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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Appellant,

v.

S.J.C,
Respondent.

AMICUS CURIAE BRIEF OF COLUMBIA LEGAL SERVICES

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Filed *z*
Washington State Supreme Court

AUG 20 2014

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I. INTRODUCTION

Youth of color are disproportionately represented at each point within the juvenile justice system. Thus, any decision of this Court relating to juvenile justice and its reverberating impacts on adult life should take into consideration the very real racial disparities that exist and the disproportionate harm to this population created by open juvenile records.

At the time of a youth's arrest, an electronically available public record is created. This record remains easily available whether or not the juvenile is charged with a crime. Any additional filing in court also remains open and electronically available whether or not a youth is found guilty. These records create significant impediments to rehabilitation, reintegration, and success as an adult. Youth who have an open record face barriers to employment, housing, and obtaining student loans.

These barriers are more pronounced for youth of color whose overrepresentation at every stage of the proceedings has a "cumulative and enduring effect [that] can increase the risk factors that contribute to [a youth of color's] continued involvement in the juvenile and adult criminal justice

systems.”¹ Given the difficulty of sealing a juvenile record, youth of color rarely seal them. Imposing additional requirements, such as the application of the factors set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), at every juvenile record sealing hearing would make the sealing process even more onerous, ensure that even fewer youth of color will move to seal their records, and exacerbate the problem of racial disparity within our society. This Court should not impose requirements in addition to those that already present substantial barriers to record sealing for former juvenile offenders.

II. INTEREST OF AMICUS

Columbia Legal Services (CLS) advocates for people facing injustice and poverty. CLS seeks to achieve social and economic justice for all using policy reform, litigation, and innovative partnerships to reveal and end actions that harm the communities we serve. CLS has extensive expertise advocating for the rights of juvenile justice involved youth and the impact that non-collateral consequences have on their successful rehabilitation. Over the last decade, CLS has led legislative advocacy efforts to improve the juvenile record sealing process, with a focus on increasing its access to youth of color and youth from low-income

¹ THE TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, *Juvenile Justice and Racial Disproportionality: A Presentation to the Washington State Supreme Court*, 16 (March 2012), <http://www.law.seattleu.edu/Documents/korematsu/JuvenileJustice/FINALReportJuvenileJusticePresentation.pdf>

communities. Because of this advocacy, youth can now petition the court to seal their records in Washington, but only if they meet several stringent criteria. CLS also led the legislative effort to pass the Youth Opportunities Act, in which the Legislature recognized that too many youth were not able to seal their records, despite being eligible, and thus simplified the process for sealing most types of juvenile records.² In sum, CLS has deep institutional knowledge about the public dissemination of juvenile offender records and how this dissemination harms young people's abilities to obtain housing, secure employment, obtain education and training, and become successful adults.

III. ARGUMENT

A. Youth of Color are Inordinately Fettered by Unsealed Juvenile Records

1. Experience and Logic Dictate Against Burdening Young People with an Open Juvenile Record Forever

Youth of color are disproportionately impacted in every phase of the juvenile justice system. In 2013, the report *Open Juvenile Records in Washington State: Process, Effects, and Costs of Protective Mechanisms* documented that youth of color are disproportionately represented at each point within the juvenile justice system including arrests, court referrals, cases filed, cases adjudicated, Juvenile Justice and Rehabilitation Administration (JJRA) dispositions, and

² Laws 2014, Ch. 175 (2SHB 1651).

transfers to adult court.³ According to data collected in Washington in 2011, youth of color represent 33.6 percent of the juvenile population ages 10-17.⁴ However, youth of color account for 41.3 percent of all juvenile court offense referrals, 42.2 percent of juveniles held in detention facilities, and 56.8 percent of juveniles held in JJRA facilities.⁵ In addition, African-American youth are 164 percent more likely to be arrested than white youth; and American Indian youth are 116 percent more likely than white youth to be arrested.⁶

The State suggests that requiring an individualized inquiry and balancing of interests for every juvenile record will somehow help curtail racial disparity in the juvenile justice system.⁷ The exact opposite is true. Prior to 1977, juvenile courts and records were not open to the public. If racial equity is better served by open records, as the State suggests, then it would not be the case that in every decade since 1977, disproportionate minority contact within the juvenile and adult

³ TONY CALERO, OPEN JUVENILE RECORDS IN WASHINGTON STATE: PROCESS, EFFECTS, AND COSTS OF PROTECTIVE MECHANISMS 20 (2013), <http://juvjustice.org/sites/default/files/ckfinder/files/Examining%20Open%20Juvenile%20Records%20in%20Washington%20State.pdf>.

⁴ WA. ST. DEP'T OF SOCIAL AND HEALTH SERVICES, THE OFFICE OF JUVENILE JUSTICE AND THE WASHINGTON STATE PARTNERSHIP COUNCIL ON JUVENILE JUSTICE, *Washington State Juvenile Justice Annual Report: 2012 Juvenile Justice Annual Report* 31, <http://www.dshs.wa.gov/pdf/ojj/2013AnnualReport/MinorityYouthAndGirls.pdf> (last visited Aug 11, 2014).

⁵ *Id.*

⁶ *Id.* at 33.

⁷ Brief of Appellant at 16.

justice system has increased.⁸ Clearly, the answer to racial disparity is not keeping records relating to juvenile criminal activity open to everyone. The lingering consequences affect youth of color substantially more often, which will both result in additional racial disparity in the justice system and increase the barriers to successful reintegration of youthful offenders of color into normal adult life. It is illogical and pointless to have a system focused on rehabilitation when few young people can move past their juvenile offenses.

2. Youth of Color Are Much More Likely to Have Unsealed Juvenile Records

It is axiomatic that if youth of color are over-represented in the juvenile justice system (both disproportionately arrested and disproportionately referred to court) then they will also bear a disproportionate share of juvenile court records. However, in addition to this, young people of color are also less likely to seal their juvenile records, thus increasing the negative impacts of these records. Only a small fraction (8.5 percent) of individuals with juvenile records eligible for sealing has sealed even one of his or her records. Specifically, as shown in Table 1, white and Asian/Pacific Islander youth, are more likely than other youth of color to have their records sealed. Sealing is uncommon for all young people. Of all juvenile records, 90 percent remain unsealed. This is not surprising given the

⁸ THE TASK FORCE ON RACE AND THE CRIMINAL JUSTICE SYSTEM, *Supra* note 1, at 4.

complexity, expense, and procedural demands of sealing a juvenile record in Washington—demands that are even more difficult for those without money or parental support.⁹

Table 1: Total Juvenile Records Eligible for Sealing Compared to Total Number of Records Sealed by Race¹⁰

Race	Percent of Total Population of Eligible Juvenile Records	Percent of Total Sealed Records
White	70.30%	73.80%
Black	12.60%	8.60%
Race Unknown	9.80%	7.50%
Asian or Pacific Islander	2.80%	3.50%
American Indian or Alaskan Native	4.60%	1.60%

Again, among the ten most common juvenile offenses, shown in Table 2 below, African American and American Indian youth were less likely than their White and Asian/Pacific Islander peers to seal their record.¹¹

⁹ CALERO, *Supra* note 1, at 37

¹⁰ CALERO, *Supra* note 1, at 30

¹¹ CALERO, *Supra* note 1, at 31

Table 2 Percent of Eligible Records Sealed, Most Frequent Charges, By Race¹²

Charge	Asian/Pacific Islander	White	Black	American or Alaskan Native (Indian)	Total
Theft - 3 rd	6.0%	5.5%	3.7%	2.1%	5.0%
Assault 4 th Degree	7.9%	7.2%	4.5%	1.7%	6.5%
Minor Possession/Consumption	7.1%	4.8%	1.5%	10.7%	4.4%
Malicious Mischief-3	8.8%	6.6%	2.7%	0.6%	6.0%
Residential Burglary	10.9%	8.8%	4.2%	2.3%	8.0%
Marijuana Possession < 40 Grams	6.5%	6.2%	2.6%	1.1%	5.6%
Harassment	7.7%	8.7%	4.6%	2.4%	7.8%
Assault-4	7.5%	6.7%	6.9%	3.7%	6.6%
Burglary 2 nd Degree	5.9%	8.1%	4.0%	0.8%	7.3%
Taking Motor Vehicle without permission -2	10.9%	8.7%	3.2%	0.0%	7.6%
Total	8.0%	6.7%	4.0%	1.6%	6.1%

Thus, the already cumbersome record-sealing process exacerbates the disproportionality that exists in the rest of the juvenile justice system.

¹² *Id.*

3. *Open Juvenile Records Damage Opportunities to Reintegrate into Society for Youth of Color*

Many rehabilitated young adults mistakenly believe that their juvenile offense records are automatically destroyed when they turn 18. Others are completely unaware of the complex process to seal their records. Worse yet, substantial numbers of youth are unaware of the decades-long repercussions of an open offense record.¹³

John Clayton, the Assistant Secretary of the Juvenile Justice and Rehabilitation Administration, acknowledges the problem with our sealing system, noting that:

Youth can commit even a minor offense at an early age and that [is] held against them for the rest of their life. That [is] one of the contributing factors I think to the recidivism rate when we work with youth: 1) they must be responsible for their actions; 2) if we believe in rehabilitation we should be working toward trying to make tomorrow better for youth. We are not making tomorrow better for youth if we hold something against them that happened years and years ago. And [they have] actually taken steps in their life to change, we need to do that differently. [Washington's sealing process] is the weakest part of our [juvenile justice] system.¹⁴

Juvenile court records, maintained and disseminated electronically, can mar every important area of life: education, housing and employment. There can

¹³ CALERO *Supra* note 1, at 33.

¹⁴ The Original Fab-5, *MEANWHILE: The Lasting Impact of Juvenile Records in Washington State*, YOUTUBE (April 9, 2013), <https://www.youtube.com/watch?v=XLA7CdiLid8>

be no success where any of these basics of life are missing. These impediments are very real: a study by the National Employment Law Project found that hundreds of companies ban any applicants with a criminal record.¹⁵ In education, 20 percent of colleges have policies denying admission based on the severity of a juvenile record and one-third collect criminal justice data during the application process, including the University of Washington.¹⁶

While the two primary purposes of the juvenile justice system in Washington are rehabilitation and reintegration, neither is possible without housing, employment, and education. Open juvenile records make it much harder for youth and young adults to obtain these basics of a decent life.

4. The Practical Steps in Sealing a Juvenile Record Are Prohibitively Complex As It Stands

The real challenges of juvenile record sealing may best be understood through a hypothetical example. Assume Gina, a 15 year-old foster youth, pled guilty at age 13 to taking a motor vehicle without permission in the second degree. At age 13, Gina and her siblings decided to borrow their neighbor's car

¹⁵ CALERO, *Supra* note 1, at 15, citing Michelle Natividad Rodriguez and Maurice Emsellem, 65 Million "Need Not Apply:" *The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project (March 2011), http://www.nelp.org/page/-/Press%20Releases/2011/PR_65_Million_Need_Not_Apply.pdf?nocdn=1

¹⁶ CALERO, *Supra* not 1, at 12, citing Caitlin Peterkin, *Colleges Grapple with Applicants' Criminal Data, Including Juvenile Records*, *The Chronicle of Higher Education*, (October 1, 2012), <http://chronicle.com/article/Colleges-Grapple-With/134806>

without permission and drive it around for an hour. For two months, Gina and her siblings had been “borrowing” their neighbor’s car until they finally got caught. Nonetheless, Gina has not been in trouble with the law since she was released from her two weeks of confinement in juvenile detention. She and her siblings jointly owe \$2,000 in legal financial obligations (LFOs). Somehow, despite her open juvenile record, her lack of parental connections, and her age, she has worked to earn the money, which she uses to pay her LFOs instead of using it for her future education or housing. After doing all of this, she would still need to follow numerous complicated steps to seal her record.

First, Gina must gather her juvenile criminal history. This involves going to the courthouse where the adjudication was entered. Assume Gina lives in a group home which will not offer transportation to the courthouse. Consequently, making the trip will be onerous and costly. At the courthouse, Gina has no idea where to find her records. She must first ask and pay for the records to be copied. Once she has her record, she must read and analyze it to determine whether her case meets the legal sealing requirements. The clerk is only able to offer her information, not advice, so Gina has to figure out whether it qualifies on her own. If she can figure this out, and if she qualifies, she still must get the correct notice, motion, proposed order and certificate of service for sealing, and fill them out accurately. Given that Gina likely has no idea how to do this, she makes the

difficult trip back home to go over the documents with the group home staff. After two weeks and piecing together information she found on the internet, Gina learns that she must contact the court to schedule a hearing. Then she must make copies of all the relevant documents and appropriately file them, including a working copy for the judge. Confident in the results of her research, Gina returns to the court only to realize she does not have enough money to pay for the copies, having used all her money on bus fare.

A week later, Gina returns to court with extra money she has earned. The clerk explains to Gina that she must give the motion and proposed order to the prosecutor, probation office, the Washington State Patrol, and all public and private agencies that might have the record. Gina has the money to make all the copies and she schedules another hearing since she missed the first date. Gina must now return again, attend her scheduled hearing without counsel, and argue eligibility to a judge. Even if she is able to persuade the court to seal the record, Gina must then get certified copies of the order and serve them on all the parties mentioned, additional costs that she cannot afford.

If Gina misses or does not complete any of the above steps, the record may not be sealed. This would be even more complicated for youth who had been involved in the system in more than one county, as these steps would have to be repeated for each county. Moreover, with the recent enactment of the Youth

Opportunities Act, which created a more simplified sealing process for some records, these steps may also be different depending on when the offense occurred.¹⁷

5. *Sealing a Juvenile Record is Even More Difficult for Those without Resources*

The composite example above may appear unusual, but it is not. The barriers that Gina faces are common among low-income youth with juvenile records who cannot afford to pay an attorney to seal their records. In most jurisdictions, even if teenagers or young adults are actually aware that they must seal their records to prevent public access, they have no access to a public defender or legal services attorney to assist them through the required steps. There are only four counties in Washington that offer assistance in sealing juvenile records.¹⁸ Seeking paid legal assistance is rarely an option, and never so for anyone with limited means. Private attorneys can charge up to \$1500 or more to seal a record.¹⁹ Again, these costs result in another layer of disproportionality.

¹⁷ Laws 2014, Ch. 175 (2SHB 1651).

¹⁸ The King County clinic is open two hours a month from October to May. The Spokane clinic is open three times a year. Skagit County has a clinic that meets quarterly. Benton and Franklin Counties held their first clinic last fall. Island County is in the process of launching a juvenile record sealing clinic.

¹⁹ CALERO, *Supra not 1*, at 6, citing Kim Ambrose, *Unlocking the Future* (October 13, 2011), <http://www.leg.wa.gov/JointCommittees/JRS/Documents/Oct132011/UnlockingtheFuture.pdf>. . As an example, one Washington firm advertises a flat fee of \$1995 to seal juvenile records, and

Obviously, a \$1,500 legal bill will be prohibitive to a homeless youth, a youth in foster care or a young adult working a part-time, minimum-wage job.

In Washington, the poverty rate among Hispanics (28 percent) and African Americans (35 percent) is two to three times higher than whites (12 percent).²⁰ Hispanic and African American children are also twice as likely to be living in poverty as their white peers.²¹ In 2012, the Washington state youth unemployment rate was 28.5 percent.²² Moreover, 41 percent of African American and Hispanic children lived in households where no adult had full-time, steady employment, compared to 27 percent of white children.²³

With limited to no resources available to youth or young adults for sealing

compares these “low rates” with other offices that charge \$2,900. RECORDGONE, a division of Higbee & Assoc., <http://www.recordgone.com/washington/juvenile-record-sealing/>

²⁰ KAISER FAMILY FOUNDATION, *Children Living in Families Where No Parent Has Full-Time, Year-Round Employment by Race*, <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/> (last visited Aug 11, 2014).

²¹ ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA CENTER, *Children Below 200 Percent Poverty by Race*, (Dec. 2013), <http://datacenter.kidscount.org/> (choose “Washington”; then follow “Children Below 200 Percent Poverty by Race” hyperlink).

²² WA. ST. DEP’T OF SOCIAL AND HEALTH SERVICES, THE OFFICE OF JUVENILE JUSTICE AND THE WASHINGTON STATE PARTNERSHIP COUNCIL ON JUVENILE JUSTICE, *Washington State Juvenile Justice Annual Report: 2012 Juvenile Justice Annual Report, Table 25 Juvenile Unemployment for 16-19 Year Olds 2000-2012* <http://www.dshs.wa.gov/pdf/oji/2013AnnualReport/Tables/Table.25.pdf> (last visited Aug 12, 2014)

²³ ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA CENTER, *Children Living in Families Where No Parent Has Full-Time, Year-Round Employment by Race*, (Dec. 2013), <http://datacenter.kidscount.org/> (choose “Washington”; then follow “Children Living in Families Where No Parent Has Full-Time, Year-Round Employment by Race” hyperlink).

records, those who cannot afford to pay for help will be less likely to know about or succeed in the process. In Washington State, it is our youth of color who are most often disproportionately in this position.

B. Applying *Ishikawa* Factors or Any Other Additional Individualized Analysis Will Create Insurmountable Barriers for Most Youth Of Color.

This complex sealing process will become even more difficult if a young person must meet the high burden of *Ishikawa* and its progeny (or indeed any additional individualized balancing requirements). *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The statute at issue in this case already contains strict conditions that are necessary to seal a juvenile record: one must pay all legal financial obligations; demonstrate that a certain amount of time has passed; and remain crime-free since the offense occurred.²⁴ If an individual seals his or her juvenile record, but commits another offense, the record is accessible to the public again.²⁵

Application of the *Ishikawa* factors to the juvenile record sealing process would prevent even more youth and young adults, especially youth of color, from sealing their records. Applying *Ishikawa* would mean the likely-unrepresented youth or young adult would have to show a need to seal the record by somehow

²⁴ RCWA 13.50.260.

²⁵ *Id.*

articulating the “interests or rights which give rise to that need as specifically as possible.” *Ishikawa*, 97 Wn.2d at 37. Then the youth would have to show a “serious and imminent threat” to that interest. *Id.* The youth would also bear the burden of demonstrating that sealing the record would be the least restrictive means available for protecting the threatened interest. *Ishikawa*, 97 Wn.2d at 38. Ultimately, the court would have to weigh the interests of the youth, like Gina, with the public interest, likely expressed by a trained government prosecutor, before issuing an order. *Id.*

Such a requirement would virtually nullify the opportunity for a youth or young adult like Gina even if she somehow pays her LFOs, discharges all her obligations, and navigates all the filing requirements. Will Gina and the tens of thousands of youth like her be able to, with no legal representation, appear at a hearing and prevail over the prosecutors to prove a “serious and imminent threat” to an important interest? Sealing would remain open only to those who cannot only afford to pay their LFOs, but who can afford an attorney.²⁶ Applying *Ishikawa* to the sealing process would ensure that virtually no low-income youth will seal their records, and that very few youth of color will be able to move past their juvenile offenses. This will result in a huge undermining of the rehabilitative

²⁶ It is already enough of a barrier that eligibility to seal a juvenile record is limited to those with the money to pay off their legal financial obligations, and the support to remain out of trouble.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I caused a true and correct copy of this *Amicus Curiae* Brief of Columbia Legal Services to be served on the following parties, in the manner indicated:

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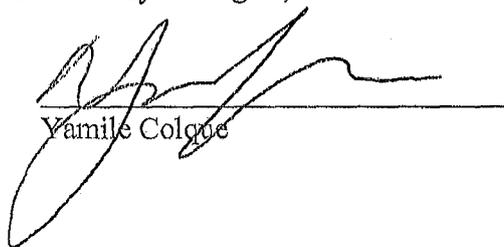
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