No. 90355-7

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

S.J.C.,

Respondent.

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

RESPONDENT'S ANSWER TO BRIEFS OF *AMICUS CURIAE*

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ORIGINAL

TABLE OF CONTENTS

A. ARGUMENT 1

1. This Court has long held that Article I, section 10 does not apply to proceedings in juvenile court 1

2. This Court should strike arguments presented for the first time in WCOG's amicus brief 6

B. CONCLUSION 10

TABLE OF AUTHORITIES

Washington Constitution

Art. I, § 10 ..... passim

Washington Supreme Court

Gallo v. Department of Labor & Industries, 155 Wn.2d 470, 120 P.3d 564 (2005) 6
Harmon v. Department of Social & Health Services, 134 Wash.2d 523, 951 P.2d 770 (1998) 6
In re Lewis, 51 Wn.2d 193, 316 P.2d 907 (1957) 1
In re Rights to Waters of Stranger Creek, 11 Wash.2d 649, 466 P.2d 508 (1970) 5
Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) ..... passim
State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159, 1162 (2013) 8
State v. Chavez, 163 Wn.2d 262, 180 P.3d 1250 (2008) 3
State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987) 2
State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012) 6, 7, 9
State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006) 3
State v. Witherspoon, __ Wn.2d __ 329 P.3d 888 (2014) 5

Washington Court of Appeals

State v. J.H., 96 Wn. App. 167, 978 P.2d 1121 (1999) 2

United States Supreme Court

Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) 4

Statutes

Former RCW 13.50.050 4
Laws 2014, ch 177 4
RCW 13.50.260 4

A. ARGUMENT

1. This Court has long held that Article I, section 10 does not apply to proceedings in juvenile court.

Amici, Washington Coalition for Open Government and Allied Daily Newspapers of Washington (hereafter WCOG), as the State before them, assume that the question before the Court is one of first impression. It is not.

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), held that where Article I, section 10 applies, a court may not restrict public access without first considering specified criteria. 97 Wn.2d 37-38. *Ishikawa* recognized and endorsed this Court's earlier holding in *In re Lewis*, 51 Wn.2d 193, 316 P.2d 907 (1957), that Article I, section 10 does not apply to juvenile proceedings. *Ishikawa*, 97 Wn.2d at 36 (citing *Lewis*); *see also*, *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (recognizing certain proceedings including juvenile matters do not implicate Article I, section 10). As with the State's contentions, WCOG's argument is foreclosed by this Court's precedent.

Recognizing that, WCOG echoes the State's claim that *Lewis* was an anomalous artifact of a different time. WCOG argues *Lewis* was decided at a time "when there was not yet any rule or law requiring the

general public's interest in open court be weighed against privacy interests." WCOG Brief at 14. Article I, section 10 was certainly in place when *Lewis* decided and had been for nearly 70 years. It was that very law regarding the public's right to access that was at issue in *Lewis*. *Lewis* specifically concluded Article I, section 10 did not apply to juvenile proceedings. 51 Wn.2d at 200. And, in adopting its familiar test, *Ishikawa* itself endorsed the continuing validity of *Lewis*.

WCOG attempts to distinguish *Lewis* on its facts, asserting that "it was not a criminal proceeding." WCOG Brief at 13. But neither is this case. Except for its use as a prior offense in adult sentencing, a juvenile adjudication is not a conviction for a crime. RCW 13.04.011. It is because they remain noncriminal that juvenile proceedings do not trigger the provisions of Article I, sections 21 and 22 guaranteeing a jury trial in criminal matters. *State v. Schaaf*, 109 Wn.2d 1, 22, 743 P.2d 240 (1987); *State v. J.H.*, 96 Wn. App. 167, 185, 978 P.2d 1121 (1999). S.J.C.'s case is no more a criminal case than was *Lewis*.

For more than 100 years there has never been a point in Washington history during which juvenile offenders were not statutorily provided some degree of privacy protection. Brief of Respondent at 7-11. The provision of such privacy protections stems

from the substantial differences that have historically existed between juvenile and criminal proceedings. *Lewis*, 51 Wn.2d at 198. Those differences are still recognized to this day. *State v. Chavez*, 163 Wn.2d 262, 267-68, 180 P.3d 1250 (2008) (citing *State v. Weber,* 159 Wn.2d 252, 264–65, 149 P.3d 646 (2006)). That is a historical truth which neither the State nor WCOG can dispute.

Additionally and as detailed in S.J.C.'s prior brief as well as the brief of numerous amicus groups, there is strong logic supporting the experience of affording some degree of confidentiality or privacy to juvenile matters. *See* Brief of Respondent at 12-16; Brief of Amici Curiae Center for Children and Youth and Juvenile law Center at 3-10 (permitting sealing of records is consistent with recent United States Supreme Court case law recognizing that children are functionally different from adult offenders and must constitutionally be afforded opportunity for rehabilitation); Brief of Amicus Curiae Columbia Legal Services at 4-7 (Because children of color are overrepresented in the juvenile justice system added hurdles to sealing juveniles record will exacerbate racial inequality in society); Brief of Amici Curiae American Civil Liberties Union, Washington Defender Association, and Team Child at 12-20 (the inability to seal records frustrates

youthful offenders' reintegration in society and is thus inconsistent with rehabilitative aims of juvenile system).

The United States Supreme Court has recognized that judges cannot, "with sufficient accuracy, distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham v. Florida*, 560 U.S. 48, 77, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). WCOG offers the cynical response that the difficulty in separating the few from the many should require a greater burden for sealing lest concealing the record of a dangerous offender harm public safety. WCOG Brief at 19-20. That response ignores the statutory limitations on sealing which exclude such individuals. Among other limitations, the statute in effect at the time the court sealed S.J.C.'s records barred a court from doing so unless

> (i) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the person has spent five consecutive years in the community without committing any offense or crime that subsequently results in an adjudication or conviction [and]
> (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
> . . . .

Former RCW 13.50.050(12)(a) (Recodified as RCW 13.50.260(4)(a) Laws 2014, ch 177 sec. 3,4). Thus, the "incorrigible" children will never

qualify for sealing in the first place. Moreover, WCOG's contention that the many must suffer for the sins of the few frustrates the rehabilitation of the majority of youthful offenders.

This is the historical experience which the State and amici urge this Court to depart from based largely upon superficial arguments of what the State and amici wish the law to be rather than what the law actually is. For the State and amici to prevail, this Court would need to overturn, or substantially limit, several of its prior decisions such as *Lewis* and *Ishikawa*. Yet neither the State nor WCOG acknowledges the reality of what they are asking this Court to do.

Neither has presented any argument that these cases are incorrect or harmful. *See e.g., State v. Witherspoon*, __ Wn.2d __ 329 P.3d 888, 897 (2014) ("The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned."); *In re Rights to Waters of Stranger Creek,* 11 Wash.2d 649, 653, 466 P.2d 508 (1970). Neither acknowledges the fundamental and historic shift they urge: a conclusion that a practice that has existed for more than one hundred years, if not since statehood, which has previously been deemed constitutional has always in fact been unconstitutional.

Washington has historically, and with good reason, endorsed the desire to rehabilitate children found to have committed offenses. Amici urges this Court to abandon that history. For the reasons above, those set forth in S.J.C.'s brief, and those set forth in the brief of the remaining amici, this Court should decline to do so.

2. This Court should strike arguments presented for the first time in WCOG's amicus brief.

It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae. *Gallo v. Department of Labor & Industries*, 155 Wn.2d 470, 495, n12, 120 P.3d 564 (2005) (citing *Harmon v. Department of Social & Health Services,* 134 Wash.2d 523, 544, 951 P.2d 770 (1998)). WCOG advances several arguments not previously presented by the parties. First, WCOG contends GR 15 "trumps" RCW 13.50 *et. seq.* WCOG Brief at 6-7. This Court should not invalidate a statute where parties have not made such an argument below. This argument has never been presented by the State and cannot be raised now.

Additionally WCOG argues this Court's decision in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012) does not apply in this case. WCOG Brief at 15-16. Again this argument has not been raised by any party in this matter. Indeed, the State has argued *Sublett* does apply,

Brief of Appellant at 9-10, a point with which S.J.C. agrees. Brief of Respondent at 5-6. Because this argument has not been presented by the parties it cannot be raised by amicus. But even assuming WCOG could properly argue that this Court should abandon or limit *Sublett*, WCOG's argument is incorrect.

In *Sublett* the determination of whether Article I, section 10 is implicated is made by asking whether by "experience and logic" the matter should be open to the public. *Sublett*, 176 Wn.2d at 73. WCOG contends there is no need to apply the experience and logic test to sealing of records because it is well established that such a sealing always implicates Article I, section 10. WCOG Brief at 18.

First, not every sealed document or record of a court implicates Article I, section 10. *Ishikawa* recognized juvenile proceedings as one such example. 97 Wn.2d at 36. As another example, a judge's chamber file or her notes of trial are not necessarily open to public view. Whether or not a sealed file implicates Article I, section 10 begs the question of whether the file, or proceeding which generated it, is subject to that constitutional provision in the first place. That determination is made by resort to the experience and logic test.

Second, this Court recently required a threshold showing that sealing a document, a jury questionnaire, violated Article I, section 10 as a prerequisite to applying the *Ishikawa* criteria. *State v. Beskurt*, 176 Wn.2d 441, 446, 293 P.3d 1159, 1162 (2013). The lead opinion in that case stated:

> Before we determine whether either an article I, section 10 or article I, section 22 violation occurred, we must first determine whether there was a closure implicating those rights.

Id. Further, the lead opinion held the term "court record" as defined in GR 31 does not include every document in a court's possession. *Beskurt*, 176 Wn.2d at 448, n.8. Contrary to WCOG's assertion, this Court does not necessarily assume ever sealed document implicate Article I, section 10, but has required a threshold showing the Article I, section 10 is implicated by such sealing before it applies *Ishikawa.*

Applying the experience and logic test equally to proceedings and pleadings is entirely consistent with this Court's case law. Where Article I, section 10 is implicated this Court has never applied separate procedural rules for proceedings and documents. *Ishikawa* itself concerned both a closed proceeding **and** a sealed record. 97 Wn.2d at 37. The Court applied the same rules to the closed proceedings as to the sealed record. *Id.* at 37-39. Thus, there is no justification for WCOG's

effort to differentiate between closed records and closed proceedings for purposes of applying *Sublett*. Nor is there logical basis to do so.

By WCOG's reasoning if a court closed a proceeding the opponent of closure could be tasked with meeting the experience and logic test before any balancing of interests was required. But if the court sealed the written record of that proceeding, the opponent would have no burden and instead the proponent of sealing would have the burden of satisfying *Ishikawa*. In that scenario, because of the relative placement of the burdens, it is easier to justify and affirm a closure of the actual proceeding than it is the historical record of that proceeding. Yet, just the opposite is more protective of the public's right of access and the policies which underlie it. Access to the actual proceedings ensures justice is meted out fairly; access after the fact can do little to change the historical fact.

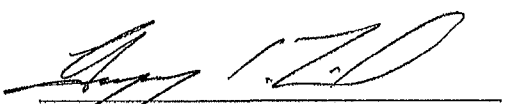
WCOG's arguments provide ample illustration of the wisdom of this Court's rule that it will not consider arguments raised for the first time in an amicus brief. WCOG's argument is contrary to the position of the very party whom amicus supports, is not fully developed, and would require this Court at least revisit if not overturn many of its prior cases.

Consistent with its prior holdings, this Court should decline to address arguments raised for the first time by WCOG.

B. CONCLUSION

This Court should affirm the juvenile court's conclusion that Article I, section 10 is not implicated by a motion to seal records of past juvenile adjudications.

Respectfully submitted this 26th day of August, 2014.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. S.J.C., Respondent.	)))))))))	NO. 90355-7

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Respondent's Answer to Brief of Amicus Curiae

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