

FILED

APRIL 10, 2015

Court of Appeals
Division III
State of Washington

NO. 33064-8-III

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

JOHN DOE,

Appellant,

v.

BENTON COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondent.

BRIEF OF APPELLANT

JASON B. SAUNDERS
Attorney for Appellant

LAW OFFICES OF GORDON & SAUNDERS
1111 Third Avenue, Suite 2220
Seattle, Washington 98101
(206) 322-1280

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT..... 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 4

 1. Background..... 4

 2. Motion to Allow Petition for Relief from Duty to Register to be filed as a new civil case with a new cause number and to Allow the Petition for Relief from Duty to Register to identify the Petition as John Doe and to hold in abeyance the submission of material in support of the Petition pending resolution of the Motion to Redact/Seal Records 8

E. ARGUMENT..... 14

 1. Under GR 15 and the Ishikawa factors, the Court erroneously denied Petitioner's Motion to Redact or Seal the Defendant's Record..... 14

 a. While the public has a constitutional right of access to court records, that right can be outweighed by the privacy rights of individuals 15

 b. John Doe's privacy interests outweigh the public's right to access court records concerning his petition for termination of the registration requirement 17

 c. John Doe should have been able to modify the title of the case under a new civil cause number as authorized by GR 15 and the *Ishikawa* factors 19

 d. The State's argument that Encarnacion and McEnry are similar to the case at bar is meritless 20

e. The Court of Appeals Rousey decision demonstrates that a court record can be redacted to ensure the public has no access to the court record 28

f. Fairness and principals of equity must allow a court to delete Respondent's name from the court record so that he will not be subjected to Ms. Zink's zealously in wanting a website that includes all Level 1 sex offenders 31

F. CONCLUSION 32

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT DECISIONS

Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993) 29

Dreiling v. Jain, 151 Wn.2d 900, 93 P.3d 861 (2004) 16, 29

Hudtofte v. Encarnacion, 181 Wn.2d 1, 330 P.3d 168 (2014) 10, 12-13, 20-23

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182W (2005) 10, 26

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982)2, 10, 13-14, 19-20, 24, 28

State v. John Doe, 105 Wn.2d 889, 719 P.2d 554 (1986) 27

WASHINGTON STATE COURT OF APPEALS DECISIONS

Indigo Real Estate Services v. Rousey, 151 Wn.App. 941, 215 P.3d 977 (2009) 28-30, 32

Beuhler v. Small, 115 Wn.App. 914, 64 P.3d 78 (2003) 29

State v. Lee, 159 Wn.App. 795, 247 P.3d 470 (2011) 15

State v. McEnry, 124 Wn.App. 918, 103 P.3d 857 (2004). 11-14, 20, 23, 24

State v. Waldon, 148 Wn.App. 952, 202 P.3d 325 (2009) 16, 29

UNITED STATES SUPREME COURT DECISIONS

Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) 15

Landmark Comm. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) 15

<u>Nixon v. Warner Comm., Inc.</u> , 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).....	16
<u>Press-Enterprise Co. v. Superior Court</u> , 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).....	16
<u>Richmond Newspapers, Inc. v. Virginia</u> , 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).....	15

FEDERAL DECISIONS

<u>Chicago Tribune Co. v. Bridgestone/Firestone, Inc.</u> , 263 F.3d 1304 (11 th Cir. 2001).....	16
<u>NBC Subsidiary, Inc. v. Superior Court</u> , 20 Cal.4 th 1178, 980 P.2d 337 (1999).....	15

OTHER DECISIONS

<u>In the Matter of 2 SEALED SEARCH WARRANTS</u> , 710 A.2d 202 (1997).....	17
<u>United States Dep't of State v. Ray</u> , 502 U.S. 164, 112 S.Ct. 541, 549, 116 L.Ed.2d 526 (1991).....	23

WASHINGTON STATE CONSTITUTIONAL PROVISIONS

Const. art. I, § 7.....	29-30
Const. art. I, § 10.....	10, 15, 26, 28
Const. art. I, § 22.....	11

STATUTES

RCW 2.28.150.....	9
RCW 4.24.550.....	4-5, 17
RCW 42.56.050.....	1, 18

RCW 42.56.540	8
RCW 9A.44.142	9

OTHER AUTHORITIES

Annie Andrews, <i>Should there be a level 1 sex offender registry</i> , KEPR 19, Aug. 9, 2013, http://www.keprtv.com/news/local/Should-there-be-a-level-1-sex-offender-registry-219085541.html	6
--	---

RULES

GR 15.....	2, 10, 14, 19, 28, 31-32
RAP 18.1	32

A. SUMMARY OF ARGUMENT

Level 1 sex offenders are deemed by the Washington Legislature to be low risk to the community and therefore are not listed on public websites as are Level 3 sex offenders. Donna Zink, a private citizen, decided she wanted to create a public website of Level 1 sex offenders and made a public disclosure act request for all Level 1 sex offender registration forms filed/maintained in Benton County. Ten Level 1 sex offenders filed a lawsuit to enjoin the disclosure of the records, arguing their privacy rights would be violated because disclosure of the information would be highly offensive to a reasonable person and there was not a legitimate concern to the public under RCW 42.56.050. Benton County Superior Court ruled in favor of the plaintiffs, found the plaintiffs had a well grounded fear of invasion of their privacy rights, denied her PDA request, enjoined production of public records and enjoined Benton County from releasing Level 1 registrant forms.

One of the plaintiffs in the action, John Doe, later sought to terminate his sex offender registration requirement and additionally asked the court to redact his name and other identifiers (date of birth, social security number, etc.) in order to maintain his anonymity from Donna Zink during the proceedings. John Doe

argued he believed the public had the right to an open court during the proceeding to ensure the public's right to scrutinize judicial proceedings and decisions and the administration of justice, but argued that his privacy right outweighed the public's right to that information while the injunction proceedings were being appealed. The judge deciding the termination of registration requirement denied his request, finding under GR 15 and the Ishikawa factors that John Doe had failed to identify sufficient compelling privacy or safety concerns that outweigh the public interest in access to court records.

B. ASSIGNMENTS OF ERROR

The superior court erroneously found that the defendant had failed to identify sufficient compelling privacy or safety concerns that outweighed the public interest in access to court records under GR 15 and the Ishikawa factors.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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. In the instant case, John Doe had prevailed on an earlier motion to seal records and for a preliminary injunction. The court ruled the

plaintiff had a well grounded fear of invasion of his privacy rights and allowing the release of information to Donna Zink would be highly offensive and such records were not a legitimate concern to the public. He did not ask that the court close the public from the hearing, only that the court records not divulge his identity. Did the trial court err in concluding John Doe failed to identify a compelling privacy or safety concern that outweighed the public's interest in access to court records, where the public had fair access to the judicial proceedings to ensure fairness and check against judicial abuse?

2. 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. Here, the legislature as well as the judge in the preliminary injunction case found John Doe had a privacy interest such that his name should not be on a public website. Should his name be found out by Donna Zink, she has promised to list his name as a Level 1 sex offender on her website. Did the superior court err in determining the appellant failed to identify sufficient compelling privacy or safety concerns that outweighed the public interest in access to court records?

3. Do the doctrines of equity and fairness require this Court allow redaction of a title of a case where public access to his true identity would lead to dissemination of information that the legislature and the preliminary injunction judge determined the public had no right to know and information that would cause substantial harm to John Doe and his family?

D. STATEMENT OF THE CASE

1. Background. Appellant Jon Doe is a Level 1 sex offender in the State of Washington. CP 5. In Washington State, a comprehensive statutory scheme governs the release of information to the public concerning all sex offenders, as codified under RCW 4.24.550. Under this statute, entitled Sex Offenders and kidnapping offenders – Release of information to public – Web site, Washington State Legislators enacted a code that breaks down the offense level of the sex offender upon release, and for each level, greater public dissemination of material is given to the public to ensure the public's safety. For Level 1 Offenders, public agencies must share information with other appropriate law enforcement agencies and, if the offender is a student, the school which the offender is attending, or planning to attend. RCW 4.24.550(3). The agency may disclose, upon request, relevant,

necessary, and accurate information to any victim or witness to the offense and to any individual community member who lives near the residence where the offender resides, expects to reside, or is regularly found. Id.

But for Level 2 and 3 Sex Offenders, more organizations and public areas are given additional information. Id. Importantly, the public is given access to a website of Level 2 and 3 Sex Offenders who reside in the area by a web site that depicts the person's photograph and his address. RCW 4.24.550(4). Sex offender registration information is also exempt from release under the Public Records Act absent an evaluation of the offender to determine whether information should be disseminated to the public to protect the public.

Because level 1 sex offenders do not pose such a risk, their identity is not placed on public websites, as their privacy interests outweigh the public's right to see their depictions on websites. Accordingly, their photographs, names and crimes are not listed on the county sex offender sites.

This method of public dissemination of sex offenders contingent on the level of sex offense has worked very well in the State of Washington. But a former city council member and former

mayor of Mesa (population 496), Donna Zink (currently a private citizen), has decided to make a public website of all sex offenders, including Level 1 sex offenders. App. A (Annie Andrews, *Should there be a level 1 sex offender registry*, KEPR 19, Aug. 9, 2013, <http://www.keprtv.com/news/local/Should-there-be-a-level-1-sex-offender-registry-219085541.html>). Ms. Zink has made a living from filing public records requests and suing cities who do not comply with her public records requests. *Id.* Zink originally filed public disclosure requests for every Level 1 sex offender living in Franklin and Benton Counties – 577 people, including juveniles. *Id.* Franklin County, wherein the City of Mesa lies and therefore cognizant of Zink’s lawsuits, quickly handed over the information Zink requested. Since her early requests, Ms. Zink has now requested the names of every Level 1 sex offender listed with the Washington State Patrol, which includes all 38 counties.

On July 15, 2013, Donna Zink submitted a request for public records to Benton County for “All Level One Sex Offender Registration form filed/maintained in Benton County.” CP 19 (Order Granting Preliminary Injunction, Benton County Superior Court No. 13-2-02039-1). Benton County provided third-party notification to Level 1 sex offenders advising them about Ms. Zink’s request. *Id.*

Ms. Zink then also requested the third party notification letters as well. Id.

The Honorable Bruce Spanner considered a motion to grant a preliminary injunction on August 30, 2013, and found that the plaintiffs have a “well grounded fear of invasion of their privacy rights.” CP 20 (Finding of Fact 7). The court found the legislature clearly intended public agencies to disseminate warnings concerning sex offenders “under limited circumstances” when it is necessary to protect the public because a specific offender poses a threat to the community. Id. (Finding of Fact 9). After reviewing declarations by the plaintiffs, the court found that the release of information to Zink would be “highly offensive to a reasonable person” where there is no evidence plaintiffs present any risk of harm. Id. (Finding of fact 10). The court granted a preliminary injunction, enjoined Benton County from releasing Level 1 registrant forms of the plaintiffs, and redacted names, addresses and telephone numbers of any compilations of sex offenders. CP 21-22.

Judge Spanner also entered an Order Granting Plaintiffs’ Motion to Seal Records on the same date (August 30, 2013). CP 14. The court found that Ms. Zink intended to disclose information

about the plaintiffs on the internet, and plaintiffs had a right to challenge any disclosure of the records under RCW 42.56.540. CP 14-15. Because the procedure under RCW 42.56.540 requires a motion and affidavit of the person named in the record seeking to enjoin the production of the record, the judge ordered the records sealed to protect their privacy rights until a decision is made on the merits. CP 15.

2. Motion to Allow Petition for Relief from Duty to Register to be filed as a new civil case with a new cause number and to Allow the Petition for Relief from Duty to Register to identify the Petition as John Doe and to hold in abeyance the submission of material in support of the Petition pending resolution of the Motion to Redact/Seal Records. On July 28, 2014, John Doe filed a motion entitled,

EX PARTE MOTION:

- (1) To Allow Petition for Relief from Duty to Register to be filed as a new civil case with a new cause number;
- (2) To Allow the Petition for Relief from Duty to Register to identify the Petition as John Doe; and
- (3) To hold in abeyance the submission of material in support of the Petition pending resolution of the Motion to Redact/Seal Records.

MOTION FOR ORDER:

- (1) To Redact &/or Seal Records.

CP 8. In the motion, John Doe wanted to maintain the privacy and anonymity he obtained from the Order to Seal and Order Granting Preliminary Injunction in No. 13-2-02039-1. CP 4. John Doe requested that the court determine his petition for relief from the duty to register, allow him to file the petition with a new cause number and maintain his name as “John Doe 1” as he is named in the companion case. CP 8-9.

John Doe argued that he was entitled to relief from registration pursuant to RCW 9A.44.142. CP 10. Moreover, Doe argued that under RCW 2.28.150, the court had the authority to carry out the motion, allow the motion to be filed ex parte, and have the court issue a new civil cause number. Id. Because he had already been successful in his petition for injunction under the name “John Doe 1,” Doe believed that had he filed the relief for termination of his registration requirement in criminal court with the same cause number, he would then be easily identified, causing him irreparable harm. CP 11. John Doe also asserted that the disclosure of his real name and cause number in the instant case would “effectively deprive him of the relief sought and obtained in the companion case” CP 12.

John Doe also filed a Memorandum of Law, arguing John Doe's identity should be protected by using the Name John Doe and any documents should be redacted and if necessary filed under sealed if they give any identifiers that would allow Ms. Zink to determine his identity. CP 5. Under GR 15 and the Ishikawa factors, John Doe argued he had a compelling privacy interest in maintaining his anonymity given the existence and substance of the preliminary injunction. CP 6.

The State opposed the petition, arguing courts must start with the presumption of openness. CP 30, citing Hudtofte v. Encarnacion, 181 Wn.2d 1, 7, 330 P.3d 168 (2014), quoting Rufer v. Abbott Laboratories, 154 Wn.2d 530, 540, 114 P.3d 1182W (2005)). The State argued that under article 1, § 10 of the Washington Constitution, justice must be conducted openly and ensures public access to court records. CP 30-31. The State asserted that the public has a significant interest in knowing what individuals are removed from the sex offender registration list, as well as what factors the government used to make that determination. CP 31-32. The State also contended that John Doe had failed to show a "serious and imminent threat" to a personal

privacy interest that outweighs the public's right of access under the Washington Constitution. CP 32.

The State argued that sealing and redaction is not appropriate when it would be available to all similarly-situated litigants because sealing is only justifiable in "unusual circumstances." CP 36. The State argued that here, John Doe's situation is no different than any other sex offender who petitions to be relieved from his/her registration requirement. Id.

The State also cited State v. McEnry, 124 Wn.App. 918, 103 P.3d 857 (2004), a case in which Division 2 of the Court of Appeals reversed a sealing order because the records *might* adversely affect the defendant's current or possible future employment because no evidence was presented to establish a "serious and imminent threat." CP 37.

In the Reply Brief, John Doe argued Article 1, § 22 requires only criminal trials be open to the public. CP 43. Since this is a civil proceeding and not a criminal trial, the public openness guaranteed under this provision is not violated. Id. John Doe also argued that he has a compelling privacy interest, which was already recognized in the earlier companion case, John Doe 1 et al. v. Benton County. CP 44. The petitioner also argued that the public's

right of access is not absolute and must be determined on a case-by-case basis. CP 45-46.

Distinguishing John Doe's case to the Encarnacion and McEnry cases, John Doe argued he is case is distinct from other sex offenders, because he had received protections to protect his privacy rights in the injunction case citing a distinct and unusual circumstances – Donna Zink, and her desire to list all Level 1 sex offenders on a website, including Doe if she finds out who he is. CP 48. This is different from situations where Ms. Zink is not involved and would not result in an "automatic class of sealed cases." Id. Unlike McEnry, Doe did not just argue a theoretical *potential* harm, he named Ms. Zink, who will list his name when the name becomes available to her. CP 48-50.

Importantly, the sealing and/or redaction of the record is tied to the injunction case, where if the plaintiffs do not prevail on appeal, the records will be immediately unsealed. CP 50.¹ Doe argued that he would lose the protections he was afforded in the injunction case, since Ms. Zink could then have the easy task of

¹ Currently the appeals concerning Ms. Zink are stayed in Division 3, pending a Washington Supreme Court ruling in John Doe v. Wash. State Patrol, et al, No. 90413-8. Oral arguments are currently set for June 9, 2015, and a decision is expected thereafter.

figuring out who John Doe 1 was if the instant case was not sealed or redacted. CP 44.

Concerning the Ishikawa factors, John Doe argued 1) he made a showing of the need, 2) an opportunity to object is satisfied when the motion is heard, 3) the least restrictive means available in protecting the interests threatened is satisfied through redaction; 4) John Doe's privacy interest outweighs the public's right to have the information because there is a serious and imminent threat (Ms. Zink); and 5) the order has no broader application or duration than necessary. CP 51-52.

A hearing was held on December 12, 2014, in Benton County Superior Court, before the Honorable Carrie L. Runge. John Doe informed the court that identifiers such as date of birth, DOC number, criminal cause numbers, telephone numbers, and police reports, would provide sufficient information such that Donna Zink would be able to determine the identity of John Doe and list him as a Level 1 sex offender on her website. RP 5. Doe properly distinguished Encarnacion and McEntry from his case. RP 7-9.

The State argued that filing a document relieving John Doe of the duty to register as a sex offender "would have no real effect." RP 9. The Sheriff's office needs to know who John Doe is to be

taken off the registration list. Id. The State reiterated its concern that the petitioner had not identified a compelling interest that separates him from the rest of the sex offenders. RP 11. The State also argued the public had an interest in knowing when a sex offender has been taken off the registration list. RP 12.

The Court denied the motion to seal and/or redact. RP 15. The court found John Doe's case indistinguishable from McEnry. Id. The court also ruled it "cannot find that there is a serious or imminent threat to some in-court interest of John Doe 1." Id.

The court entered written findings as follows:

1. After reviewing GR 15, as well as the factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 38 (1982), the Defendant has failed to identify sufficient compelling privacy or safety concerns that outweigh the public interest in access to court records in this matter.
2. Additional motion(s) by Petitioner (to redact/seal) on the basis of additional declarations is reserved and not prohibited by this order.

CP 63. The petitioner timely appealed. CP 64-73.

E. ARGUMENT

1. Under GR 15 and the Ishikawa factors, the Court erroneously denied Petitioner's Motion to Redact or Seal the Defendant's Record
 - a. While the public has a constitutional right of access to court records, that right 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. 829, 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.Ed.2d 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).

The protections afforded under article 1, § 10 of the Washington Constitution “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 access to court records is not absolute. Nixon v. Warner Comm., Inc., 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); Waldon, 148 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 Co. 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).

b. John Doe's privacy interests outweigh the public's right to access court records concerning his petition for termination of the registration requirement. In the instant case, the public's right to access John Doe's relief from registration requirement hearing is outweighed by John Doe's right to privacy in such information. While the public might be interested in the underlying criminal conviction record and the fact that he was a registered sex offender, the public's interest in the termination of the registration requirement is not as strong as Doe's privacy interest in that information.

For Level 1 Offenders, public agencies share information with other appropriate law enforcement agencies and inform the school if the offender is a student or planning to be a student at a school. RCW 4.24.550(3). Upon request, the agency may also disclose necessary information to any victim or witness to the offense and to any individual community member who lives near

the residence where the offender resides, expects to reside, or is regularly found. Id. Information about the registration requirement for Level 1 sex offenders is not made accessible to the public via a website. RCW 4.24.550(3). The Washington Legislature has determined that the risk to the public is not substantial enough to place Level 1 sex offenders on a website.

Judge Spanner also determined that the public's right to know John Doe's identity was outweighed by Doe's right to privacy, finding under the Public Disclosure act, RCW 42.56.050, that Doe's right to privacy would be invaded should the information be made public and the information is "not of legitimate concern to the public." CP 20, 21. That is two branches of government in Washington agreeing that the public's right to know is outweighed by the privacy interest of the Level 1 sex offender.

Importantly, the public still has great access to information they need concerning John Doe, his conviction and his registration requirement. The information that John Doe committed a sex offense is still accessible to the public – his criminal record still can be accessed, which shows his crime as well as the fact he had to register as a sex offender. Redaction of the title of the case simply for the termination of the registration requirement is not of great

value to the public, since the information was not accessible to the public earlier via a public website and any information that the public wants to know about Doe can still be located under his criminal cause number.

c. John Doe should have been able to modify the title of the case under a new civil cause number 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.

The district court made the following findings in the Order Denying Petitioner's Motion to Redact and/or Seal Records:

1. After reviewing CR 15, as well as the factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 38 (1982), the Defendant has failed to identify sufficient compelling privacy or safety concerns that outweigh the public interest in access to court records in this matter.
2. Additional motion(s) by Petitioner (to redact/seal) on the basis of additional declarations is reserved and not prohibited by this order.

CP 63. The court failed to make any findings concerning the balance of the Ishikawa factors.²

d. The State's argument that Encarnacion and McEnry are similar to the case at bar is meritless. Hundtofte v. Encarnacion is not similar to the case at bar. In that case, the owners of a building filed an unlawful detainer action against two tenants, which was later resolved by stipulation and the tenants were not evicted.

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"

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30,38-39, 640 P.2d 716 (1982).

Hundtofte v. Encarnacion, 169 Wn.App. 498, 502, 280 P.3d 513, 516 (2012) aff'd, 181 Wn.2d 1, 330 P.3d 168 (2014). When the two defendants later attempted to find housing elsewhere, they were denied rental housing due to the court record of the unlawful detainer case. Id. at 503. The trial court agreed with the defendants that their names should be redacted and be replaced by their initials in the title of the case in the court's electronic records index. 169 Wn.App. at 502.

The Court of Appeals found nothing distinguished the defendants from any other defendants in unlawful detainer actions that were also not ultimately evicted. Id. The Court reversed the trial court ruling because if that relief were afforded, it "would similarly be available to all such litigants." Id. The Court concluded, "such a de facto 'automatic limitation' on the public's right to open courts effectively precludes the case-specific analysis mandated by article I, section 10." Id.

The Washington Supreme Court affirmed the Court of Appeals in a case where there is no majority decision. Hundtofte v. Encarnacion, 181 Wn.2d 1, 9, 330 P.3d 168, 173 (2014). Instead, five judges could only agree that the ultimate ruling of the Court of Appeals was correct, but not as to why the Court of Appeals was

correct. Four justices believed that the privacy interest at stake was not sufficiently compelling to warrant redaction, since petitioners were able to find rental housing for their family but would have preferred housing closer to Burien. Hundtofte v. Encarnacion, 181 Wn.2d at 9. Another justice did not believe a name *could* be redacted from court records, but otherwise did not agree with the other four. 181 Wn.2d at 12-13. Two justices dissented, arguing housing concerns are sufficiently important to justify redaction. Id. at 22-26. Finally, the last two justices found that the appeal should have been dismissed on procedural grounds. 181 Wn.2d at 26-27.

The case at bar is not the same. Here, John Doe's case is unique and his circumstances compelling. In Encarnacion, the defendants were already identified in the unlawful detainer action. Here, John Doe is not identified in the preliminary injunction action, wherein the court determined he had a compelling privacy interest and the public was not at any risk of harm by plaintiff. CP 20. Moreover, unlike all other Level 1 sex offenders, Mr. Doe was part of a party in a preliminary injunction case with a limited number of parties, which prevailed at the superior court level (10 plaintiffs).

The circumstances are also unique and compelling because John Doe is concerned that public access to this hearing and order

would lead to humiliation for him, as well as his family (including his children who are in school). CP 20, 21. Doe also does not want to give up the protections afforded in his preliminary injunction case, which would happen if his identity was available to the public and hence Ms. Zink. CP 47-48. He is alone among all the participants in that case in that he is seeking to have the termination of his registration requirement sealed and or redacted. The undersigned attorney on appeal has located no other case in which a party in this injunction case has sought such relief. This case is unique, the circumstances are unique, and the relief sought is unique. There is no similarity to the circumstances in Encarnacion. This Court should find no merit in the State's argument that this case would lead to an automatic limitation to public access. 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").

The State's argument that McEnry is similar is also meritless. In McEnry, the defendant wanted to seal his trial court file because the record could adversely affect current or future employment. 124 Wn.App. 918, 921, 103 P.3d 857 (2004). But the

facts of that case showed that McEnry had actually worked for his current employer for 20 years and nothing indicated that the employer would now check court records. 124 Wn.App. at 921–22. Concerning opportunity for housing, the defendant even conceded that this was not an issue since he owned his own home. 124 Wn.App. at 926. Because of these factual problems, the Court of Appeals ruled that “McEnry failed to show a ‘serious and imminent’ threat to an important interest — he merely argued that his criminal records could affect his employment.” McEnry, 124 Wn.App. at 926, citing Ishikawa, 97 Wn.2d at 37.

This is not a case where John Doe was worried about some potential unknown threat sometime in the future as was the case in McEnry. Here, John Doe is properly concerned that the information about being a Level 1 sex offender would get into the hands of Donna Zink and that she would then place that information on her website. CP 11, 20. This would unnecessary embarrass John Doe, of course, but it would also seriously affect his family. CP 11, 20, 21. The harm was serious and imminent such that his anonymity was preserved during the preliminary injunction.

In the instant case, the public would still have all access to the underlying conviction, including the defendant’s real name,

cause number, and any other identifiers that are currently accessible to the public through SCOMIS. For example, if John Doe's real name was actually "Joe John," the public would have full access to the court records concerning his criminal conviction. Those records, the Information, the Certificate for Determination of Probable Cause, the Verdict Forms, and the Judgment and Sentence (including the sex offender registration requirements) would all be accessible to the public, even Ms. Zink. Accordingly, if a neighbor wanted to check SCOMIS to determine whether the person moving in next to her is a sex offender, he or she can do that and that will not change.

Instead, solely for purposes of the termination of the registration requirement, John Doe requested a separate cause number for this now *civil* case, with no identifiers of his true identity. Any member of the public would still be able to discover the criminal matter through court records, the criminal matter will show the registration requirement. And because he is a Level 1 sex offender, the public would not have access to information on a website concerning his registration requirement. Therefore, the trial court erred in finding John Doe did not identify sufficient compelling

privacy or safety concerns that outweigh the public interest in access to court records.

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 (Const. art. 1, §10 not relevant to documents that do not become part of court’s decision making process). Here, John Doe informed the court that he was not asking the court for a closed courtroom – the public would be entitled to be present at the hearing. CP 44. Doe also asserted he was not seeking to seal all the documents in the case. Id. The public would still be able, under this situation, to fully be present at the hearing, view the administration of justice by the court, and determine how the court heard and decided the matter. Rufer, 154 Wn.2d at 542.

But under Rufer, the public would have no interest in those portions of the court record concerning his identity, because it is not

relevant or incredibly minimally relevant to any decision making process by the court. The only time this civil case would actually be of any importance to the public is if Donna Zink wins on appeal and starts a website with all the information concerning Level 1 sex offenders.

Access to court files using “John Doe” has long been approved in cases such as State v. John Doe, 105 Wn.2d 889, 719 P.2d 554 (1986).³ 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 and remanded for further proceedings. 105 Wn.2d at 891.⁴ 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

³ 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.

⁴ 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.

the fact that the public cannot search for the case with the name of the father, the Supreme Court determined that it should change the title of the case to protect the privacy interests of a father accused of molesting his daughter because there was no conviction.⁵

e. The Court of Appeals Rousey decision demonstrates that a court record can be redacted to ensure the public has no access to the court record. In Indigo Real Estate Services v. Rousey, Division One 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

⁵ 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.

Constitution. 151 Wn.App. at 948-49. The Rousey 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.

Here, the State was only concerned with the public's right of access and failed 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, § 7.⁶ 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, under GR 31 the Washington Supreme Court

⁶ 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).

declared that the policy and purpose of the rule is to facilitate public access to court records, but that such access “is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, § 7 of the Washington State Constitution . . .”

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.

f. Fairness and principals of equity must allow a court to delete Respondent’s name from the court record so that he will not be subjected to Ms. Zink’s zealouslyness in wanting a website that

includes all Level 1 sex offenders. In Washington, some cases where an individual is found guilty are entirely deleted from the JIS system (such as traffic infractions), while others are made so that public access is limited. Here, this is not a criminal matter, but a civil matter. It is not imposing a registration requirement, but rather terminating a requirement. In essence, John Doe's risk is deemed by the legislature to be so low now that he need not register as a sex offender any longer. Asking the court to redact the order terminating his registration requirement is no longer of any interest to the public, but for John Doe, the privacy interest is great, since Donna Zink can figure find this information and not be bound by any injunction by the Benton County Superior Court.

Vacated sentences are also made unavailable to the public. 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."

By allowing the court to redact the information from the title of the case, John Doe will be assured that Ms. Zink cannot locate him and place him on her website.

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).

John Doe requests this court award attorney fees and costs on appeal under RAP 18.1.

F. CONCLUSION

For the foregoing reasons, John Doe respectfully requests this Court reverse the Benton County Superior Court order denying

petitioner's motion to redact and/or seal records to allow the
modification of the name of the case on SCOMIS and JIS.

DATED this 10th day of April, 2015.

Respectfully submitted,
GORDON & SAUNDERS, PLLC

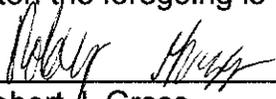
A handwritten signature in black ink, appearing to read 'Jason B. Saunders', is written over a horizontal line. The signature is stylized and somewhat cursive.

JASON B. SAUNDERS, WSBA #24963
Attorney for Appellant John Doe

CERTIFICATE OF SERVICE

Today I deposited in the mail of the United States of America, postage pre-paid, a properly stamped and addressed envelope to **Ryan Lukson, Benton County Prosecuting Attorney's Office, 7122 W Okanogan Pl Bldg A, Kennewick, WA 99336-2359**, containing a copy of the foregoing **Appellant's Opening Brief** filed in **John Doe v. Benton County Prosecuting Attorney's Office**, Cause No. 33064-8-III.

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name: 
Robert J. Gross
Paralegal
The Law Offices of Gordon & Saunders

Date: 4/10/2015