90355-7

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Appellant, v. S. J. C., Respondent.	No. 69154-6 - I RESPONDENT'S ANSWER TO STATE'S MOTION FOR DISCRETIONARY REVIEW

A. Summary of Procedural History

The superior court granted Respondent S.J.C.'s petition for an order sealing his juvenile court file and records. The State has filed a motion for discretionary review of the of trial court's order. Prior to filing an answer to the State's motion, Respondent filed a motion for a stay of proceedings pending the state supreme court's decision in State v. Richardson, No. 85665-6. By ruling dated November 6, 2012, Commissioner Neel of this court denied Respondent's motion to stay review. The Respondent now files this answer to the State's motion for discretionary review.

B. There are Insufficient Grounds for the Relief Sought by the State.

The State claims that the trial court's ruling is subject to review under RAP 2.3(b). *Motion for Discretionary Review* at 2. RAP 2.3(b) provides four criteria under which the reviewing court may accept review. Two of those criteria are not applicable in this case.

RAP 2.3(b)(3) is not applicable because "the accepted and usual course of judicial proceedings" includes what the trial judge did – that is, grant a motion to seal juvenile records pursuant to the juvenile sealing statute.

RAP 2.3(b)(4) is not applicable because the trial court has not certified, nor have the parties stipulated, that the judge's order involves a controlling question of law.

RAP 2.3(b)(1) and (2), which comprise the other two criteria for accepting review, read as follows:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

The State appears to be creating a hybrid of RAP 2.3(b)(1) and (b)(2) when it argues as grounds for review that "the decision is clearly or probably incorrect and further proceedings on the issue of access to the

public record are useless, absent a change in circumstances." *Motion for Discretionary Review* at 2.

The standard of "probable error" is expressed in RAP 2.3(b)(2), which allows for review when the moving party shows that "[t]he superior court has committed probable error *and* the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act" (emphasis added).

The criterion of RAP 2.3(b)(2) was originally intended to apply to proceedings such as injunctions that had been subject to appeal prior to the Rules of Appellate Procedure being adopted. In short order, however, the distinction was eliminated. Minehart v. Morning Star Boys Ranch, Inc., 232 P.3d 591, 156 Wn. App. 457, 463 n.6 (citing G. Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure,* 61 Wash. L. Rev. 1541, 1545-1546 (1986)). Because this rule was originally written to apply to ongoing proceedings or conflicts between parties, it is difficult to see how it applies in a case where the allegedly erroneous ruling necessarily occurs well after proceedings have concluded.

The trial court did not "substantially alter[] the status quo" when it ordered Respondent's file sealed. The passage of time, Respondent's compliance with the conditions of probation, and Respondent's

subsequent good behavior together operated to make Respondent eligible to have his juvenile record sealed. The order sealing Respondent's juvenile records did not alter the status quo; rather, the order made manifest the Legislature's view that once certain conditions were met, the proceedings in a juvenile case "shall be treated as if they never occurred." RCW 13.50.050(14)(a). The status quo with respect to juvenile records is that they shall be subject to sealing after a certain period of time has passed. An essential element of rehabilitation – especially for a person who committed his offense when he was a minor – is being able to move forward without being compromised by a criminal record. Respondent sought and was granted only what he was entitled to; it would hardly be fair to portray this as "substantially altering the status quo."

Nor did the trial court's order sealing the juvenile record "substantially limit[] the freedom of a party to act". Because proceedings in Respondent's case had long since been concluded, there were no acts that could have been reasonably contemplated by the State. The State (i.e., the prosecutor's office) presumably retains all the information about the case that was available to or generated by the State, so there are no limits to the State's freedom to act in terms of information. Theoretically the State could take action with regard to Respondent if Respondent committed a new offense, but in that circumstance the order sealing

Respondent's juvenile file would be nullified by operation of RCW 13.50.050(16).[1]

The other criterion incorporated in the State's hybrid rule for accepting review, RAP 2.3(b)(1), allows for review when the trial court "has committed an obvious error which would render further proceedings useless." The State asserts that due to the "incorrect" decision of the trial court, "further proceedings *on the issue of access to the public records* are useless, *absent a change in circumstances.*" (emphasis added where the State has added verbiage to the rule). While the State labors to frame the issue as one of access to public records, it ignores the likelihood that if this Court were to grant the motion for review, reverse the trial court and remand, the trial court would issue an order with the same result: sealing the juvenile record. This is because the Respondent's request to seal his juvenile record may be granted even after weighing the issue of access to public records. As argued below, Respondent has amply demonstrated that sealing his juvenile record is appropriate not only because the sealing

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[1] RCW 13.50.050(16) provides:

> Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order. Any charging of an adult felony subsequent to the sealing has the effect of nullifying the sealing order for the purposes of chapter 9.94A RCW. The administrative office of the courts shall ensure that the superior court judicial information system provides prosecutors access to information on the existence of sealed juvenile records.

statute allows it, but also because sealing his juvenile file may be done without offending the constitutional principle of open courts.

C. The Decision to Seal Juvenile Records Is Not Subject to Ishikawa's Five-Factor Test Because of the Special Status of Juveniles in the Criminal Justice System.

The State begins by quoting the state constitution: "[j]ustice shall in all cases be administered openly . . . ." *Motion for Discretionary Review* at 2 (quoting Const. art. I, § 10). However, courts have recognized that this is a presumption of openness, not an absolute rule. State v. McEnroe, 174 Wn.2d 795, 801, 279 P.3d 861 (2012). It is a presumption that may be limited by significant countervailing interests. Hundtofte v. Encarnacion, ___ Wn. App. ___, 280 P.3d 513, 516 (2012). The court must strike a balance between the public's right of access and a person's constitutional right to privacy. "Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article I, section 7 of the Washington State Constitution and shall not unduly burden the business of the courts." Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 952, 215 P.3d 977 (2009) (citing GR 31).

In response to the petition to seal filed in the court below, the State began its argument against sealing by pointing out that the 2001 amendment to RCW 13.50.050 granted the trial court discretion in

deciding whether to grant a motion to seal juvenile records. Prior to 2001, the relevant subsection (now subsection 12) of the statute read "The court *shall* grant the motion to seal records . . . *if* it finds that [certain conditions have been met]" (emphasis added). In 2001 the Legislature amended subsection 12 to read "The court shall *not* grant any motion to seal records . . . that is filed on or after July 1, 1997, *unless* it finds that . . . [certain conditions have been met]" (emphasis added).

The State argued in the court below that the court should infer that the 2001 amendment to the juvenile sealing statute required juvenile offenders to prove not only that they have met the conditions of RCW 13.50.050(12), but that, in addition, their request passes the five-part test set out in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). But there is no indication whatsoever the Legislature so intended. There is nothing either in the legislative history of the juvenile sealing statute nor in the case law construing the statute over the years that suggests this grant of discretion to the trial court should be accompanied by a new five-part test which petitioners must meet to have their juvenile records sealed. Prior to the 2001 amendments, trial courts were not expected to apply the Ishikawa factors to a motion to seal juvenile records, and there is nothing about the 2001 amendments that suggests that this practice should change.

The juvenile sealing statute has never been analyzed in terms of the open-courts doctrine because juveniles are recognized to be special. See, e.g., State v. T.K., 139 Wn.2d 320, 336, 987 P.2d 63 (1999) (acknowledging the "special protection granted to juveniles" by the juvenile sealing statute) (Ireland, J., dissenting); State v. Chavez, 111 Wn.2d 548, 566, 761 P.2d 607 (1988) (reflecting on the "special nature of juvenile prosecutions," the primary purpose of which is rehabilitation, not merely punishment) (Dore, J., dissenting in part); State v. Schaaf, 109 Wn.2d 1, 12-13, 743 P.2d 240 (1987) (noting the persistence of flexibility and informality in juvenile proceedings as evidence that jury trials for juveniles are unnecessary, including the fact that "[l]imitations are placed on the use of juvenile records and the length of time they will be made public"); State v. Saenz, No. 84949-8 (Wash. Supr. August 23, 2012) (noting restrictions on the use of juvenile records and their access by the public, citing RCW 13.50.050).

D. Respondent Showed He is Eligible to Have His Juvenile Record Sealed.

A juvenile offender is eligible to petition the court for an order sealing his juvenile record only if certain conditions have been met. Respondent was found in February 2008 to have committed two counts of assault in the fourth degree, a gross misdemeanor. Pursuant to RCW 13.50.050(11) he was eligible to move for an order vacating the 2008

order and findings and move for an order sealing the official juvenile court file, the social file, and records of the court and of any other agency in the case as long as the five conditions listed in RCW 13.50.050(12)(b) (pertaining to records of class B, C, gross misdemeanor and misdemeanor offenses) had been met. Those conditions are as follows:

> (i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;
> (ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;
> (iii) No proceeding is pending seeking the formation of a diversion agreement with that person;
> (iv) The person is no longer required to register as a sex offender under RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense; and
> (v) Full restitution has been paid.[2]

Respondent filed a declaration with the trial court in 2011 attesting that he had met all the conditions required of him in order to petition the court for an order sealing his juvenile file. In his declaration, Respondent included this statement:

> I committed my offense when I was 13 years old. Since then, I have successfully completed a treatment program that helped me realize what led to my offense. . . . My having a juvenile record accessible to the public means that anyone can look up allegations against me that do not reflect who I am. My ability

[2] Additionally, the Respondent gave notice of the motion to the prosecution and to all persons and agencies whose files were sought to be sealed, as required by RCW 13.50.050(13).

to get a job and perhaps even my lifelong chances of success will be unfairly and unnecessarily hampered if my juvenile court file remains a publicly accessible record.

Under the plain terms of the juvenile sealing statute, RCW 13.50.050(11) and (12), Respondent was eligible to have his juvenile record sealed.

E. This Court Can Affirm the Trial Court's Sealing Order on Alternative Grounds.

The appellate court can affirm the superior court's decision on any alternative theory argued in the court below. "[T]his court can still affirm the lower court's judgment on any ground within the pleadings and proof." State v. Michielli, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); State v. Hudson, 79 Wn. App. 193, 900 P.2d 1130 (1995) (affirming based on an alternative theory argued to the trial court).

In granting Respondent's petition for an order sealing his juvenile record, the trial court expressly based its decision on RCW 13.50.050 and declined to apply Ishikawa. However, this Court may affirm the trial court's order sealing Respondent's juvenile record on alternative grounds, namely that Respondent's petition to seal his juvenile record meets the five-factor test for constitutionality set out in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

Respondent did fully brief this issue in the court below, arguing that application of the Ishikawa factors supports the decision to seal

Respondent's juvenile file. See attached as Appendix A a redacted copy of *Respondent's Legal Memorandum in Support of Motion to Vacate and Seal Juvenile Record* filed in superior court, specifically Section C at pp. 6-9.

The five factors as set out in Ishikawa are:

> 1. The proponent of closure and/or sealing must make some showing of the need therefor. In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests. . . .
>
> If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown.
>
> . . . .
>
> 2. "Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction]." . . .
>
> 3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened. . . . If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.
>
> 4. "The court must weigh the competing interests of the defendant and the public", and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory.
>
> 5. "The order must be no broader in its application or duration than necessary to serve its purpose . . ." If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing.

State v. Waldon, 148 Wn. App. 952, 958, 202 P.3d 325 (2009) (quoting Ishikawa, 97 Wash.2d at 37-39 (internal citations omitted)).

As demonstrated in *Respondent's Legal Memorandum in Support of Motion to Vacate and Seal Juvenile Record* (Appendix A), Respondent raised and proved sufficient grounds under Ishikawa for the court to grant his petition to seal his juvenile record. Thus this Court could affirm the trial court's order sealing the juvenile record, even if the Court concluded the trial court arrived at that result for the wrong reasons.

F. Even If This Court Grants the State's Motion for Discretionary Review, Ruling Should Be Reserved Pending the State Supreme Court's Decision in State v. Richardson.

Respondent previously moved for an order staying proceedings in this matter pending the decision of the Washington supreme court in State v. Richardson, No. 85665-6. That motion was denied. However, if the Court does grant the State's motion for discretionary review, it would be prudent in terms of time and resources for the Court and for both parties if the Court reserved ruling until after Richardson is decided.

Richardson involves issues of the constitutional right to open courts. It involves issues of the standards to be applied in seeking an order to seal a criminal record. Although it is not a case involving the juvenile sealing statute, the briefs filed in Richardson suggest that the supreme court's decision may affect any case pending review where the issue is the tension

between the open-courts doctrine and the constitutional right to privacy. That tension underlies the issues in Respondent's case. For that reason, Respondent asks that the Court reserve ruling until after the Richardson case is decided.

G. Conclusion.

The State has failed to articulate sufficient grounds for review of the trial court's decision sealing Respondent's juvenile record.

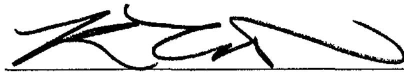
The trial court's decision was sound and should remain intact because it recognizes the special status bestowed on juvenile offenders in the criminal justice system. This status extends to how juvenile records are treated, which is with an emphasis on the rehabilitative aspects of juvenile justice and the constitutional value of individual privacy. The Legislature has codified this principle in RCW 13.50.050, the juvenile sealing statute.

Even if this Court disagreed with the legal basis for the trial court's ruling, this Court should affirm that ruling on the basis that sealing Respondent's juvenile record meets the five-factor test of Seattle Times Co. v. Ishikawa, an argument that was fully briefed and argued in the court below.

For the above reasons, Respondent urges the Court to deny the State's motion for discretionary review. If the Court does grant review,

the Respondent respectfully requests that the Court stay its decision until after the state supreme court has issued its opinion in State v. Richardson.

RESPECTFULLY SUBMITTED this 29th day of November, 2012.



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Appendix A

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Hearing set for:
Friday, March 16, 2012, at 9:00 a.m.
The Honorable Barbara Mack, Courtroom 2

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY
JUVENILE DEPARTMENT

STATE OF WASHINGTON, Plaintiff, v. [redacted], DOB 03/03/94 Respondent.	No. 07-8-03374-4 RESPONDENT'S LEGAL MEMORANDUM IN SUPPORT OF MOTION TO VACATE AND SEAL JUVENILE RECORD

Recent Procedural History

The respondent [redacted] has brought a motion for an order sealing his juvenile record. The State has indicated its opposition to the Respondent's motion and has filed a brief in that regard. The Court has asked for further briefing on the issue.

Legal Argument

A. The Respondent Can Show That Protection Of His Privacy Interests Outweighs The Public's Interest In Open Administration Of Justice.

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1 The Respondent's juvenile record stems from two counts of counts of assault in the
2 fourth degree with sexual motivation, a gross misdemeanor. He committed his offense when
3 he was 13 years old. By the time Respondent's motion is heard, he will have turned 18.

4 The Respondent's motion to seal is brought pursuant to RCW 13.50.050 as well as
5 General Rule 15(c). The relevant portions of the statute are found in subsections (11) and (12).

6 RCW 13.50.050(11) reads in its entirety as follows:

> 7 (11) In any case in which an information has been filed pursuant to RCW 13.40.100 or a complaint has been filed with the prosecutor and referred for
> 8 diversion pursuant to RCW 13.40.070, the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and
> 9 findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any
> 10 other agency in the case.[1]

11 The relevant portion of subsection (12) of RCW 13.50.050 reads as follows:

> 12 (b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection
> 13 (11) of this section unless:
>
> 14 (i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the
> 15 diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;
>
> 16 (ii) No proceeding is pending against the moving party seeking the
> 17 conviction of a juvenile offense or a criminal offense;
>
> (iii) No proceeding is pending seeking the formation of a diversion
> 18 agreement with that person;
>
> (iv) The person is no longer required to register as a sex offender under
> 19 RCW 9A.44.130 or has been relieved of the duty to register under RCW 9A.44.143 if the person was convicted of a sex offense; and
>
> 20 (v) Full restitution has been paid.

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[1] Subsection (23) states: "Except for subsection (17)(b) [pertaining to governor's pardon] of this section, no
24 identifying information held by the Washington state patrol in accordance with chapter 43.43 RCW is subject to destruction or sealing under this section. For the purposes of this subsection, identifying information includes photographs, fingerprints, palmprints, soleprints, toeprints and any other data that identifies a person
25 by physical characteristics, name, birthdate or address, but does not include information regarding criminal activity, arrest, charging, diversion, conviction or other information about a person's treatment by the criminal
26 justice system or about the person's behavior."

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1 Respondent's motion filed on December 28, 2011, included a sworn declaration by the
2 Respondent. Based on the information set forth in that declaration, the Respondent has shown
3 that he has met all five conditions listed in RCW 13.50.050(12)(b) above. The Respondent is
4 eligible to have his conviction vacated and his juvenile record sealed.

5 The State, however, asks this Court to exercise its discretion and deny the Respondent's
6 request to enter adulthood without being hobbled by the consequences of his youthful offense.
7 The State is correct that, prior to the Legislature's amendment of RCW 13.50.050, courts had
8 no discretion but to grant a motion to seal for any respondent who qualified. *See State v.*
9 *Webster*, 69 Wn. App. 376, 848 P.2d 1300 (1993). The State is also correct that the 2001
10 amendment recasting the language of the statute granted the court discretion in determining
11 whether to seal a juvenile record. The State has cited a number of cases for the proposition
12 that discretion should be exercised in favor of open courts. However, with the exception of
13 *State v. Webster, supra,* none of the cases cited by the State involved the interest of a juvenile
offender in having his record sealed.

14 Most of the cases cited by the State examine the issue of whether closing court
15 proceedings violates the principle embodied in art. 1, sec. 10 of the Washington constitution
16 ("Justice in all cases shall be administered openly, and without unnecessary delay"). In none
17 of those cases was the court asked to weigh the privacy interests of a criminal defendant in
18 having his record sealed. *See, e.g., Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004)
19 (whether the documents filed in support of a motion to terminate a shareholder's derivative
20 suit were properly sealed); *In Re Detention of D.F.F.*, 144 Wn. App. 214, 183 P3d 302
21 (2008) (finding court rule that automatically required closure of proceedings in mental
22 health court unconstitutional as a violation of the principle of open administration of
23 justice); *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d
24 1258 (1993) (law banning disclosure of victims of child abuse violates constitutional right
25 of open access to judicial proceedings); *United States v. Antar*, 38 F.3d 148 (3d Cir. 1994)
(holding trial court improperly limited, without specific findings, right of press to access
voir dire in case involving securities fraud).

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Notwithstanding the above cases, courts in this state recognize that not all court records are subject to the constitutional right to access judicial proceedings. *See Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768, 781 (2011) (ruling that the decision sealing orders and documents related to the issue of defense funding, which was not an issue in the criminal trial, was properly governed by GR 15 rather than subject to analysis under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982)).

The court must strike a balance between the public's right of access and a person's constitutional right to privacy. "Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article I, section 7 of the Washington State Constitution and shall not unduly burden the business of the courts." *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 952, 215 P.3d 977 (2009) (citing GR 31).

Most of the cases cited by the State provide no guidance to this Court in weighing the privacy interests of a juvenile in having his juvenile record sealed. While the respondent in *Webster* sought to have his juvenile court record sealed, as noted above, that case was decided prior to the 2001 amendments to the juvenile sealing statute, RCW 13.50.050. To this author's knowledge, there are no cases construing the post-2001 version of RCW 13.50.050 in the context of a juvenile seeking to have his juvenile record sealed.

B. The Evolution of Case Law In The Context Of Open Access To Court Proceedings Raises Questions About The Applicability Of *Ishikawa* To A Motion To Seal Juvenile Records.

The State urges this Court to balance the five factors set out in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), in determining whether the juvenile record in this case should be sealed. While it is true that *Ishikawa* has served for three decades as providing the framework for courts asked to decide issues involving access to courts, this Court should consider the case law history leading up to *Ishikawa*. The genesis of that case explains why applying the five *Ishikawa* factors to a person's request to seal court records often seems to require contortions in reasoning.

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1 The issues in *Ishikawa*, which involved a prosecution for murder, were whether the trial
2 court judge was justified in closing a pretrial hearing on a motion to dismiss and whether there
3 was sufficient justification for the continued sealing of the record of proceedings on the motion
4 to dismiss. *Ishikawa* at 32. The state supreme court ruled that the trial court had created an
5 insufficient record on which to conduct a meaningful review and remanded the case so that the
6 trial court could set forth its rationale for the sealing order "in accordance with the standards
7 expressed herein." *Id.* at 45-46.

8 The five standards articulated by the court in *Ishikawa* were drawn from a case
9 involving similar underlying facts, *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615
10 P.2d 440 (1980). As in *Ishikawa*, the court in *Kurtz* was asked by a newspaper to rule on the
11 propriety of the trial court closing proceedings in a murder case during a pretrial hearing, in
that case a suppression hearing.

12 The court in *Kurtz* had to look to the U.S. Supreme Court for guidance in balancing the
13 competing interests involved in deciding whether to close suppression hearings. *Kurtz*
14 expressly adopted the principles suggested by Justice Powell's concurring opinion in *Gannett*
15 *Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979). *Kurtz* at 62. As
16 in *Ishikawa* and *Kurtz*, the court in *DePasquale* was asked to review the trial court's ruling
17 that denied the press access to a pretrial suppression hearing in a murder case. The Court
18 held that the newspaper had no affirmative constitutional right of access to the pretrial
19 proceedings. *DePasquale*, 443 U.S. at 394; 99 S. Ct. at 2913.

20 Justice Powell's concurring opinion, from which our state supreme court drew the
21 five standards that have come to be known as the "*Ishikawa* factors", framed the question
before the Court this way:

22 > The question for the trial court, therefore, in considering a motion to close
23 > a pretrial suppression hearing, is whether a fair trial for the defendant is likely
> to be jeopardized by publicity if members of the press and public are present
24 > and free to report prejudicial evidence that will not be presented to the jury.

25 *DePasquale*, 443 U.S. at 400; 99 S. Ct. at 2916.

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As this Court can see, the question passed upon by the U.S. Supreme Court in *DePasquale* is different enough from the issue raised by Respondent in this case that the "*Ishikawa* factors" should be treated as they were originally meant to be used – as guidelines rather than as a strict five-part test. *See Kurtz*, 94 Wn.2d at 62.

From *DePasquale* to *Kurtz* to *Ishikawa*, the standards for deciding whether to grant the request of a defendant or juvenile in a criminal case to seal the record of a closed case were developed in the context of the constitutional right of the press and public to access ongoing court proceedings. Neither those three cases nor the cases cited by the State examine the prevailing privacy interest a juvenile has in being able to reap the fruits of his successful rehabilitation.

C. Applying The Guidelines Announced In *Ishikawa* To The Facts In This Case Demonstrates That Sealing Respondent's Juvenile Records Is Appropriate And Necessary.

Although the Respondent asks that this Court bear in mind the peculiar history of jurisprudence regarding open access to judicial proceedings, Respondent can show that his motion to seal his juvenile record meets the constitutional requirements embodied in the five *Ishikawa* factors.

1. Application of the first *Ishikawa* factor.

Respondent's right to privacy is expressed in art. 1, sec. 7 of our state's constitution. The Respondent has shown that sealing his juvenile record furthers his right to privacy, and that keeping his juvenile record open poses a serious and imminent threat to his privacy interests.

Respondent is on the cusp of adulthood, looking forward to graduating from high school. The success he will enjoy as an adult hinges to a large extent on his ability to obtain employment and to be allowed to participate in opportunities such as the military and college. If those in decision-making roles are allowed to look into records of Respondent's past conduct, violating his right to privacy, and deny him opportunities to achieve success as an adult, such access poses a serious and imminent threat to Respondent's right to privacy.

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As a juvenile, Respondent was prosecuted without many of the due process protections available to adult defendants in criminal proceedings, *e.g.*, no right to a jury trial (RCW13.04.021(2)). One rationale for this discrepancy is because the "juvenile justice system is rehabilitative in nature while the criminal system is punitive." *State v. Weber*, 159 Wn.2d 252, 283, 149 P.3d 646 (2006) (citing, *inter alia*, *State v. Schaaf*, 109 Wn.2d 1, 4, 743 P.2d 240 (1987)). If the pivotal distinction in juvenile cases is the goal of rehabilitation, and a juvenile offender has shown that he is rehabilitated, allowing the record of his criminal offense to follow him into adulthood eviscerates the benefit of his rehabilitation.

2. Application of the second *Ishikawa* factor.

The Respondent has provided written notice to the following entities of his intent to seek an order vacating and sealing his juvenile record: King County Prosecuting Attorney, Juvenile Division; Juvenile Court Administrator; Juvenile Rehabilitation Administration; Juvenile Probation Manager; DSHS, Division of Children & Family Services; Redmond Police Department; Washington State Patrol; and Timothy J. Kahn, MSW & Associates. Notice included a copy of Respondent's motion and his declaration, which stated the specific grounds for the motion.

3. Application of the third *Ishikawa* factor.

The threatened interest – that of Respondent's privacy rights – pertain to and follow Respondent throughout his life, especially as he embarks on the chapter of his life that is marked by independence and responsibility. The only means for protecting Respondent from the unwarranted condemnation that would follow inquiry into his juvenile record is to seal that record from public access. Any less restrictive means for curtailing access would be ineffective in protecting Respondent's constitutional right to privacy.

4. Application of the fourth *Ishikawa* factor.

The interest of the Respondent in being able to enter adulthood unencumbered by the consequences of the mistakes of his youth outweigh the public's interest in reading about his grievous misjudgment when he was a 13-year-old boy.

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When the Respondent committed his offense, he was just at the beginning of his sexual development and awareness, a young person ill-equipped to manage his new and confusing feelings. His offense was committed at an age when a young person's conduct says little about the adult he would become. A gross misdemeanor committed at age 13 is far less serious a matter and is of far less interest to the public than a felony sex offense committed at 25 or even 17 years old.

Within two years of his offense, the Respondent had completed a course of treatment in which he learned the damage he inflicted on his victim, how to manage any inappropriate feelings he may have, and how to move forward with an appreciation for healthy conduct. He is not the confused 13-year-old who committed the offense that comprises his record. He should not continue to pay the price for that offense as a young adult.

5. Application of the fifth *Ishikawa* factor.

The court in Ishikawa stated that "[i]f the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing." It is this factor that underscores the difficulty of fitting the square peg of a motion to seal juvenile records into the round hole of open access to judicial proceedings. The purpose of sealing Respondent's juvenile record is to preserve his right to privacy. That purpose does not abate or extinguish or become moot with the passage of time. In granting Respondent's motion to seal his juvenile records, this Court protects his privacy rights from serious and imminent threat. Keeping the record sealed maintains that protection.

It should be noted that both under statute and court rule, the defendant whose record was sealed loses the benefit of that decision if he is found to have committed a new offense. RCW 13.50.050(16) provides in part that "[a]ny adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order. Any charging of an adult felony subsequent to the sealing has the effect of nullifying the sealing order for the purposes of chapter 9.94A RCW." GR 15(e)(4) references back to that statutory provision ("Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying

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the sealing order, pursuant to RCW 13.50.050(16).”). The Respondent asks that the Court consider this prospect as an added incentive for him to remain a law-abiding citizen in all respects.

D. Applying The Relevant Factors Listed in GR 15 Leads To The Same Result As Analysis Under *Ishikawa*.

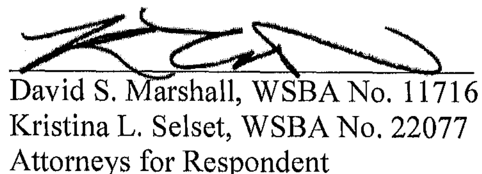
The State correctly points out that court rules cannot supersede the *Ishikawa* factors. However, as shown above, Respondent meets the criteria set out by the court in *Ishikawa* for having his juvenile record sealed. Having shown that his request to seal his juvenile record passes constitutional muster, Respondent invites application of the factors set out in GR 15.

General Rule 15(c)(2) requires that a court's decision sealing records be justified by “identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” Those concerns may include findings that “(A) The sealing or redaction is permitted by statute;” “(C) A conviction has been vacated;” or “(F) Another identified compelling circumstance exists that requires the sealing or redaction.” Of the six factors listed in GR 15(c)(2)(A-F), the Respondent has shown that at least two, if not three, of those factors apply to his case.

E. Conclusion

The Respondent has demonstrated that his request to seal his juvenile record protects his right to privacy from serious and imminent threat and is therefore constitutional pursuant to the five-part *Ishikawa* analysis. Respondent has also shown that he is eligible to have his juvenile records sealed pursuant to RCW 13.50.050, and that there are compelling privacy concerns sufficient to justify a sealing order under GR 15. The Respondent respectfully asks that this Court enter an order vacating his offense and sealing his juvenile record.

DATED this 2nd day of March, 2012.



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	
Appellant,	No. 69154-6
v.	CERIFICATE OF SERVICE
S. J. C.,	
Respondent.	

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I hereby certify that on the date shown below, I caused to be sent by legal messenger one copy of the foregoing *Respondent's Answer to State's Motion for Discretionary Review* with attached *Appendex A* to the following:

King County Prosecuting Attorney
James M. Whisman, Attorney for Appellant
King County Courthouse, W554
516 3rd Ave
Seattle, WA 98104-2362

DATED this 29th day of November, 2012.

Tracey McDonald, Legal Assistant

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