the agreement to plead guilty by Mark Ciavarella in United States

v. Michael T. Conahan and Mark A. Ciavarella, 3:09-CR-028 (U.S. District Court, M.D. Pa.). The Commonwealth believes a remand is necessary in order to assist this Court in determining whether the record supports the findings set forth in the Third Interim Report and Recommendations given the fact of Ciavarella's withdrawal of his agreement to plead guilty.

In its Reply to Objections to the Third Report and Recommendations of the Special Master, the Juvenile Law Center ("JLC")¹ responds that even in the absence of Ciavarella's guilty plea ample evidence exists to support Judge Grim's findings that the juvenile proceedings before Ciavarella were unfair and that all adjudications and all consent decrees should be vacated. The JLC also submits documents as exhibits to its Reply, including: (1) the July 2, 2009 sworn testimony of Ciavarella before President Judge William H. Platt of the Court of Common Pleas of Lehigh County, in Joseph v. The Scranton Times, 19 MM 2009, a matter over which this Court has assumed and still retains plenary jurisdiction; (2) an excerpt from the Transcript of Proceedings of Arraignment and Guilty Plea dated July 1, 2009, in United States v. Powell, No. 09-CR-189 (U.S. District Court, M.D. Pa.), relating to the federal guilty plea by Robert Powell, Esq., which details, among other things, that Powell paid Ciavarella and Conahan more than \$2.8 million in connection with the building and operation of the PA Child Care and Western PA Child Care juvenile facilities; and (3) an excerpt of the Transcript of Proceedings of Arraignment and Guilty Plea dated September 2, 2009, in United States v. Mericle, No. 09-CR-247 (U.S. District Court, M.D. Pa.), relating to the federal guilty plea of developer and builder Robert K. Mericle, which corroborates the payment of those monies to Ciavarella and Conahan in connection with the juvenile facilities.

¹ The JLC did not file objections, and indeed, asks this Court to adopt "in its entirety" the Third Interim Report and Recommendations of the Special Master.

The Commonwealth argues that this Court should not consider or rely upon the JLC's exhibits as a factual basis for adopting the Special Master's report and recommendations. The procedural posture of this matter is distinguishable, however, from the cases relied upon by the Commonwealth, which involved appeals from lower courts, and addressed compliance with the Rules of Appellate Procedure and related case decisions governing the scope of records on appeal and whether certain issues had been properly preserved for appeal.²

This matter does not involve a direct appeal. By order dated February 11, 2009, this Court assumed plenary jurisdiction through the exercise of our King's Bench powers and appointed Judge Grim to act on behalf of the Court as Special Master. This Court has continuously retained jurisdiction. Furthermore, for the reasons that follow, we conclude that a "remand" is unnecessary, since this Court may consider Judge Grim's recommendations based upon the present materials, which we deem more than adequate to proceed to adjudicate this matter.

Preliminarily, the Commonwealth cites no cases that support the notion that this Court is precluded from considering Ciavarella's prior entry of an agreement to plead guilty to the initial federal charges, for the distinct and collateral purpose of determining how to address and remedy the travesty of juvenile justice that Ciavarella perpetrated in Luzerne County, merely because Ciavarella was permitted to withdraw the plea after the federal district court rejected the negotiated sentence as inadequate. Drawing logical inferences from the plea, for the collateral purposes at issue here, does nothing

² The Commonwealth cites the unrelated decisions in Commonwealth v. Powell, 956 A.2d 406 (Pa. 2008) (appellant's claim that introduction of autopsy photograph was improper found to be waived because photograph had not been made part of the certified record), and in Commonwealth v. Kennedy, 868 A.2d 582 (Pa. Super. 2005) (records from county jail could not be considered in challenge to legality of sentence because records had not been made part of certified record).

to burden Ciavarella's rights as a federal criminal defendant. Moreover, Ciavarella has not sought to participate in this matter, or to explain his actions which are at issue here. This Court's concerns, now and at the outset of our exercise of plenary jurisdiction, are with finding the facts of the matter and acting swiftly to take remedial action. Nothing in Ciavarella's withdrawal of his plea calls into question the accuracy of the essential facts which formed the basis for the Special Master's recommendations.

With respect to those cases where juveniles appeared before Ciavarella without counsel, Judge Grim's independent review of the transcripts of individual cases disclosed Ciavarella's systematic failure to determine whether a juvenile's waiver of the right to counsel was knowingly, intelligently and voluntarily tendered; the failure to conduct the requisite waiver colloquy on the record; the failure to advise the juvenile of the elements of the offenses charged; and the failure to determine whether an admission was tendered, and then to apprise the juvenile of the consequences of an admission of guilt. In addition, this Court's review of those same transcripts reveals a systematic failure to explain to the juveniles the consequences of foregoing trial, and the failure to ensure that the juveniles were informed of the factual bases for what amounted to peremptory guilty pleas. The transcripts reveal a disturbing lack of fundamental process, inimical to any system of justice, and made even more grievous since these matters involved juveniles. Even in the absence of the admissions inherent in the original federal plea agreement Ciavarella was permitted to withdraw, Ciavarella's complete disregard for the constitutional rights of the juveniles who appeared before him without counsel, and the dereliction of his responsibilities to ensure that the proceedings were conducted in compliance with due process and rules of procedure promulgated by this Court, fully support Judge Grim's analysis.

Thus, Judge Grim's review of transcripts of juvenile proceedings over which Ciavarella presided provides a sufficient, independent basis upon which to consider his recommendations regarding the adjudications and consent decrees entered by Ciavarella between January 1, 2003 and May 31, 2008, in cases in which the juveniles were unrepresented by counsel. We conclude that the record supports Judge Grim's determination that Ciavarella knew he was violating both the law and the procedural rules promulgated by this Court applicable when adjudicating the merits of juvenile cases without knowing, intelligent and voluntary waivers of counsel by the juveniles.

With respect to the remaining cases, where counsel was not waived, we likewise find that the materials before us provide an adequate basis upon which to assess Judge Grim's recommendations. The staggering financial payments made to Ciavarella and Conahan in connection with PA Child Care and Western PA Child Care are well documented. In this regard, we have taken judicial notice of Ciavarella's testimony in Joseph v. The Scranton Times, 19 MM 2009; the Transcript of Proceedings of Arraignment and Guilty Plea dated July 1, 2009, in United States v. Powell, No. 09-CR-189 (U.S. District Court, M.D. Pa.), relating to the guilty plea of Robert Powell; and of the Transcript of Proceedings of Arraignment and Guilty Plea dated September 2, 2009, in United States v. Mericle, No. 09-CR-247 (U.S. District Court, M.D. Pa.), relating to the guilty plea of Robert K. Mericle. During the hearing conducted by President Judge Platt in Joseph v. The Scranton Times, 19 MM 2009, Ciavarella admitted under oath that he had received payments from Robert Powell, a co-owner of the PA Child Care and Western PA Child Care facilities, and from Robert K. Mericle, the developer who constructed the juvenile facilities, during the period of time that Ciavarella was presiding over juvenile matters in Luzerne County. It is a matter of record that Ciavarella routinely committed juveniles to one or another of these facilities. It is also a matter of record that

Ciavarella failed to disclose his ties to Powell, much less the financial benefits he received in connection with the facilities to which he routinely committed Luzerne County juveniles. Ciavarella's admission that he received these payments, and that he failed to disclose his financial interests arising from the development of the juvenile facilities, thoroughly undermines the integrity of all juvenile proceedings before Ciavarella. Whether or not a juvenile was represented by counsel, and whether or not a juvenile was committed to one of the facilities which secretly funneled money to Ciavarella and Conahan, this Court cannot have any confidence that Ciavarella decided any Luzerne County juvenile case fairly and impartially while he labored under the specter of his self-interested dealings with the facilities.

In short, there is ample support in the materials properly before us to assess the bases cited by Judge Grim for his finding that all juvenile adjudications and consent decrees entered by Ciavarella between January 1, 2003 and May 31, 2008, are tainted. Accordingly, we **DENY** the Commonwealth's request to remand.

(2) Given the above decision and discussion, this Court now approves of Judge Grim's recommendation that, for all cases in which Ciavarella entered adjudications of delinquency or consent decrees between January 1, 2003 and May 31, 2008, orders shall be entered vacating those adjudications and consent decrees, regardless of whether the juvenile was represented by counsel. See In Interest of McFall, 617 A.2d 707 (Pa. 1992). We note that the parties are in agreement that this particular remedial measure is proper; indeed, the Commonwealth continues to concede as much, notwithstanding its request to remand.

This Court is aware, of course, that some juveniles appeared before Ciavarella with counsel and were not committed to either of the PA Child Care facilities. We agree with the parties and Judge Grim, however, that those cases are no less tainted by

Ciavarella having presided. Judge Grim refers to the “pall” that was cast over all juvenile matters presided over by Ciavarella, given his financial interest, and his conduct in cases where juveniles proceeded without counsel. We fully agree that, given the nature and extent of the taint, this Court simply cannot have confidence that any juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial manner.

(3) This Court approves of Judge Grim’s further recommendation that adjudications of delinquency and consent decrees be reversed and dismissed with prejudice, and that expungement of records proceed (with copies to be retained under seal in accordance with any other order of court), in all cases, whether final or not, where a juvenile either proceeded before Ciavarella without counsel, or was committed by Ciavarella to PA Child Care or Western PA Child Care. Judge Grim suggests that this remedy is commanded by the double jeopardy protections in the Pennsylvania Constitution, see PA. CONST. art. I, § 10, citing cases involving intentional prosecutorial misconduct. The JLC likewise has asked us to extend the double jeopardy analysis in Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992), which is applicable to intentional prosecutorial misconduct, to foreclose the Commonwealth from retrying any juvenile matter on the basis of judicial misconduct.³ We need not reach this Pennsylvania constitutional question. This matter is unlike any prior Pennsylvania case examining the parameters of the double jeopardy doctrine. In this review, we consider a broad class of

³ The JLC has also claimed that vacating the adjudications and consent decrees with prejudice is the proper remedy based upon the District Attorney’s Office’s failure to object to or challenge Ciavarella’s actions during the relevant time period, which it alleges amounts to prosecutorial misconduct. The Third Interim Report and Recommendations does not set forth any findings of prosecutorial misconduct, and the JLC filed no exceptions challenging the absence of such findings. Thus, we will not address the argument.

cases; not all of the affected juveniles are represented at present; the Commonwealth has provided no indication of which, if any, of the individual cases it would actually seek to re prosecute; and thus it is unclear which claims of double jeopardy would ripen. The situation at hand is so unique and extreme that it has already warranted exercise of this Court's plenary review pursuant to our King's Bench powers. We award the relief suggested by Judge Grim in the interest of justice and in the exercise of our plenary powers, and we do not pass upon Judge Grim's suggestion that state constitutional double jeopardy principles command that result.

(4) Pursuant to the exercise of this Court's King's Bench powers, and in the interest of justice, we also approve of Judge Grim's recommendation that orders of dismissal with prejudice and expungement of records be entered in those of the "remaining cases" which are final, with copies to be retained under seal in accordance with any other order of court.⁴ We agree with Judge Grim that "neither the victims, the juveniles, nor the community will benefit by having new proceedings" in cases of juveniles who have received final discharge either from commitment, placement, probation or any other disposition and referral, and who have paid all fines, restitution, and fees. In addition, we note that the Commonwealth, in its objections, has presently identified no interest that would be served by permitting re prosecution in these cases.

(5) We accept, in part, Judge Grim's recommendation with respect to those of the "remaining cases" that are not yet final. As for this class of cases, the Luzerne County District Attorney is directed to submit a document under seal to Judge Grim identifying the specific juvenile cases in which it intends to proceed with further delinquency proceedings, and to file a sealed copy of the document with the Supreme

⁴ The remaining cases consist of those juvenile matters adjudicated before Ciavarella where the juvenile had counsel and the juvenile was not committed to either PA Child Care or Western PA Child Care.

Court Prothonotary's Office. The sealed document shall be submitted within thirty (30) days of this Court's order.

(6) This Court authorizes Judge Grim to vacate and dismiss with prejudice those juvenile adjudications and consent decrees in the "remaining cases" that are not identified by the Commonwealth as matters that it would intend to pursue. Judge Grim is further authorized to direct that the records of those juvenile matters be expunged, with copies to be retained under seal in accordance with any other order of court.

(7) With respect to those juvenile matters in which the Commonwealth expresses an interest in exercising its discretion to initiate further delinquency proceedings, Judge Grim shall permit the juvenile to pursue claims of double jeopardy, or any other theory, in support of an argument that re prosecution should not be permitted.

(8) Judge Grim is directed to make a further recommendation to this Court, at the appropriate time, respecting disposition of the cases where a prospect of re prosecution has emerged.

Jurisdiction retained.

OFFICE RECEPTIONIST, CLERK

To: Serena Holthe
Cc: greg@washapp.org; Jim.Whisman@kingcounty.gov
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To: OFFICE RECEPTIONIST, CLERK
Cc: greg@washapp.org; Jim.Whisman@kingcounty.gov
Subject: Amici Brief: No. 90355-7

Please accept the attached Motion for Leave and Amici Brief with two exhibits for filing in *State of Washington v. S.J.C.*, Case No. 90355-7, pending before the Supreme Court of the State of Washington.

Sincerely,
Serena E. Holthe
WSBA No. 46877

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To advance justice for and enhance the lives of children and youth through juvenile justice, child welfare, and related systems reform.

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