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DIVISION ONE

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NO. 65843-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

J.S.,

Respondent,

v.

STATE OF WASHINGTON,

Appellant.

BRIEF OF RESPONDENT

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A. ISSUES

1. Under GR 15(c)(2), a court has the authority to redact a court record if compelling privacy concerns outweigh the public interest in access to the court record. GR 15(b)(5) defines “redact” as a means to protect court records or files from being examined by the public. Did the RALJ court have authority under GR 15 to redact the caption of a court record to prevent the name of the party of a dismissed case from being examined by the public?

2. GR 15(c)(2) provides a court the authority to order court files and records be sealed or redacted if the court makes and enters written findings that redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Here, the RALJ court ordered the name removed from the title of the case after making and entering written findings that redaction was justified by compelling privacy concerns that outweighed the public interest in the name involved in a court record that was 18 years old and dismissed upon an unopposed State motion to dismiss. Did the RALJ court act within its authority?

3. The public has a right to access judicial proceedings in order to scrutinize court functions and activities to ensure fairness in court proceedings and serve as a check against judicial abuse. Though court

records are presumptively open to the public, access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy. The RALJ court determined that the public had very little if any interest in an 18-year-old arrest court record that was dismissed on the State's unopposed motion to dismiss. Did the RALJ court properly consider the Ishikawa factors and weigh the competing interests involved when it removed the name from an old case in which the public would have no conceivable interest?

4. Do the doctrines of equity and fairness require this Court allow redaction of a title of a case that was dismissed on the State's own motion before any trial when GR 15(d) allows for the sealing of vacated convictions with information that the case was vacated?

B. STATEMENT OF THE CASE

1. Background. In 1990, when J.S. was a teenager, he pled guilty to a Colorado offense, was placed on probation, and thereafter decided to turn his life around. He attended college in Washington, received academic excellence awards and scholarships, and then completed his education at Boston College with a degree in biology and an emphasis in biochemistry. He graduated Summa Cum Laude. He then took a position at ICOS Pharmaceuticals and moved to New York in 1999.

The only reminder of his teenage offense is a court record in Washington State. While attending college here, J.S. was arrested on March 18, 1992, as a “fugitive from justice” for his Colorado offense. The State filed a probable cause document, alleging J.S. was a fugitive from justice and on March 24, 1992, a formal complaint was filed. Shortly thereafter, on June 22, 1992, the charge was dismissed on the State’s motion and the case was closed.

J.S. petitioned and was granted a pardon by the Colorado Governor. The underlying Colorado offense/conviction and court record is gone and can no longer be located anywhere. The Washington State Patrol, the Seattle Police Department, and the FBI have all expunged the dismissed Washington arrest from their records. The only record of any offense lies in JIS: a Washington court record that shows the dismissed charge for the arrest for fugitive from justice stemming from his Colorado offense, which has long ago been pardoned and is not a court record in Colorado. Only the Washington court record on JIS, concerning the arrest, State’s motion to dismiss, and the court granting the State’s motion to dismiss remains.

Presently, nineteen years later, J.S. is a successful businessman who currently lives and works in New York City with his family and he travels internationally both for work and for pleasure. The arrest record

and record of the dismissed charges arising from this case have twice caused him delay at the US-Canadian Border and at JFK upon reentry into the United States because of the Washington record of the arrest 18 years ago. J.S. fears he may be unnecessarily embarrassed if he is held at the border while with a client. The arrest record could also impact his ability to find another job.

2. Amended Motion to Expunge or Modify Nonconviction Data in District Court. J.S. first moved to expunge his criminal data and remove the data from JIS under RCW 10.97.060. On October 27, 2009, a motion to expunge and delete court records or in the alternative to modify the nonconviction data was held before the Honorable Ann Harper. 10/27/09RP.

The only witness called was Seattle District Court Director of Technology, Cathy Grindle. Ms. Grindle testified “at a certain point JIS was automatically deleting criminal records.” Id. at 4. But since the late 1990’s computerized records remain in a database in perpetuity even when the record consists of only non-conviction data. Id. at 4. Although the *possibility* of sealing a record is available to some defendants, Ms. Grindle testified that the record still shows the person’s name in connection with a criminal case and cause number. Id. at 6.

Moreover, Ms. Grindle testified that the manner in which the JIS system was first generated, to input a person's name into the system, it first generate the probable cause number (here, No. 920012349), which is generally the book of arrest number. 10/27/09RP 25. That number is created in JIS simply so the court can calendar a case and track it for 48 hours. Id. But after the 48 hours, at his or her first appearance, another cause number is then placed into JIS if charges are filed. Id. Because of the JIS system, a defendant with one *alleged* offense would have two cause numbers in the system – and the public could assume two offenses were committed based solely on the manner in which the cause numbers are generated by JIS. Id.

With a modern JIS system, court record information became more readily available to the public through the subscription service that AOC has for JIS. Id. at 20. Sometime in 2006 or 2007, a statewide index came into effect on the JIS website. Id. When the State mainframe started in the mid-1990s, the system was created with a mirror image available – one system where the public could gain access to court records and the other system where the public had no access, which Ms. Grindle called “the JIS warehouse.” Id. Even if a name was removed from the system, Ms. Grindle testified the public could still find the case through a search of the

cause number, but a search of the file via a name search would not show a case. Id. at 21.

Ms. Grindle believed that changing the title of the case, rather than simply sealing the file, offered better protection against public access to nonconviction data, because

When a case is sealed, the name of the case, the case number remain. And it'll come up, I think, on a public search as sealed, case sealed. But, the name . . . remains in the system. If a case is expunged, the name is gone but the case still remains. So, I can look up, you know, 93083 and find that case. But, if I look . . . under the name of the case, I'm not going to find it.

Id. at 23. With the mirrored database in existence, the court still maintains the record in the JIS warehouse and the information, including the name of the defendant is still accessible but only to court employees. Id. at 23.

The public could not find a court file with a search of a person's name after redaction of the court file. Ms. Grindle testified with this procedure, she believed that if the court ordered her to modify the record so that the name is changed to "name removed," she would have authority to do so because she would not be destroying the record in any way. Id.

J.S. argued that sealing the file alone did not cure the problem, since his name would still be attached to two cause numbers, obviously criminal cases ("State" v. J.S.), and then the information would show "sealed." At the district court level, the State did not contest the

modification of the court record. Id. at 1-2. The State recognized that this situation was different from a typical case when the defense requests sealing a criminal matter, since this entailed only a nonconviction matter that was dismissed by the State's own motion. Id. at 1-2. The State did submit a memo from John Bell, suggesting court records could not be "expunged." Id. at 10.

Judge Harper understood that RCW 10.97.060 protected the individual's interest in not disseminating non-conviction data to the public via the King County Jail and law enforcement agencies (e.g. Washington State Patrol). Id. at 12. The judge stated, "if this were an issue of equity, particularly considering the underlying information that I have, that I'd be ordering that the record be placed in such a position ... that people can't see it at all." Id. at 12. But the court refused to do so, explaining that the public has an interest in court records. Id. at 12-13. Judge Harper ruled GR 15 trumped RCW 10.97.060, adding that GR 15 would be the only authority for her to limit access to the records. Id. With the agreement of both parties and based on GR 15(c) and the Ishikawa factors, the court file was then sealed on November 4, 2009.

3. RALJ Court Decision. Superior Court Judge Teresa Doyle heard argument on July 2, 2010. Judge Doyle affirmed the district court including the order to seal the record, but ordered a single modification of

the court record: “The caption on the file shall reflect, “State v. Name Redacted.” CP 130. The court ruled it was authorized under GR 15(c) to redact the record in this manner, “because the appellant’s privacy interests outweigh the public interest in access to the court record bearing his name.” Id. The court entered written findings as follows:

1. There was never a conviction;
2. The prosecutor has dismissed the case;
3. The case is 18 years old;
4. The public has little interest in an arrest 18 years old where the charge was dismissed by the prosecutor; and
5. J.S. has significant privacy interests because such data can affect his ability to travel and gain employment.

CP 130-31. In its oral ruling, the court noted that it could treat the motion to modify or redact the title of the case name under GR 15(b)(4) as a motion to seal. In its written findings, the court found the compelling privacy interests of J.S. outweighed the public interest in access to appellant’s name data and ordered his name redacted to read “Name Redacted” in the caption of the file. CP 131. The State appealed.

C. ARGUMENT

THE SUPERIOR COURT ACTED WITHIN ITS AUTHORITY UNDER GR 15 AND THE ISHIKAWA FACTORS TO REDACT THE NAME OF THE DEFENDANT FROM A COURT RECORD

1. The public’s constitutional right of access to court records can be outweighed by the privacy rights of individuals. The right to inspect

and copy judicial records is a right grounded in the democratic process, as “[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern.” Landmark Comm. v. Virginia, 435 U.S. 29, 839, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). “[I]n the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.” Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.3d2d 248 (1982). In particular, courts have recognized that public access allows the public to monitor the conduct of judicial proceedings, providing an effective restraint on the possible abuse of judicial power. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592, 596, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring); NBC Subsidiary, Inc. v. Superior Court, 20 Cal.4th 1178, 1201-02, 980 P.2d 337 (1999).

This Court has similarly recognized under the Washington Constitution that article I, § 10 “has been interpreted as protecting the public and press’s right to open and accessible court proceedings, similar to the public’s right under the First Amendment.” State v. Lee, 159 Wn.App. 795, 802, 247 P.3d 470 (2011). These constitutional provisions “assure a fair trial, foster public understanding and trust in the judicial system and give Judges the check of public scrutiny.” Id; Dreiling v. Jain,

151 Wn.2d 900, 903-04, 93 P.3d 861 (2004); State v. Waldon, 148 Wn.App. 952, 957, 202 P.3d 325 (2009).

But the right to inspect and copy is not absolute. Nixon v. Warner Comm., Inc., 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); Waldon, 14 Wn.App. at 957. The right to access “may be limited ‘to protect other significant and fundamental rights.’” Waldon, 148 Wn.App. at 957, quoting Dreiling, 151 Wn.2d at 909. A judge’s exercise of discretion in deciding whether to release judicial records should be informed by a “sensitive appreciation of the circumstances” that led to the production of the court record. Nixon, 435 U.S. at 598. The protection of an individual’s right to privacy can outweigh the right of the public to know particular information disclosed in a court proceeding or document. See Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511-12, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); Chicago Tribune Company v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1317 (11th Cir. 2001) (court held public can be barred from accessing discovery documents even when not protected by a privilege); In the Matter of 2 SEALED SEARCH WARRANTS, 710 A.2d 202, 213 (1997) (public access to search warrants and supporting documentation does not assist public in role of monitoring fairness of judicial process and could expose witnesses to unnecessary and potentially harmful scrutiny).

In the instant case, the public's right to access J.S.'s dismissed case does not fulfill any legitimate purpose under the constitutional provision. The public has no interest in J.S.'s court record. The record at issue is for a simple arrest in Washington that stemmed from a Colorado matter. The Washington arrest case was quickly dismissed by the State's own motion – no pretrial hearings nor trial occurred. Reading this record does not help the public ensure the fairness and honesty of judicial proceedings, provide the public with insight into the operations of the courts and judicial conduct of judges, or check the judicial branch for possible abuse of judicial power. The State cannot name, and will never be able to name, a possible reason why the public would want to view his name attached to this record or why having this record available to the public addresses any public concern whatsoever. While the record does remain available to the public, the only change made in this case is that the public can no longer easily search for the case by using the full name of individual, whose case was dismissed.

2. The RALJ court properly redacted the name of the Respondent from the title of the case as authorized by GR 15 and the *Ishikawa* factors. General Rule 15 defines motions and orders to redact or delete as “motions to seal,” not as motions to expunge or destroy. GR 15(b)(4) defines “Seal” as follows:

To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or redact, shall be treated as a motion or order to seal.

Secondly, the general rules give a court the authority to seal and redact records. GR 15(c) **Sealing or Redacting Court Records** provides in pertinent part:

(1) In a criminal case or juvenile proceeding, the court, any party, or an interested person may request a hearing to seal or redact the court records. . . .

(2) After the hearing, the court may order the court files and records in the proceeding, or any party thereof, to be sealed or redacted if the court makes and enters written findings that the specified sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record.

Here, at the district court level the parties agreed that sealing the court file was proper. 10/27/09RP 16-17, 30. Importantly, the State had no objection at the district court level in changing the case name to “Name Removed” rather than “Expunged.” 10/27/09RP 27. In fact, the judge recognized that it made no sense that the public would not be able to access the record from the Washington State Patrol or Seattle Police, but then simply access the JIS system and retrieve the information. 10/27/09RP at 12. Judge Harper stated, “I think if this were an issue of equity, particularly considering the underlying information that I have, that I’d be ordering the record be placed in such a position – that people

can't see it at all." Id. But the district court held it could not do so under RCW 10.97.060 because "[t]he legislature has no authority to tell the courts it can or cannot destroy our records." Id. at 13. The court also stated that there was no basis "*aside from General Rule 15, that allows me to destroy court records or destroy the access.*" (Emphasis added.) Id. at 14.

Upon a finding that J.S.'s privacy concerns outweighed the public interest in access to the court record, District Court Judge Ann Harper sealed the file. The district court granted the agreed motion to seal. 10/27/RP at 30-31. The district court made the following findings in an Order on Motion to Seal Court Records:¹

1. Adequate notice was given to the appropriate parties;
2. The Defendant has identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. The compelling privacy or safety concerns that justify sealing the entire court file include:
 - a. The Defendant, J.S., King Country District Court Director of Technology Cathy Grindle and King County Prosecutor Laura Petregal all agreed that sealing of the defendant's records is necessary.
 - b. The parties were given an opportunity to object to sealing the record. While J.S. requested expungement and

¹ The parties agree that the district court order to seal was proper. See MDR at 10 (State conceding district court properly sealed entire court record and had authority to do so under GR 15(c)(4); MDR 12 (State conceding it did not contest sealing the record at district court nor contest the order on review in superior court).

- changing the records, he ultimately greed his least desired choice, sealing, was agreeable.
- c. The court found that sealing was the least restrictive means that was currently available to protect the interests involved;
 - d. In the instant case, J.S., the State, and Ms. Grindle (on behalf of the Clerk's Office) all agreed the public had little to no legitimate interest in these court records, and any public interest in the records were substantially outweighed by J.S.'s interest in sealing the records.
 - e. The order is no broader in its application or duration than necessary to serve its purpose.
 - f. As such, the above combined with the procedural posture and resolution of this matter fits into the criteria contemplated in GR 15(c)(2)(F).

At the RALJ appeal level, Judge Doyle agreed with J.S. that the sealing order as it stood failed to fully protect J.S.'s interests and accordingly modified the sealing order by redacting J.S.'s name in the title of the case. 7/2/10RP 11. The superior court similarly denied expungment of the record under RCW 10.97.060, but found that GR 15 permitted modification of the case name under GR 15(b)(4) and (5), and 15(c). CP 130. The court was authorized to do so because GR 15(c)(2) authorizes the court to redact court files and records if the court enters written findings that the redaction is justified by identified compelling privacy concerns that outweigh the public interest in access to the court record. CP 130. The court complied with the court rule ordering a change of the name of the case from "State v. [Client Name]" to "State v. Name

Redacted.” CP 130. She further complied with the rule by entering the following written findings:

1. There was never a conviction;
2. The prosecutor has dismissed the case;
3. The case is 18 years old;
4. The public has little interest in an arrest 18 years old where the charge was dismissed by the prosecutor;
5. J.S. has significant privacy interests because such data can affect has ability to travel and gain employment.

CP 130-31. The court concluded such findings provide compelling privacy interests that outweigh the public interest in access to appellant’s name data and ordered the name from the record changed from his name to “Name Redacted.” CP 131.

The State argues that the RALJ court failed to incorporate all of the Ishikawa factors² into its analysis. AOB at 11. All the Ishikawa factors were before the RALJ court in arguing for redaction of the case title. In merely modifying the district court sealing order, the RALJ court followed

² The Ishikawa factors are as follows:

1. The proponent of sealing must make some showing of the need therefor;
2. Anyone present when 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;
4. The court must weigh the competing interests of the defendant and the public, and consider the alternative methods suggested;
5. The order must be no broader in its application or duration than necessary to serve its purpose”

the same criteria of Ishikawa that the district court already ordered and modified the order to reflect the name change.

First, the proponent of redaction, J.S., made a showing of the need to redact the title of the case, arguing that sealing alone was insufficient because the public could see that J.S. had a criminal conviction merely by the title of the case. CP 32.

Concerning the second Ishikawa factors, the State had an opportunity to object at the RALJ level and did. The argument on the RALJ appeal was whether the district court erred in failing to modify the court title to read State v. Name Redacted, and the record clearly shows that the State objected at the RALJ level any redaction of the name in the title of the case under GR 15(c). CP 12, 32, 7/2/10RP 12. The State never asked for additional time to make any further objections.

Concerning the third Ishikawa factor that the parties should analyze whether the requested method for curtailing access would be the least restrictive means, J.S. argued the prior sealing order alone was insufficient because his name was in the title of the case and modifying the name under GR 15(c) would cure that problem. 7/2/10RP 9. The State argued that the district court's sealing order was sufficient to protect J.S.'s interests. Id. at 14. After hearing the parties arguments, the RALJ

court ruled in favor of J.S. and ordered the title of the name changed. CP 130-31.

Concerning the fourth factor, the RALJ court carefully weighed the competing interests of J.S. and the public and determined that J.S.'s interests were far greater than the nonexistent interests of the public to access this court record of a charge dismissed 18 years ago on the State's own motion. CP 131. In fact, at the district court level, the parties all agreed that the public had "little to no legitimate interest in these court records, and any public interest in the records were substantially outweighed by J.S. interest in sealing the record." Before the RALJ court, J.S. argued that while the public may have had some minor interest in this case in 1992, the interest over time dissipated to a point that the public has no interest at all, while J.S.'s privacy interests in not having these records disseminated has grown. 7/2/10RP 17, 18, citing United States Department of Justice, et al. v. Reporters Committee for Freedom of the Press et al., 489 U.S. 749, 764, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989) (recognition that while nonconviction data may be of public interest during the arrest and charge, over time the public interests wane while the individual's privacy interest in the nonconviction data grows such that the nonconviction data should become private). In making her ruling, Judge Doyle understood that the 18-year-old case that was dismissed before trial

on the State's own motion 18 years ago was of no interest to the public. See Rufer v. Abbott Laboratories, 154 Wn.2d 530, 547-48, 114 P.3d 1182 (2005) (court, in balancing competing interests of the parties and the public pursuant to the fourth Ishikawa factor considers whether there is little or no valid interest of the public because the interest of the public that we are concerned with in making these determinations is the public's right to the open administration of justice). J.S.'s dismissed charge is not relevant to evaluate the administration of justice because the only decision of the court in the instant case was to accept the State's unopposed motion to dismiss. Accordingly, under Rufer, the public would have no interest in the court record because it is not relevant or incredibly minimally relevant to any decision making process by the court.

Concerning the fifth Ishikawa factor, the parties at the district court below already agreed that sealing the entire record satisfied this condition. Judge Doyle simply modified that sealing order by redacting the Respondent's name in the title of the case so that the order satisfied J.S.'s privacy interests and was no broader in its application or duration than necessary to serve its purpose. No argument was made by the State how redaction for a certain time period alone would solve any privacy problems.

Because the RALJ court was authorized under GR 15 to redact the name of the Respondent from the title of the case and followed the Ishikawa factors in making her findings, this Court should affirm the RALJ court.

3. The State's argument that the record is essentially "destroyed" because it is more difficult for the public to access is meritless. The RALJ court did not order the destruction or obliteration of the court record. The court affirmed the original order to seal but ordered a single modification of the order – to redact the caption on the file to have the name redacted under GR 15(c). GR 15(b)(4) defines the term “seal” as follows:

To seals means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.

Accordingly, an order to “redact” is permissible under GR 15 as a means to protect from examination by the public and is in fact considered under GR 15(b)(4) as an order to seal – not a motion to destroy as the State alleges.

Appellant first mistakenly argues that in changing the name of the file, Judge Doyle “destroyed” the record under GR 15(b)(3) because it would be irretrievable *by the public*. AOB at 11. The Appellant is incorrect. The rule does not state that it is the public’s access to the record

that controls whether or not a record is destroyed. Instead, the language of the court rule specifically defines what is meant when a file is “destroyed” and when it is simply “modified” or “redacted”.

GR 15(b)(3) defines the term “destroy” as follows:

To destroy means to obliterate a court record or file in such a way as to make it permanently irretrievable.

GR 15(b)(5) defines the term “redact” as follows:

To redact means to protect from examination by the public . . . a portion or portions of a specified court record.

The term “redact” is commonly known as an act of removing sensitive information from a document. The record here has not been obliterated. Nothing in the rule suggests that it is the public’s ability to retrieve the record defines whether or not the record is retrievable and the State can cite no authority for its position. The fact that the public cannot obtain a record through a search of the client’s name does not destroy the file.

Secondly, the State is incorrect in arguing that the public’s difficulty in accessing a court record makes the record “irretrievable” to the public. Ms. Grindle testified the record can still be retrieved by the public, just not through a search by the client’s name. 10/27/09RP at 23. Should the public have an urgent need to search for J.S.’s 19-year-old dismissed charge it can search for the record through the two cause numbers or it could even file a motion and have court personnel locate the

record via a name search. 10/27/09RP at 23. The court and court employees can still use the JIS warehouse, the mirror database, to locate the file by case name. 10/27/09RP at 23. Ms. Grindle, the only expert witness called and the only record before the court, testified that changing the title of a case does not destroy the record or delete the file, but merely changes the name of the case. Id.

Lastly, an argument that somehow changing the title of a case makes a record “destroyed” would make all cases in which the public cannot locate a record via a full name search therefore irretrievable and destroyed.³ An example of such a case is State v. John Doe, 105 Wn.2d 889, 719 P.2d 554 (1986).⁴ In Doe, a published Washington Supreme Court case, a father was suspected of sexually abusing his four-year-old daughter, the superior court dismissed his case, and his case was reversed

³ Under the State’s argument that removal of the full name destroys the record because it makes the file irretrievable by the public, all juvenile and dependency cases with titles using initials must also be deemed “destroyed.” The fact that the public cannot find a juvenile case through a search of the juvenile’s full name does not make the record destroyed nor does it make the citizen’s constitutional right to access court records meaningless. AOB 13. Important to note, even for this Court, the Rules of Appellate Procedure allow the title of a case to be changed and the rule does not state that initials would be the only available modification to the title of a case. RAP 3.4. GR 15(c) and RAP 3.4 provide a court with the authorization to change the title of the case.

⁴ A Westlaw search by the undersigned counsel for cases with parties named “John Doe” in the title of the case exceeded the maximum allowable search result of 10,000 cases or less.

and remanded for further proceedings. 105 Wn.2d at 891.⁵ In Doe, the Supreme Court kept the names of the parties fictitious (father John Doe and daughter Jane Doe) to protect the individuals, even the accused father who on remand could eventually be convicted of a crime. 105 Wn.2d at 891 n.1. Despite the fact that the public cannot search for the case with the name of the father, the Supreme Court determined that it should change of the title of the case to protect the privacy interests of a father accused of molesting his daughter because there was no conviction.⁶

The instant case is similar. The court file is still accessible but the RALJ court determined that the privacy interests of J.S. outweighed the public's right to access the record through a name search. Changing the name of the case does not obliterate the case simply because the public cannot find a case by case name, and it does not make retrieval of the case impossible. 10/27/09RP 23. Ms. Grindle testified that just changing the

⁵ In Doe, the father was charged with indecent liberties, admitted his daughter touched his genitals three times but explained the contacts were accidental. Id. The superior court dismissed the charges on child hearsay reasons. Id. at 892. The Court of Appeals reversed and remanded. The Supreme Court affirmed the Court of Appeals and reversed the superior court, holding the daughter's statements to her foster mother were not excited utterances but remanded the case to the trial court to determine if her statements were otherwise reliable under RCW 9A.44.120(1). Id. at 894-95.

⁶ See United States v. Doe, 867 F.2d 986 (7th Cir., 1989). Defendant convicted of mail fraud, racketeering and obstruction of criminal investigation sought writ of error coram nobis, arguing he was convicted for conduct that was not criminal. Id. at 986. The United States District Court granted writ, and Government appealed. Id. The 7th Circuit Court of Appeals reversed the district court and upheld the conviction. Id. at 989. Even though this is a case where the defendant was convicted and the Court of Appeals reversed the district court's ruling the convictions be dismissed, the Court carried the title of the case with a fictitious name arguably to protect the identity of the defendant.

name of the title of the case is authorized by court rule because it is not destroying the record. Id. at 28. Accordingly, the State's argument that the record is destroyed is meritless.

Judge Doyle modified the district court's agreed order to seal to also redact the name from the case title as allowed under GR 15(b)(4) and GR15(c)(2). As she stated orally at the RALJ hearing, GR 15(b)(4) permits the court to redact, remove, or excise information from a court record, and the court could remove the name from the title of the case as a modification of the district court's order to seal. 7/2/10RP 8, 11.

4. This Court's Rousey decision demonstrates that a court record can be redacted to ensure the public has no access to the court record and such redaction does not equate to destruction of a court record. In Indigo Real Estate Services v. Rousey, this Court correctly held "GR 15 authorizes the redaction of information in SCOMIS." 151 Wn.App. 941, 954, 215 P.3d 977 (2009). The Rousey Court held that a court has authority to redact the title of the case to prevent the public from accessing a court record under GR 15(c)(2). The Court specifically addressed the State's argument that redaction of the name of a case eliminates the public's right to know the existence of a court file and ruled that when the Court follows GR 15(c)(2) and the Ishikawa factors, it does not violate article I, § 10 of the Washington Constitution. 151 Wn.App. at 948-49.

This Court found GR 15(c)(2), as harmonized with the Ishikawa factors, properly considers the competing interests between the public's right to access court files and the privacy interests of the defendant. Id. at 950. The Court held the right of access to court records is not absolute and must be consistent with reasonable expectations of personal privacy as provided by article I, § 7 of the Washington Constitution. Id. at 952.

The State repeatedly argues that the Washington Constitution guarantees the public's right of access to court records. AOB at 3, 13, 14, 16, 17, 18. Despite the repeated efforts to call this Court's attention to the public's right of access, the State fails to recognize strong precedent and the court rule that the public's right to access to court records is not absolute and must be consistent with expectations of privacy under article I, § 7.⁷ GR 31; Rousey, 151 Wn.App. at 952. The Rousey decision is a good example of the competing interests involved between a public's right to view court records and an individual's right to privacy. In fact, in GR 31 the Washington Supreme Court declared that the policy and purpose of the rule is to facilitate public access to court records, but that such access

⁷ Dreiling, 151 Wn.2d at 903-04 (the public's right of access is not absolute and may be limited "to protect other significant and fundamental rights."); Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) (right of access to the courts not absolute and may be outweighed by some competing interest); Waldon, 148 Wn.App. at 957; Beuhler v. Small, 115 Wn.App. 914, 918-19, 64 P.3d 78 (2003)(right to inspect and copy judicial records not absolute and must be weighed against individual privacy interests, including court documents such as affidavits of probable cause, search warrants, and inventories).

“is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, § 7 of the Washington State Constitution . . .”

This Court should decline the State’s invitation to overrule the Rousey decision and prevent courts from redacting a person’s name from SCOMIS. In Rousey, the petitioner asked the court to redact her full name from the record of a dismissed detainer action but the court denied her motion. 151 Wn.App. at 945. On appeal, the Rousey Court considered the two competing interests involved – the public’s right to access of court records and the individual’s right to privacy. The Court found that in cases such as Ms. Rousey’s, the public’s right to access court records can be outweighed by an individual’s right not to have court records viewed by the public, including the name of the case in SCOMIS. 151 Wn.App. at 949. The Rousey Court correctly held that redaction of a name in the title of a case is possible as long as the court undergoes the proper consideration of the rights of the defendant versus the right of the public to access court records.

In the instant case, Judge Doyle fully complied with this Court’s Rousey decision. The court decided that the appellant’s privacy interests outweighed the public interest in access to the court record bearing his name, finding the appellant did not receive a conviction, the court had

dismissed the case under the prosecutor's motion to dismiss, the case was 18 years old, the public had little interest in an arrest 18 years old where the charge was dismissed by the prosecutor, and the appellant had significant privacy interests because such data can affect his ability to travel and gain employment. CP 130-31. The court expressly found that the compelling privacy interests outweighed the public interests in access to appellant's name data. CP 131.

5. Fairness and principals of equity must allow a court to delete Respondent's name from the court record so that he will no longer be harmed by the dismissed charge. In Washington, some cases where an individual is found guilty are deleted from the JIS system or made so that public access is limited. During the district court's inquiry of the district court clerk, the court asked whether the courts were currently expunging records, to which Ms. Grindle answered, "I don't believe so, although I have to say, . . . traffic infractions are deleted completely out of the system." 10/27/09RP 24. Respondent argues that it is fundamentally unfair for the court to deny deletion or modification of his court record of nonconviction data, while for traffic infractions, where a person has been found guilty of committing the infraction, it is deleted completely out of the court system. If the court has the authority to delete such infractions,

doctrines of fairness and equity require nonconviction data be similarly deleted.

Vacated sentences are also made unavailable to the public. A close reading of GR 15(c)(2) and GR 15(d) shows the unjust disparity between cases where a person is convicted of a crime which is later vacated (under RCW 9.92.066, RCW 9.95.240 or RCW 9.94A.640) and a person, such as Respondent, who is at one time charged with a crime but there is no trial, no conviction and nothing to be vacated. For the person who had a finding of guilt and a conviction, GR 15(d) allows the public indices to be limited to the case number, case type, name of the defendant and the notation “vacated.” But for a court record with only nonconviction data, the remedy under GR 15(c)(4) allows a clerk to keep in the indices the case number, name of the defendant, and only a notation “case sealed.” Accordingly, the public is left with the misimpression under both scenarios that for the person convicted at least the reason his case was sealed was because his conviction was vacated, while for the person, like Respondent in this case, who had a case dismissed on the prosecutor’s own motion before a trial even began, will indicate a criminal record that is merely sealed with no notation that the case was dismissed before any trial and there was no conviction.

This Court should hold that this reason alone identifies the existence of an identified compelling circumstance that requires sealing or redaction under GR 15(c)(2)(F).⁸ By allowing the court to redact the information from the title of the case, J.S. receives a just remedy for ensuring his dismissed charge does not harm him. Sealing alone is an inappropriate remedy. With a sealed record, the public can still see that J.S.'s name is attached to a criminal record from the title itself, State v. [Respondent's Name]. Moreover, because of the method district court uses to input a person into JIS, first with a probable cause number and then again with a court number, the public sees that there are two criminal cause numbers for the Respondent, when in fact only one incident occurred. In addition, when a record is sealed, the public can only use its imagination as to what offense was committed and can speculate that the offense may have been an assault, child luring, or domestic violence. The worst part about sealing in the instant case is that the public does not know that the case against J.S. was dismissed on the State's own motion three months after the arrest. Sealing unduly harms J.S. because the remedy does little to stop the public from using the record against him.

⁸ See Washington Supreme Court ruling denying discretionary review of expungement issue, wherein the Court Commissioner ruled, "J.S. may have a fairly compelling policy argument that a court should be able to delete nonconviction data, just as it can other data under RCW 9.95.240 and RCW 9.94A.230. But RCW 10.97.060 does not provide a basis for accomplishing this result."

6. The State's argument that even if the record was not destroyed, the court exceeded its authority under GR 15(c)(4) is contrary to caselaw and the court rule. The State argues this Court should modify the Rousey decision, asserting "Rousey conflicts with several provisions of GR 15." AOB at 15. This Court should reject the State's invitation. In Rousey, this Court correctly recognized that SCOMIS met the definition of a court record and that GR 15(c)(2) authorizes a court to order redaction, if it determines that redaction is justified by identified compelling privacy concerns that outweigh the public interest in access to the court record. Rousey, 151 Wn.App. at 947. But the State argues for the first time on appeal that redaction of the record as authorized under GR 15(c)(2) would somehow violate GR 15(c)(4) because that rule "lists information to remain available on court indices for public viewing even when a court file is sealed, including the cause number, case type, and names of the parties." AOB 15-16. The State's argument is flawed.

GR 15(c)(4) provides:

Sealing of Entire Court File. When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation "case sealed," the case type and cause of action

in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

This Court has properly recognized that GR 15(c)(4) is a procedural rule and not a substantive rule that establishes a standard for determining whether a court file should be destroyed, sealed or redacted. Waldon, 148 Wn.App. at 959, citing 2 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE GR 15 AUTHOR'S CMTS. TO DRAFTERS' CTMS. AT 16 (6TH ED.Supp.2008).

GR 15(c) is broken down as follows: section (1) explains who may request a hearing to seal, (2) gives a court authority to seal or redact a court record, (3) limits the authority of the court in deciding whether to seal or redact a file, followed by sections (4) through (6), which are procedural rules for the court clerk to follow, including (4) what a clerk must do when a court seals an entire court record, (5) what a court must do when the court orders the sealing of specified court records, and (6) what a court must do when a court record is redacted.

GR 15(c)(4) explains to the clerk the procedures the clerk must undertake following a court order – “When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access.” The Rule then explains to the clerk that the

clerk should then limit the information on the court indices to the case number, names of the parties, and give a notation “case sealed.”

The procedural rule GR 15(c)(4) provides an upper limit on the information that can be stored on the index – it does not set a floor. The rule states “[t]he information on the court indices is limited to the case number, names of the parties, the notation ‘case sealed,’ and the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply.” The rule contemplates that no more than this bare amount of information should be in the index; it does not prohibit a court from redacting a case name to protect an individual’s privacy. The Rousey Court correctly held a judge “may order redaction” of a name in the title of a case. 151 Wn.App. at 947, 949. This Court should reject the State’s invitation to overrule the decision.

The State in essence argues that, despite GR 15(c)(2), the substantive rule which allows a court to redact a court record to make it inaccessible to the public, the procedural rule GR 15(c)(4) requires the name be kept on the title of the case and somehow should override the substantive rule. The rules concerning the Judicial Information System itself fully contemplate and accommodate the possible sealing and redaction of information contained in the court record system. JISCR 11

“All court record systems must conform to the privacy and confidentiality rules as promulgated by the Supreme Court upon the recommendation of the Judicial Information System Committee and approved by the Supreme Court, which rules shall be consistent with all applicable law relating to public records.”) Consistent with GR 31(a), “the policy of the courts [is] to facilitate public access to court records, provided such disclosures in no way present an unreasonable invasion of personal privacy. . . .” Compare JISC 15 with GR 31(a). The Rousey Court holding that redaction of a name in SCOMIS is fully consistent with the rules of JISC, GR 15 and GR 31(a). The Rousey Court properly recognized the court authority under GR 15(c)(2) to change the title of a case and the decision does not conflict with the remainder of the court rule(s).

7. GR 15(c)(6) and 15(c)(5) require a publicly accessible record reflecting the redacted record, but does not necessitate the party’s full name in the order to redact. GR 15(c)(6) Procedures for Redacted Court Records states that when a court record is redacted, the original court record shall be replaced in the public court file by the redacted copy and the original unredacted court record shall be sealed following the procedures in GR 15(c)(5). GR15(c)(5) then directs the clerk to preserve the docket code, document title, document number and date of the original court records. The rule does not state that the clerk must preserve the

original document tile and therefore allows the clerk to substitute the redacted title for the document title. GR 15(c)(5)(B) then requires the sealed record to be returned to the file or sealed separately, and directs the clerk to restrict access to any medium “so as to prevent unauthorized viewing of the sealed court record.” Lastly, GR 15(5)(c) requires any sealing order and supportable findings then be publicly accessible.

The State argues for the first time on appeal, that this sealing order must also include the party’s full name in the file, arguing again that it would be the only way the public could locate a record pertaining to a specific individual. AOB 17. But the State’s argument must fail for the same reasons its argument that a court file must bear the full name of the parties above. See § E(1)(c) supra. The State is simply wrong in believing the public must be able to know the names of every party that comes before the court and that the names of those individuals must always be available no matter what privacy issues are at stake. The reasons for the constitutional right to access court records is to ensure fairness in court proceedings and to allow for a check of the judicial branch potential abuses of power – it is not simply to find out what parties ever had a court hearing.⁹ In fact, Ms. Grindle testified that for some cases

⁹ Public access allows the public to monitor the conduct of judicial proceedings, providing an effective restraint on the possible abuse of judicial power. Richmond Newspapers, Inc. v. Virginia, 448 U.S at 592, 596 (1980)(Brennan, J., concurring). The

the public has no right to access court records, such as traffic infractions which are “deleted completely out of the system.” 10/27/09RP 24. The Washington Supreme Court has noted that the public interest in access to a court record is greatest where the record is necessary to understand what happened in a particular trial and to evaluate how the court heard and decided a case. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 542, 114 P.3d 1188 (2005). The Court also recognized that the public has “very little, if any interest” in court records that are not relevant to the administration of justice. Rufer, 154 Wn.2d at 548 (art. 1, §10 not relevant to documents that do not become part of court’s decision making process).

In Dreiling, the Court held that discovery may be sealed for good cause under CR 26(c). 151 Wn.2d at 909. The Court found that much of the discovery may be unrelated or only tangentially related to any cause of action. 151 Wn.2d at 909, citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). The Court distinguished the public right to access materials attached to a summary judgment motion, since summary judgment effectively adjudicates the substantive rights of the parties, just like a full trial. Dreiling, 151 Wn.2d at 910.

constitutional provisions “assure a fair trial, foster public understanding and trust in the judicial system and give Judges the check of public scrutiny.” Dreiling, 151 Wn.2d at 903-04; Waldon, 148 Wn.App. at 957.

Here, however, there was no trial and there was not even a summary judgment. Rather than defense moving to dismiss the case before a trial, the State filed the motion to dismiss soon after J.S.'s case was docketed. The public has no interest to view how the court simply granted the State's unopposed motion to dismiss an arrest. The reason for a public right to access of court records is not to demean and invade the privacy rights of others, but instead the right to access of court records is to give the public a right to scrutinize the government function of a court to determine what the courts are up to. The State has failed to articulate any reason why the public would want to view this dismissed nonconviction data that took place 18 years ago. See United States Dep't of State v. Ray, 502 U.S. 164, 112 S.Ct. 541, 549, 116 L.Ed.2d 526 (1991) ("Mere speculation about hypothetical public benefits cannot outweigh demonstrably significant invasion of privacy").

J.S. requests this court award attorney fees and costs on appeal under RAP 18.1. J.S. prevailed in the superior court below. By filing before this Court, the State has forced J.S. to incur additional costs and attorney fees. If deemed the prevailing party on appeal, J.S. requests permission to file within 10 days after filing a decision, an affidavit regarding attorney fees and expenses. This Court may award terms and compensatory damages for a frivolous appeal. RAP 18.9(a); RAP 18.1;

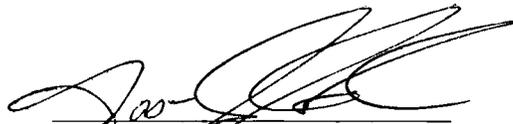
see also, In re Marriage of Healy, 35 Wn.App. 402, 406, 667 P.2d 114, rev. denied, 100 Wn.2d 1023 (1983). RCW 4.84.185 provides that in any civil action, the court may award attorney fees as a sanction for filing a frivolous action. The RALJ court in no way “destroyed” a court record. This Court should award costs and attorney fees.

D. CONCLUSION

For the foregoing reasons, J.S. respectfully requests this Court affirm the RALJ court and allow the modification of the name of the case on SCOMIS and JIS.

DATED this 16th day of May, 2011.

Respectfully submitted,
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