No. 85665-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MATTHEW H. RICHARDSON,
Respondent,

v.

MIKE SIEGEL,
Intervenor/Petitioner.

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU-WA strongly supports the constitutional requirement that court proceedings generally should be open to the public. It also recognizes the competing civil liberties interests—privacy, public oversight of government, and the right to fully participate in society—involved in access to court records. The ACLU-WA has participated in litigation (as *amicus curiae*, as counsel to parties, and as a party itself) as well as legislative and rule-making procedures surrounding access to a wide variety of public records (including court records).

ISSUES TO BE ADDRESSED BY *AMICUS*

1) The appropriate standard under which to evaluate an unsealing motion for records sealed prior to adoption of current GR 15.
2) Whether a limited intervenor may appeal a decision denying unsealing as a matter of right.

STATEMENT OF THE CASE

This case involves a motion to unseal court records. Because the records are currently sealed, many of the facts are unavailable to *amicus*. This statement is therefore based on the pleading of the parties.

It would appear that Matthew Richardson pled guilty to a misdemeanor in 1993 and received a deferred sentence. After completing the terms of the sentence, he was allowed to withdraw his guilty plea and the charges were dismissed. In 2002, Richardson successfully moved to vacate the record of conviction, and subsequently successfully moved to seal the records of the case. At the time, the relevant court rules on sealing simply stated that a court could seal criminal records if "there are compelling circumstances requiring such action," with no requirement for written findings. Former GR 15(c)(1)(B) (2000). There were no provisions in the rule addressing redaction or other less restrictive alternatives to sealing. Similarly, at the time Richardson's records were sealed, this Court had not yet decided *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004) (prescribing constitutional requirements for sealing records related to a motion to terminate a shareholders' derivative suit).

In 2010, Richardson entered the race for a Washington State Senate seat. There was a subsequent media report of his old conviction, and Mike Siegel sought to learn more details. Upon learning the records were sealed, Siegel successfully moved to intervene in the long-concluded case for the limited purpose of filing a motion to unseal. His original and amended unsealing motions were both summarily denied. The Deputy Clerk of this Court denied Siegel's ability to appeal as a matter of right.

Siegel petitioned this Court for discretionary review, which was granted.

ARGUMENT

The briefing by the parties would lead one to believe that this case involves significant issues of first impression regarding the standards to seal court records. Intervenor Siegel asks the Court to make broad statements about the standards to be used in sealing court records. The State largely agrees, and further invites the Court to repudiate long-standing public policy regarding vacated convictions. But neither of those issues is properly before the Court. Instead, all that is at issue is the denial of a motion to *unseal* records. This case, therefore, simply asks how to interpret the unsealing provisions in current GR 15 with respect to orders entered under previous versions of GR 15 and prior to development of this Court's case law on sealing requirements. *Amicus* respectfully suggests that proper resolution of this case need go no further.

A. Limited Intervenors in Completed Criminal Cases Have a Right to Appeal Denials of Unsealing Motions

As a preliminary matter, *amicus* agrees with Siegel that RAP 2.2(a) provides for an appeal as a matter of right when an unsealing motion is denied in a completed criminal case.[1] An order denying unsealing in such a case is a final determination, and leaves no other issues unresolved. As

[1] *Amicus* takes no position on the right of appeal—or, indeed, the right to intervene—in an active criminal case.

such, it falls within the definition of either “final judgment”, appealable under RAP 2.2(a)(1), or “final order after judgment”, appealable under RAP 2.2(a)(13). *Cf. Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1129 (9th Cir. 2003) (holding denial of motion to unseal is a final order in a completed case). No matter how it is characterized to fit within the rule, this Court has already recognized that appeals are an integral part of decisions on unsealing orders. *See Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 799 n. 10, 246 P.3d 768 (2011) (“If Judge Lust had made a decision on the Herald–Republic's motion to unseal court records, either party could separately appeal that decision.”)

An appeal as a matter of right furthers our state’s public policy in favor of open court records. A proponent of unsealing faces an uphill battle in any case, as the burden of proof falls on the proponent to demonstrate “compelling circumstances” to justify unsealing. GR 15(e)(2). This difficulty is compounded because the court hearing the unsealing motion is typically the same court that issued the sealing order in the first place. Although we do not doubt that our state’s honorable and capable judges will do their utmost best to consider unsealing motions solely on their merits, it is perhaps inevitable that there will be some degree of bias towards upholding the previous sealing decision. It would be an injustice, or at least present the appearance of injustice, to deny a

proponent of unsealing the opportunity to have a completely neutral forum review the trial court's decision.

B. GR 15(e)(2) Requires Proof of Compelling Circumstances to Unseal Records

1. Courts Must Be Allowed to Correct Deficient Findings in Old Sealing Orders

GR 15(e)(2) provides that criminal records "shall be ordered unsealed only upon proof of compelling circumstances." The State asks this Court to ignore this plain language with respect to old sealing orders, and lift the burden of proof from the proponent of unsealing. Brief of Respondent at 5-7. It would have the Court follow Division Two of the Court of Appeals, which has held that "it is not appropriate to apply the current standard for unsealing" to records sealed under previous versions of GR 15. *In re Marriage of R.E.*, 144 Wn. App. 393, 403, 183 P.3d 339 (2008). Instead, the suggested procedure would have courts simply invalidate older sealing orders, and start anew, deciding from a fresh slate whether sealing is justified.

Both the State and the Court of Appeals propose ignoring GR 15(e)(2) only when "the original sealing order does not conform to the current rule," *R.E.*, 144 Wn. App. at 403. In practice, however, that means ignoring GR 15(e)(2) for all sealing orders entered prior to 2006, since it is unlikely that any will fully conform to the current rule. For example, both

Siegel and the State find fault with the order at issue here because there is no indication that the sealing court considered redaction as an alternative, as required by GR 15(c)(3). Brief of Petitioner at 34; Brief of Respondent at 7. Redaction was not even contemplated under previous versions of GR 15, so it would be remarkable if *any* sealing order prior to the current rule indicated that the court considered redaction. Effectively, therefore, the State asks this Court to invalidate every sealing order entered prior to 2006. Such a sweeping result surely was not intended when GR 15 was amended in 2006—with no mention of that effect.

A better approach is to simply follow the dictates of GR 15(e)(2), and require the proponent of unsealing to prove compelling circumstances to unseal. One such compelling circumstance could be the unconstitutionality of the sealing itself—not a mere deficiency in compliance with all current procedural requirements, but instead a failure to properly weigh the competing privacy and public interests, as mandated by *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).[2] If the constitution precludes sealing of records in the first place, that is surely a compelling circumstance to justify unsealing those records.

[2] For the purposes of this argument, *amicus* assumes that in order to pass muster under Article 1, Section 10 a sealing order must comply with *Ishikawa*. There is serious question about that assumption with respect to sealing records of a long-completed criminal matter, as *amicus* has argued to the Court of Appeals in *J. S. v. State*, No. 65843-3-I. That question is not before the Court in the present case.

A lack of written findings should not, however, by itself be a compelling circumstance for unsealing. Because prior versions of GR 15 did not require written findings, it is likely that many sealing orders, such as the one in the present case, are missing any articulation of the justification for sealing—regardless of whether the court properly weighed the interests. "Rulings of a trial court are presumptively correct, and the burden is upon one challenging the correctness of such rulings to show that they were erroneous." *State v. Michaels*, 60 Wn.2d 638, 641, 374 P.2d 989 (1962), *overruling on other grounds recognized by State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012). This presumption of correctness is rooted not only in law, but in fact. It would be both a mistake and an insult to presume that judges routinely ignored the constitution when considering sealing motions prior to 2006. Instead, it is likely that most judges properly evaluated the public and private interests at issue, and only sealed records when justified; a lack of written findings simply reflects the practice of the time, and not a lack of judicial diligence.

Amicus suggests that a far better approach is to allow a trial court to correct procedural deficiencies in a pre-2006 sealing order when an unsealing motion is made. Unlike the proponent of unsealing, the court has access to the entire record, and is in a better position to determine whether the public and private interests were weighed prior to sealing, and

to supplement the public record with written findings describing the balancing. To be clear, this corrective step does not involve the trial court engaging in a new balancing of interests; instead, it is limited to supplementing the public record with findings gleaned from the sealed record in cases where the court determines interests were balanced. If the court can supplement the record by articulating a factual basis for the sealing, the unsealing motion can then be treated normally, with the proponent of unsealing bearing the burden of proof to show compelling circumstances for unsealing the records.

If the sealed record is devoid of information indicating the basis for a sealing order, the trial court will naturally be unable to supplement the public record. It is only in those cases that deficiencies in the sealing order should be considered a compelling circumstance for unsealing. Even then, the records should not be immediately unsealed; there may well still be compelling concerns that dictate sealing, even if they were not adequately documented in the record. The court should therefore, while granting the unsealing motion, simultaneously request a hearing to seal or redact the records at issue, pursuant to GR 15(c)(1). That will involve a *de novo* review of the records, and an opportunity for the proponent of sealing to argue the existence of compelling privacy or safety concerns. *Cf. R.E.*, 144 Wn. App. at 403-04 (commending commissioner for *de novo*

review of file and entry of new sealing order).

2. Remand Is the Appropriate Remedy in This Case

Resolution of the present case requires a remand to the trial court, as this Court does not have before it an adequate record for review. The trial court's order denying the motion to unseal does not make any factual findings about the relative interests of the parties, nor does it explain how the trial court balanced those interests. It is well established that the appropriate remedy for a record lacking in findings of fact and conclusions of law, as is the case here, is remand to the trial court. *See, e.g., In re Parentage of Jannot,* 149 Wn.2d 123, 128-29, 65 P.3d 664 (2003); *State v. Head,* 136 Wn.2d 619, 964 P.2d 1187 (1998).

Remand is also the appropriate method to apply the procedure suggested in the previous section. It is clear that the 2002 sealing order at issue here is deficient under the current GR 15 standards. At a minimum, it is missing the written findings required by GR 15(c)(2). The trial court should therefore be given an opportunity to examine the full record, and supplement the order with written findings if supported by the record. *Amicus* naturally takes no position as to whether such supplementation is possible, as we have no knowledge of the contents of the sealed records.

If the court is unable to document the sealing with written findings, it will then need to determine whether there are "identified compelling

privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2). On the other hand, if the court is able to provide written findings, it will still need to determine whether Siegel has provided "proof of compelling circumstances" for unsealing. GR 15(e)(2).

Amicus takes no position as to whether the records should ultimately be unsealed or not. We do not know what interests were advanced by Richardson when he moved to seal the records in 2002. Richardson has been unrepresented on appeal and has not filed any appellate briefing, so we do not know whether those or other interests are still applicable today.[3] As discussed more fully below, vacated convictions may be a compelling privacy or safety concern under GR 15(c)(2), but in the absence of written findings, it is mere speculation whether that is a concern advanced by Richardson. There may be other compelling privacy or safety concerns that argue for sealing or redaction of some or all of the records at issue.

Amicus suggests that there are other factors that the trial court should also consider in its final balance of public and private interests. One is the public interest in finality of judicial determinations; if the original sealing order is found to have properly balanced interests,

[3] *Amicus* does not represent Richardson nor his interests. Our only interest is clarification of the law on unsealing criminal records, especially records of vacated convictions, without reference to the facts of any particular case.

GR 15(e)(2) presumes that the balance continues unless there are changed circumstances. Another factor is Richardson's voluntary insertion of himself into the public sphere by running for several public offices, which may be such a changed circumstance. On remand, the trial court must carefully balance these factors, along with any others presented by the parties or intervenor, and enter written findings to support its decision.

C. The Court Should Preserve the Ability to Seal Court Records of Vacated Convictions

Both the State and Intervenor ask this court to adopt sweeping changes in the rules governing the sealing and unsealing of vacated convictions, with the State going so far as to suggest that long-standing vacation statutes are unconstitutional. State's Answer to Motion for Direct and Discretionary Review at 9. That question is not properly before the Court, and resolution of this case does not require the Court to address it—as noted above, the record does not establish that the 2002 sealing order was based on the vacation of Richardson's conviction. Nonetheless, because of the potential broad implications, *amicus* feels it is important to counter these radical suggestions. The ability to vacate an old conviction and, in appropriate cases, seal the records is an important component of our state's public policy on rehabilitation of offenders, and affects thousands of persons.

1. Settled Law Recognizes an Individual Interest in Limiting Dissemination of Vacated Conviction Records

Since at least 1981, Washington has recognized an interest in limiting dissemination of convictions when an individual has been rehabilitated. Such statutes are neither new nor unusual, having been on the books in many states since the 1950s. *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L. J. 1705, 1707-08 (2003). The intent is to "address the more subtle punishment represented by societal prejudice against the criminal offender that lingers long after the penalties prescribed by law have been fully satisfied." *Id.* at 1707-08.

Both the State and Siegel assert that defendants have no privacy interest in records of vacated convictions, and support that assertion with citations to cases involving Federal constitutional privacy and interpretations of privacy torts. Brief of Petitioner at 28-30; Brief of Respondent at 12-15. But "privacy law is significantly more vast and complex, extending beyond torts to the constitutional 'right to privacy,' Fourth Amendment law, evidentiary privileges, dozens of federal privacy statutes, and hundreds of state privacy statutes," along with privacy exemptions to public records law. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L.Rev. 477, 483 (2006).

This broad body of law—dealing with medical records, financial records, social security numbers, driver and vehicle information, video rentals, and more—is necessary to protect the myriad of privacy interests that each of us hold, and that are not protected by constitutional or tort law. In many instances, the information protected is not particularly personal or sensitive when viewed in isolation, but becomes sensitive because of ways in which the information can be misused—so statutes limit both dissemination and misuse. For example, our Legislature has wisely determined that it is not sufficient to simply prohibit the misuse of financial account information, RCW 9.35.020, but has also taken steps to prevent the public dissemination of such information, RCW 42.56.230(5).

Here, the vacate statutes create a clear privacy interest, establishing a public policy that defendants may *deny* the existence of the conviction, RCW 9.94A.640(3), and the state may not *disseminate* a nullified conviction, *see State v. Breazeale*, 144 Wn. 2d 829, 833, 31 P.3d 1155 (2001) ("Upon vacation of the sentence, the related criminal history record information is available for criminal justice purposes only and is not disseminated as public information."). Thus, vacation creates a privacy interest somewhat different in nature than those at issue in privacy torts or due process violations of a right to informational privacy. It is not the product of common law but of statute. It arises from the state's recognition

that ex-offenders must be offered meaningful opportunities to shed the label of conviction, and that continued state dissemination of the record of conviction undermines any state-recognized rehabilitation.

In sum, Siegel and the State incorrectly frame the question as whether defendants have a "right" to privacy in records of their vacated convictions—but if there were a "right" to nondisclosure of the records, there would be no need to balance public and private interests. Instead, both GR 15(c)(2) and *Ishikawa* direct balancing the competing public and private interests in situations where there is not an absolute right on one side or the other. Defendants certainly have a privacy "concern" or "interest" in records of their vacated convictions, appropriate to balance against the public interest in open records in an individual case.

Similarly, the State's "moral criticism" of the vacate statutes and its assertion that such statutes are "outdated" in the information age are both wrong and simply irrelevant. Brief of Respondent at 15-18. The mere fact that information was public at some point—or even posted on the Internet—does not mean that a person's privacy interest in that information is forever lost. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 412-414, 259 P.3d 190 (2011) (holding that media coverage of information does not diminish the privacy interest in it). More significantly, vacation of convictions remains a crucial part of

the rehabilitation scheme. *See* Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—State v. Schultz*, 31 Wm. Mitchell L. Rev. 1331, 1341 (2005) ("The existence of the expungement remedy offers hope. This hope gives individuals an incentive to rehabilitate and promotes the public's safety.").

The Legislature has concluded that rehabilitated ex-offenders should be restored to pre-conviction status. Part of the mechanism chosen to achieve this goal is a method to vacate convictions of ex-offenders, and to limit dissemination of state records of vacated convictions. The Legislature has reaffirmed its commitment to this mechanism over the years by filling gaps in the vacation scheme. *See, e.g.*, Laws of Washington (2003), ch. 66 (ensuring vacation available to offenders sentenced prior to 1981); Laws of Washington (2001), ch. 140 (providing for vacation of misdemeanor offenses).

If the State disagrees with current vacation policy, it should address its concerns to the Legislature. "[I]t is not this Court's function to question the wisdom of an enactment, unless a constitutional impediment is present. We will not inquire into the policies underlying a clear legislative enactment." *State v. Heiskell*, 129 Wn. 2d 113, 122, 916 P.2d 366 (1996) (citation omitted). The Court should not undermine the Legislature's judgment by concluding that an individual has no interest in

limiting state dissemination of the record of a vacated conviction.[4]

Moreover, it is not just the Legislature, but also this Court that has recognized the importance of vacating convictions and limiting governmental dissemination of records of vacated convictions. *See, e.g.*, *Breazeale*, 144 Wn.2d 829 (upholding authority of court to vacate pre-1981 conviction). This Court has explicitly recognized that the interest in governmental non-dissemination of vacated convictions can extend to court records. When it amended GR 15 in 2006, this Court concluded that a vacated conviction was a "sufficient" interest to be weighed against the public interest when considering sealing court records. GR 15(c)(2)(C). There is no reason to reconsider that conclusion in the present case.

2. Eliminating Sealing as an Option in Vacated Criminal Cases Would Have Broad Impact and Disproportionately Harm People of Color

Thousands of Washingtonians could be impacted by a broad ruling eliminating the option of sealing vacated criminal cases. Over 65 million Americans—nearly 1 in 4 adults—carry the stigma of a criminal record. *See* Michelle Natividad Rodriguez & Maurice Emsellem, National Employment Law Project, *65 Million Need Not Apply: The Case for*

[4] This is not to say that the courts *must* seal records in all cases where a conviction has been vacated, merely that courts should acknowledge the interest in non-dissemination created by the Legislature and give that interest due weight in the constitutional analysis of whether to seal or redact court records.

Reforming Criminal Background Checks for Employment (2011), *available at* http://nelp.org/page/-/65_Million_Need_Not_Apply.pdf. The United States incarcerates a greater percentage of its population than any other country in the world—nearly 500 out of every 100,000 people in 2010. Paul Guerino et. al., Bureau of Justice Statistics, *Prisoners in 2010* (Feb. 9, 2012), *available at* http://www.bjs.gov/content/pub/pdf/p10.pdf. The scale of American incarceration is recent and unprecedented. *See* The Sentencing Project, *Trends in US Corrections* (May 2012), *available at* http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf (showing significant growth in the prison population over the past 30 years). In addition, the majority of persons in state and federal prisons are incarcerated for non-violent offenses. *See* Guerino at Appendix Table 17A (showing that 47.6% of state prisoners are incarcerated for non-violent offenses) and Appendix Table 18 (showing that approximately 90% of federal prisoners are incarcerated for non-violent offenses).

The rise in American incarceration disproportionately impacts people of color. Nationwide, African Americans are almost 6 times more likely than whites to be incarcerated; Latinos nearly 2 times more likely. *See* Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 87 Wash. L. Rev. 1, 17 (2012). Similar disproportionality

exists at every stage of the criminal justice system in Washington State. "Much of the disproportionality cannot be explained by legitimate race-neutral factors." *Id.* at 49.

This disproportional effect is felt outside prison walls as well. People with criminal histories face barriers to reintegration long after they have completed the terms of sentence, in part because of increasing reliance on criminal background checks to screen applicants for employment, housing, credit, education, and volunteer opportunities. A recent survey of national employers revealed that over 90% conduct background checks on some or all applicants. *See* Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC Enforcement Guidance 915.002, at 6 (2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf. Many employers use criminal history as a screening tool, declining to hire any applicant with any criminal record. Accordingly, persons with a criminal record are significantly less likely to be called back for interviews or offered jobs than similarly situated peers, and the impact is substantially larger for African Americans. *See* Devah Pager, Bruce Western and Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am.

Acad. Pol. & Soc. Sci. 195 (2009), *available at* http://www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf.

Amicus is well-positioned to inform the Court of the broader implications of any ruling limiting a court's ability to seal its records of vacated conviction. In September 2011, the ACLU-WA launched its Criminal Records Project, to provide direct legal services to individuals whose criminal history poses a barrier to housing and employment. Since opening intake in December 2011, the Project has served over 150 individuals, many of whom have been denied housing or employment based on criminal records.

The public dissemination of conviction records harms people who have rehabilitated. The ACLU-WA has represented dozens of clients unfairly denied jobs on account of long-past criminal history. In a particularly egregious case, an African American woman had a job offer as an administrative assistant rescinded solely on account of a 32-year-old conviction for welfare fraud. She was denied despite the fact that she had been working in the field for over 30 years, had no other criminal history, and had honestly disclosed the conviction. In that case, corporate headquarters stated they would not hire anyone who did not have a "clean background check." Another client, an African American man, was denied a security guard position on account of a vacated 25-year-old conviction

for theft, notwithstanding the fact that case was his only involvement in the criminal justice system and he was a veteran with security experience. A third client, a Native American woman, was denied a promotion to catering manager because of a 15-year-old misdemeanor theft conviction, despite her exemplary 7 years of employment with the company. In each of these cases, employers obtained background checks prepared by consumer reporting agencies that searched electronic court databases.

For these individuals, and others similarly situated, sealing court records to limit dissemination through the online court information systems (such as SCOMIS, JIS, and the Washington Courts website) helps protect against unreasonable denials of basic opportunity. This Court should limit its ruling to the narrow facts of this case, and decline the invitation to eliminate or severely curtail the ability of courts to seal records to protect against such injustices.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to remand this case to the trial court to supplement its 2002 sealing order with written findings, if possible, and properly balance the private and public interests in the records. *Amicus* also respectfully urges the Court not to issue a broader ruling on the propriety of sealing vacated convictions.

Respectfully submitted this 4th day of September 2012.

ACLU OF WASHINGTON FOUNDATION

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