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No. 85665-6  
IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW H. RICHARDSON,

Respondent,

v.

MIKE SIEGEL,

Intervenor/Appellant.

---

~~BRIEF OF APPELLANT~~  
PETITIONER

---

Michele Earl-Hubbard  
Chris Roslaniec  
Attorneys for Appellant/Intervenor  
Mike Siegel

2200 Sixth Avenue, Suite 770  
Seattle, WA 98121  
(206) 443-0200 (Phone)  
(206) 428-7169 (Fax)



ORIGINAL

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## I. INTRODUCTION

This case addresses the ability of the public to monitor a criminal case against a teacher, public official, and candidate for statewide elective office, Matthew Richardson, and to understand and monitor the actions of the court and prosecutor in connection therewith. Richardson was, and still is, a licensed teacher, and a public official who was charged, tried, and entered an Alford plea in 1993, when he was then an adult, to a sex crime against a child. See CP 12.<sup>1</sup> Richardson later had his conviction vacated and the entirety of the case and docket sealed. See CP 12. See Appendix A (Decl. of Chris Roslaniec filed in this Court on March 28, 2011 (“Roslaniec Decl.”), at ¶¶4-11).

This case presents a much-needed opportunity for this Court to clarify and re-emphasize the required procedures for denying access to Courts, in this case in the unique scenario where a record of conviction has apparently been vacated and the file and docket sealed, but without any paper trail for the public to assess how this happened. In addition, this case provides the Court the opportunity to definitively address for the first time the path to review for an intervenor seeking to unseal records in a case that

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<sup>1</sup> For reasons unknown to Siegel’s counsel (Siegel’s appellate counsel was not involved in this action at the Superior Court level prior to the motion to unseal being denied), the referenced article does not appear in the court record, and hence is not in the clerk’s papers. However, the article in question is available at: [http://seattletimes.nwsourc.com/html/localnews/2012581024\\_richardson10m.html](http://seattletimes.nwsourc.com/html/localnews/2012581024_richardson10m.html), last accessed February 10, 2012.

has long since ended—an explanation the public and courts desperately need. Finally, this case affords this Court the opportunity to clarify that parties such as Richardson should not be provided public defenders at public expense solely to pursue continued secrecy of court records.

## II. ASSIGNMENT OF ERROR

Assignments of Error: (1) The trial court erred in issuing the January 25, 2011, Order denying Siegel's Motion to Unseal court documents, (2) the trial court erred in appointing counsel at public expense to push for continued secrecy and sealing in this action, and (3) Siegel's appeal of the denial of motion to unseal was treated as a discretionary appeal instead of an appeal as a matter of right.

### Issues Pertaining to Assignment of Error:

1. Whether a trial court's sealing of a complete docket of a criminal action and all docket entries from the public violates Article I, Section 10 of the Washington Constitution, the First Amendment to the United States Constitution, and GR 15;
2. Whether a court may vacate a criminal judgment and seal all court records, including the sealing orders, and have the underlying matter removed from the Court docket and made inaccessible to the public in compliance with Article I, Section 10 of the Washington Constitution, GR 15 and the First Amendment to the United States Constitution;
3. Whether a Court can permissibly vacate a criminal judgment and seal the record, including the sealing orders, and have the underlying matter removed from the Court docket and made inaccessible to the public without ever performing analysis and the required written findings pursuant to Seattle Times v. Ishikawa,

Article I, Section 10 of the Washington Constitution, GR 15, and the First Amendment to the United States Constitution;

4. Whether Richardson met his burden under Seattle Times v. Ishikawa and GR 15 to justify sealing of the records or sealing or the docket here;
5. Whether an intervenor may appeal a sealing order or the denial of a motion to unseal as a matter of right in a case where sealing is the sole remaining issue rather than being required to petition for discretionary review; and
6. Whether a party in a long-closed criminal action seeking to seal or maintain sealing of court records and docket is entitled to appointed counsel at public defense when the party will face no threat of incarceration or fine if records are unsealed?

### **III. STATEMENT OF THE CASE**

#### **A. Relevant Background**

In 1993, the King County Prosecuting Attorney's Office charged the defendant herein Matthew H. Richardson with molesting his two young cousins Sari and Shelly Thompson over a period of three years between 1979 and 1982. Richardson was between the ages of 13 and 16 during the alleged events, Sari was age 3 to 5, and Shelly was age 5 to 8. Richardson when charged and tried in 1993 was 28 years old and was tried as an adult. When Richardson was prosecuted he was working as an on-campus security guard security for the Kent School District working around young children. Sometime in 1993 or 1994, Richardson apparently entered an Alford plea before the Honorable Brian Gain to a lesser charge of communicating with a minor for an immoral purpose stemming from

his admission he had “played doctor” with one of the girls and examined her genitals. He received a deferred sentence. CP 87. On February 28, 1994, after completing the terms of his deferred sentence, Richardson obtained an Order of Dismissal from Judge Gain allowing him to withdraw his guilty plea and dismissing the charges with prejudice. CP 87. In 2002, Richardson obtained an Order from Judge Gain vacating his earlier conviction (CP 87) and a separate Order sealing the criminal file (CP 90). The docket for the criminal case was also made secret such that the public, including Intervenor/Appellant, could not locate the docket information or even learn of the existence of the case.

Richardson thereafter obtained his teaching certificate from the Office of Superintendent of Public Instruction, and until very recently was a public school teacher of young children. He also ran for and was elected to the City Council of the City of Sumner and in the fall of 2010 was running as a candidate for the State Senate.

The above facts are largely not contested by Richardson. He has acknowledged most of them in filings before this or the trial court as well as interviews with the media. His distortion of the underlying charges—claiming to be younger than he was at the time of the alleged events, hiding the extreme youth of his victims and the severity of the acts alleged, and claiming he was tried as a juvenile—can be evaluated by a

review of the court records themselves, which are currently sealed, along with the dockets, but which are accessible to this Court for review and access although beyond the reach of the Appellant here. The Commissioner of this Court has confirmed this Court can access the sealed docket, and this Court is capable of asking for transmission of the sealed records from the trial court as it did in Yakima County v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011). See CP 114 (Commissioner’s Ruling stating “[p]reliminarily I note that this court already has access to that docket through the ACORDS system” as basis for denying motion to unseal full docket so sealed records could have been identified and transmitted under seal as Clerks Papers); see also March 11, 2010, Order to Supplement the Record, entered in Yakima County v. Yakima Herald-Republic, ordering sealed documents transferred from Yakima Superior Court to Supreme Court, attached hereto as **Appendix B**.

**B. Sealing of Record and Attempt to Unseal**

On August 9, 2010, the Seattle Times reported that Richardson, then a candidate for Washington State Senate, pled guilty to communicating with a minor for immoral purposes in 1993. CP 12. The Times article further reported that Richardson was allowed to “withdraw” his guilty plea four months later. CP 12. At the time the article was released, Richardson was also a sitting councilman for the City of Sumner,

WA. CP 12. The Times story came to the attention of Mike Siegel, who is a nationally syndicated radio talk show host. CP 11. For many years Siegel has provided commentary, opinions and analysis concerning the character, qualifications and fitness for office of political candidates. CP 11. In light of the charges referenced in the August 9, 2010, Times article, Siegel sought to review the court file in the underlying cause of action here, State of Washington v. Matthew H. Richardson, King County Superior Court No. 93-1-02331-2 (hereafter "State v. Richardson").

However, the King County Superior Court Clerk's office summarily denied access to the file based on a sealing order entered at an unknown date and for unknown reasons. CP 12, ¶9. After being denied access to the court record, on October 14, 2010, Siegel filed a motion to intervene and a motion to unseal the record in State v. Richardson. CP1.

On October 27, 2010, Superior Court Judge Sharon Armstrong entered an order authorizing Siegel to intervene for the limited and sole purpose of filing a motion to unseal. See CP 38-39. Judge Armstrong's order also directed Siegel to re-note his motion to unseal before Superior Court Judge Brian Gain, who entered the original sealing order in 2002. CP 39. On November 15, 2010, Judge Gain entered an order denying the motion to unseal stating only:

The above-entitled Court, having set a hearing for a motion to unseal the above referenced me and the Prosecuting Attorney appearing and no others appearing and no compelling circumstances having been shown and the underline conviction having been previously vacated;

It is hereby ordered that the motion to unseal is denied.

CP 41. The order was signed only by Judge Gain and no attorney representing any party. CP 41.

On January 7, 2011, Siegel filed an amended motion to unseal, and noted the motion without oral argument. CP 42-53. Richardson responded to the motion to unseal on January 18, 2011, stating in essence that the motion to unseal was political, and the court had previously sealed and vacated the conviction. Richardson cited no compelling interest that would be harmed by the unsealing of the record. See CP 57-70. The victims of the alleged crimes, Shelley and Sari Thompson additionally stated that they did not object to the file being unsealed and they were in full agreement with the motion to unseal the file. CP 34, 36.

On January 25, 2011, Judge Gain entered an order summarily denying Siegel's motion to unseal and providing no justification for the continued sealing. See CP 107. The Order simply stated, with regard to the basis for sealing:

ORDERED that the Intervenor's Motion to Unseal the court file under the provisions of GR 15, the Washington State Constitution, and applicable case law, is hereby DENIED.

It is further, ORDERED that this Court's Orders vacating the underlying charges and sealing the record are hereby confirmed.

CP 107. Again, there was no analysis of the factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn. 2d 30, 37-39, 640 P.2d 716 (1982), nor was it even mentioned, and though GR 15 was passively mentioned, the court performed no analysis pursuant to the rule.

Siegel then filed this appeal directly in the Supreme Court on February 23, 2011. CP 108. By letter dated March 1, 2011, Siegel received notice from the Deputy Clerk of this Court that it did not appear that the order denying unsealing was appealable as a matter of right and inviting comment from the parties. Siegel responded asking that if the court denied appeal as a matter of right, that he be granted discretionary review. Via letter dated March 11, 2011, the Deputy Clerk of this Court denied appeal as a matter of right, and required Siegel to file a Motion for Discretionary Review along with his Statement of Grounds, stating:

I have reviewed comments from counsel as to the proper designation of this matter. The order of which review is sought denied a motion to unseal a court file. The Petitioner argues that the order is a final judgment covered by RAP 2.2(a)(1), but I must disagree. I do not believe the denial of a motion to unseal would be considered a final judgment as that term is used in the rule, nor does that decision come within any of the other types of decisions listed in RAP 2.2(a) of which review may be sought as a matter of right.

However, the underlying case in this matter is long over; it was dismissed on February 28, 1994. See CP 87.<sup>2</sup> By order dated January 22, 2002, the Court vacated the record of conviction. See CP 92-93.<sup>3</sup> The matter was sealed by order dated February 20, 2002, purportedly pursuant to GR 15 though it contains none of findings required by that rule—namely “written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” GR 15(c)(2); see also CP 90. The order sealing the record contains no reference to Ishikawa, which sets forth the constitutional test for sealing records, or complies in any way with the requirements of Ishikawa or Article I, Section 10 of the Washington Constitution or the First Amendment to the United States Constitution. Further, though the underlying action involved Richardson’s conduct as a juvenile, Richardson was tried as an adult, not a juvenile, as the caption and sealed records and docket will make clear.

**C. Continued Difficulties Arising from Sealed Docket.**

In this case, not only were the pleadings sealed, but the docket was fully sealed as well. See Roslaniec Decl. at ¶¶4-13.

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<sup>2</sup> Because the underlying case remained sealed, Siegel obtained the documents from the underlying case from his copy of the Declaration of Matthew Richardson, CP 85-98.

<sup>3</sup> The Order is entitled “Order Vacating Record of Conviction and Order to Seal Court File.” However, the sealing portions of the order were removed by Judge Gain, and the record was instead sealed pursuant to the subsequent February 20, 2002 order. See CP 92-93 (removal of sealing language), and CP 90.

**1. Obtaining Order for Superior Court to Unseal Docket.**

This Court accepted review via Order dated August 9, 2011, and, as with any appeal, the Appellant had to designate clerk's papers for this Court's review. However, there was no way for Siegel to do so as the docket and all pleadings were sealed. See Roslaniec Decl. at ¶¶4-13. Siegel could not even access his own pleadings or obtain a sub number for his pleadings as everything filed in this matter was automatically sealed, and was not accounted for in any publicly-accessible manner. Id.

All of the court filings, including all pleadings filed and orders issued in connection with Siegel's intervention and sealing motion, were sealed in the entirely sealed court file. Id. As of August 31, 2011, the docket remained inaccessible, and the trial court would not provide any information about the existence or nonexistence of this case or access to any of the court records. Therefore, on August 31, 2011, Siegel moved this Court to direct the Superior Court to allow access to at least those portions of the record pertaining to his motion to unseal. See August 31, 2011 Motion for Transmission of Records from Trial Court to Supreme Court and Sufficient Access to Record for Review.

On September 21, 2011, the Supreme Court directed the Superior

Court to unseal documents pertaining to the denial of the motion to unseal currently on appeal. See CP 113-116. The purpose of the partial unsealing was, in part, to allow Siegel to designate and access clerk's papers for the appeal. The Superior Court granted its Order Regarding Intervenor's Access on November 18, 2011, unsealing what appeared to be all documents filed in connection with the motion to unseal, including the response, reply, and the order denying such motion. See CP 137-140. The documents unsealed were assigned a new cause number and filed in a newly opened matter: King County Superior Court No. 11-2-40383-1. CP 130. Thereafter, 11-2-40383-1 was handwritten on all unsealed documents from cause number No. 93-2-02331-2, and they were re-filed in the new cause number with a new docket beginning at 1—so, for example, the motion to intervene became Docket No. 1 in the new case, whereas it was formerly Docket. No. 59 in the 93-2-02331-2 cause number. See, e.g., CP 1, 14, 25, 34, 36.

The Notice of Appeal, however, was not unsealed, neither were continued pleadings regarding Mr. Richardson's appointment of counsel or anything else following the order denying unsealing. See CP 139-40.

## **2. Motion for Reconsideration**

Because documents necessary for the appeal in this matter remained sealed, Siegel moved for reconsideration on November 11, 2011,

requesting that all documents filed after, and including, the notice of appeal be unsealed as there could be no justification for their sealing. See CP 131-135. On December 6, 2011, Judge Gain granted Siegel's Motion for Reconsideration, and unsealed the notice of appeal and apparently all subsequent filings in cause number 93-1-02331-2. CP 156-57.

### **3. Multiple Dockets.**

Strangely, after the Court granted Siegel's Motion for Reconsideration, the newly-unsealed documents were not assigned a new cause number and re-filled like the previously unsealed records had been, but rather were simply unsealed within the 93-1-02331 cause number. Therefore, this case now enjoys the added confusion of occupying multiple dockets, with differing docket numbers for identical documents, some of which are accessible under a new cause number, and remain inaccessible under the old cause number. Compare CP 1 (with multiple cause numbers and filed in 11-2-40383-1, with CP 108 (solely showing cause number 93-1-02331-2).

#### **D. Richardson Obtains Order Appointing Counsel.**

On October 21, 2011, while Siegel was still unable to access pleadings filed in the 93-1-02331-2 cause number, Richardson filed a "Motion and Declaration for Order Authorizing Defendant to Seek Review at Public Expense and Appointing and Attorney" in the 93-1-

02331-2 cause number. CP 117. On November 2, 2011, before counsel for Siegel had even received the October 21, 2011, Motion and Declaration for Order, Judge Gain entered an order granting the relief requested. CP 121. The order was titled “Order on Criminal Motion” despite the fact that Richardson cannot face criminal penalties arising out of the instant intervention to unseal records. Siegel’s counsel received the “Order on Criminal Motion” on November 4, 2011, which came as a surprise because Siegel’s counsel did not even receive the motion for appointing an attorney until November 7, 2011. See CP 146, 148, 150.

#### IV. STANDARD OF REVIEW

The standard of review for an appellate court’s review of a trial court’s decision to seal records is *de novo*; the abuse of discretion standard is only appropriate if the trial court applied the proper legal standard in deciding whether or not to seal—which it did not do here. In re Marriage of R.E., 144 Wn. App. 393, 399 n.9, 183 P.3d 339 (2008) (citations omitted); see also Dreiling v. Jain, 151 Wn.2d 900, 907, 93 P.3d 861 (2004) (trial court decision to seal normally reviewed under abuse of discretion, but where inappropriate legal standard employed, the legal issues are reviewed *de novo*). Moreover, because it is an issue of constitutional magnitude, the denial of the right to open courts “is one of the limited classes of fundamental rights not subject to harmless error

analysis.” **State v. Easterling**, 157 Wn.2d 167, 181, 137 P.3d 825 (2006) (holding right to public trial fundamental right which is not subject to harmless error analysis); **see also In re Detention of D.F.F.**, 172 Wn.2d 37, 43-44, 256 P.3d 357 (2011) (same).

## V. LEGAL AUTHORITY AND ARGUMENT

The trial court erred in denying Siegel’s motion to unseal because it failed to perform the required analysis necessary to justify overriding the public’s right of access to court records under Article I, Section 10 under the Washington State Constitution, the First Amendment of the United States Constitution, the common law, and GR 15, because it also failed to apply the correct standard in deciding whether to keep the records sealed, and because when such standards are properly applied, these records should not be sealed and remain sealed.

### A. Article I, Section 10 of the Washington State Constitution

Under Article I, Section 10 of the Washington State Constitution, “[j]ustice in all cases shall be administered openly.” This provision is mandatory. **State v. Duckett**, 141 Wn. App. 797, 804, 173 P.3d 948 (2007) (citation omitted); **King v. King**, 162 Wn.2d 378, 393, fn. 14, 174 P.3d 659 (2007) (same). The provision has been interpreted to mean that the public and the press have a right of access to judicial proceedings and court documents—in both civil and criminal cases. **Dreiling v. Jain**, 151

Wn.2d 900, 908, 915, 93 P.3d 861 (2004) (“[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well.... These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”) (citation omitted); **see also Allied Daily Newspapers v. Eikenberry**, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (affirming that “it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice”). This right extends to pretrial proceedings, such as voir dire, suppression hearings, and motions to dismiss. **Easterling**, 157 Wn.2d at 174 (citations omitted); **see also Beuhler v. Small**, 115 Wn. App. 914, 920, 64 P.3d 78 (2005) (“Article I, Section 10 generally provides a right of access to trials, pretrial hearings, transcripts of trials or pretrial hearings, and exhibits introduced at these proceedings.”) (emphasis added; citation omitted); **see also Federated Publ’n Inc. v. Kurtz**, 94 Wn.2d 51, 60, 615 P.2d 440 (1980) (Article I, Section 10 applies to all judicial proceedings). It also applies to all materials filed with a court in anticipation of a decision, whether filed in connection with a dispositive or non-dispositive motion, whether or not those materials are ever reviewed by a judge or relied upon by a judge in connection with a ruling. **In re Marriage of Treseler and Treadwell**, 145 Wn. App. 278, 284-85, 187 P.3d 773 (2008); **Dreiling**, 151 Wn.2d at 916-

18 (applying Ishikawa to non-dispositive motions).

The strong policy and rationale behind the public's constitutional right to open court proceedings and records has been repeatedly recognized by this Court and United States Supreme Courts.

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (“Press-Enterprise I”) (citation omitted); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 604, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Blackmun, J., concurring) (“[T]he public has an intense need and a deserved need to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, other public servants, and all the actors in the judicial arena....”) (citation omitted). Further, absence of public scrutiny “breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law[.]” 448 U.S. at 595 (Brennan, J., concurring). This policy has been echoed by the Washington State Supreme Court:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests and any limitation must be carefully considered and specifically justified.

**Dreiling**, 151 Wn.2d at 903-04; **see also Duckett**, 141 Wn. App. at 803

(Article I, Section 10 "secures the public's right to open and accessible proceedings") (citation omitted); **see also Federated Publication**, 94

Wn.2d at 66 ("[T]he judiciary must preserve the public right of access to proceedings to the maximum extent possible.") (Utter, C.J., concurring and dissenting).

Although the public's right to court documents is not absolute, restrictions on access are to be granted only in rare circumstances. **State v. Bone-Club**, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)

("[P]rotection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.").

Because courts are presumptively open, the party seeking to restrict access bears the burden of justifying any infringement on the public's right to access. **Nebraska Press Ass'n v. Stuart**, 427 U.S. 539, 558-59, 569-70, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); **Ishikawa**, 97 Wn.2d at 37 ("The burden of persuading the court that access must be restricted to prevent a

serious and imminent threat to an important interest shall be on the proponent .....”); see also Dreiling, 151 Wn.2d at 909 (same). To meet this burden, the party must meet the following five-part test:

- (1) The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right;
- (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure;
- (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
- (4) The court must weigh the competing interests of the proponent of closure and the public;
- (5) The order must be no broader in its application or duration than necessary to serve its purpose.

Dreiling, 151 Wn.2d at 913-15 (citing Ishikawa, 97 Wn.2d at 37-39).

The trial court must find the compelling need necessary to allow closure.

Bone-Club, 128 Wn.2d at 261. Reviewing courts have not hesitated in overruling rules or statutes that do not comply with the above constitutional inquiry mandated by Ishikawa. See Allied Daily Newspapers, 121 Wn.2d at 212 (preventing enforcement of bill that could close certain court proceedings involving minors because it did not comply with Ishikawa); see also In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (“We now consider whether [mental proceedings rule] is unconstitutional in light of article I, section 10. We hold that it is unconstitutional.”). Further, a member of the public has standing to assert

the right to access. Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).

In order for a sealing of court records to be valid it must comply with the procedural and substantive requirements shown above. The trial court must “weigh the competing constitutional interests, consider the suggested alternatives to closure, and record the results of those deliberations ‘in its findings and conclusions, which should be as specific as possible rather than conclusory.’” In re Orange, 152 Wn.2d 795, 807, 100 P.3d 291 (2004). Indeed, the proponent of sealing must make a showing of need, and in demonstrating that need, the proponent should state the interest or rights which give rise to that need with specificity, without endangering those interests. Ishikawa, 97 Wn.2d at 37; Bone-Club, 128 Wn.2d at 260-61. Finally, the sealing order must be limited in its duration. Ishikawa, 97 Wn.2d.at 39.

**B. First Amendment and Common Law Rights of Access**

The United States Supreme Court has held on numerous occasions that the public and press also have a First Amendment right to open court proceedings and records. See, e.g., Richmond Newspapers, 448 U.S. at 575-77; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610-11, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (striking down state rule mandating court closure in certain circumstances); Press-Enterprise I,

464 U.S. at 512-13 (ruling that blanket suppression of voir dire transcript in violation of public's right to court access). This Court has also recognized a First Amendment right of access to court documents. See Seattle Times Co. v. Eberharter, 105 Wn.2d 144, 148-150, 713 P.2d 710 (1986). This right applies to "pretrial documents filed in civil cases, including materials submitted in connection with motions for summary judgment." Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1134 (9th Cir. 2003). The United States Supreme Court has further explained that the policy considerations favoring open justice apply regardless of the nature of the proceeding—specifically, by stating that "historically both civil and criminal trials have been presumptively open." Richmond Newspapers, 448 U.S. at 580 n.17.

The United States Supreme Court in Waller v. Georgia, applied the test established in First Amendment closure cases to the Sixth Amendment right to a public trial held by a defendant. 467 U.S. 39, 44-46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). The test adopted by Waller states, in part, that:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

467 U.S. at 45 (citation and internal quotation marks omitted). Following Waller, this Court also applied the aforementioned five-part test developed under Article I, Section 10 to cases brought under the “speedy public trial” provision of Article I, Section 22 of the Washington State Constitution. Bone-Club, 128 Wn.2d at 261 (holding that trial court violated defendant’s speedy trial right because there was nothing on the record justifying closure under the five-part test).

Additionally, the United States Supreme Court has also recognized a common law right of access to court records. See Nixon v. Warner Comms, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (“[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”) (citations omitted). The Ninth Circuit has also interpreted this common law right of access broadly, stating that the right “[requires] courts to start with a strong presumption in favor of access,” which may be overridden only on the basis of “articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.” Hagestad v. Tragesser, 49 F.3d 1430, 1434-35 (9th Cir. 1995) (citations omitted) (court reversed and remanded “because the district court failed to articulate any reason in support of its sealing order, [making] meaningful appellate review [ ] impossible.”); see also Valley Broad. Co. v. U.S.

**Dist. Ct. of Nevada**, 798 F.2d 1289, 1293 (9th Cir. 1986) (“The common-law right of access has historically developed to accomplish many of the same purposes as are advanced by the first amendment. For example, courts have recognized that exercise of the right helps the public keep a watchful eye on public institutions, and the activities of government.”).

This Court has likewise recognized that under the common law, open public access to court records is presumed:

The common law presumption of open judicial records is grounded in the generalized belief that maximum public access to all governmental information provides the people, the governed, with the information to understand the functioning of their government and to evaluate the performance of public servants. Furthermore, an informed public is in a better position to exercise the freedom to choose intelligently those who will govern.

**Cowles Publ’g. Co. v. Murphy**, 96 Wn.2d 584, 589, 637 P.2d 966

(1981). This policy of openness has been held as especially important in the context of the courts, as opposed to other branches of government. **See** 96 Wn.2d at 590 (“The public’s interest in an open legal process convinces us that our judicial process is best served by ordering that these records should be available to the public.”). Further, this Court has also recognized that this right is “fundamental to a democratic state.” **Nast v. Michels**, 107 Wn.2d 300, 303, 730 P.2d 54 (1986) (citation and internal quotation marks omitted); **see also Beuhler**, 115 Wn. App. at 919 (“[T]he public has an

interest in the openness of the judicial process and the neutrality of the judiciary.”).

Under the common law, filed court records are presumptively open to the public. Cowles, 96 Wn.2d at 588-90. That presumption may be overcome only if the party arguing in favor of sealing or redacting can show that there exists a substantial threat to safety or personal privacy that overrides the public’s interest in the documents. Id. However, Cowles has been interpreted to imply that any trial court judge issuing a sealing or redaction order must “file a transcript of the in camera proceeding, the sealing order, and written findings of fact and conclusions of law immediately after the decision to seal is made.” Eberharter, 105 Wn.2d at 148. Moreover, the above procedural mechanisms “[become] meaningless unless the decision to seal a document can be publicly and judicially scrutinized.” Id. at 147-48. Therefore, the sealing or redaction order and the underlying rationale justifying it must be available for public inspection. Id. at 148.

### **C. Court Rules for Sealing**

General Rule (“GR”) 15 contains the procedures for the sealing of court records at the trial court. In a criminal case, under GR 15(c)(1), “the court, any party, or any interested person may request a hearing to seal or redact the court records.” The next subsection, (c)(2), states

[a]fter the hearing, the court may order the court files and records in the proceeding... to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record [.]

Read together, subsections (1) and (2) show that a hearing is required, and, to comply with the rule, the court must make written findings detailing with specificity how the public interest in open access to the court record is outweighed by competing interests. While the hearing may not be required to be in person, due process requires “that a party receive proper notice of proceedings and an opportunity to present [its] position before a competent tribunal.” **Rivers v. Washington State Conference of Mason Contractors**, 145 Wn.2d 674, 697, 41 P.3d 1175 (2002). Moreover, subsection (2) states that “[a]greement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.”

Further, GR 15(c)(3) states that “[a] court record shall not be sealed under this section when redaction will adequately resolve the issues presented to the court pursuant to subsection (2).” Subsection (4) states, in part, that “[t]he order to seal and written findings supporting the order shall also remain accessible to the public [.]” This is reemphasized in subsection (5)(C), where the rule states that “the order to seal and written findings supporting the order to seal” must remain open to the public.

King County Local General Rule (“KCLGR”) 15(b) requires that

Any order containing a directive to destroy, redact or seal all or part of a court record must be clearly captioned as such and may not be combined with any other order; the clerk’s office is directed to return any order that is not so captioned to the judicial officer signing it for further clarification. See also LCR 26(c), LCR 79 (d)(6), LFLR 5(c) and LFLR 11. The clerk is directed to not accept for filing and to return to the signing judicial officer any order that is in violation of this order.

KCLGR 15(a) also states that

Motions to destroy, redact or seal all or part of a civil or domestic relations court record shall be presented, in accordance with GR 15 and GR 22, to the assigned judge or if there is no assigned judge, to the chief civil judge . . . .

**D. The January 25, 2011, Order**

The trial court erred in issuing the January 25, 2011, Order denying Siegel’s Motion to Unseal, upholding the prior court orders sealing the record, because it failed to perform the required Ishikawa analysis, did not comply with GR 15, and offered no basis whatsoever for the continued sealing of records related to Richardson’s criminal conviction. Prior to Siegel’s intervention, the complete sealing of the records in this case, including all docket information, prevented any public oversight of the actions of the judiciary with regard to Richardson’s criminal conviction, subsequent vacating of the conviction, and the sealing of the records themselves.

1. **The trial court failed to perform the Ishikawa analysis in deciding whether or not to seal or redact the court records.**

The sealing of the records in this case violates the clear mandates under Article I, Section 10 of the Washington State Constitution, and the First Amendment of the United States Constitution. Sealing of court records requires a court to follow the five-part test specified in Ishikawa and Dreiling. See Ishikawa, 97 Wn.2d at 37 (stating that “courts must” apply the five factors when deciding whether to allow restrictions on court access); see also Bone-Club, 128 Wn.2d at 258 (“To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria[.]”). “For nearly three decades, these five Ishikawa factors have served as the benchmark constitutional analysis regarding attempts to restrict access to courtroom proceedings or records.” Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 949, 215 P.3d 977 (2009). Here, not only did the trial court wholly fail to address the factors required under Ishikawa, but the court made no mention of the Ishikawa factors at all, simply stating “the Intervenor’s Motion to Unseal the court file under the provisions of GR 15, the Washington State Constitution, and applicable case law, is hereby DENIED.” CP 107.

a) **Richardson cannot demonstrate a serious and imminent threat to a compelling interest.**

“The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right” Dreiling, 151 Wn.2d at 913 (citing Ishikawa, 97 Wn.2d at 37). Ishikawa applies equally to matters that are pending or have long since past. See State v. McEnry, 124 Wn. App. 918, 925, 103 P.3d 857 (2004) (flatly rejecting argument that “sealing a file after all judicial proceedings have concluded is fundamentally different from sealing a file during pre-trial and trial proceedings.”) Because the criminal aspect of this matter has long past there can be no argument that access to these records affects the right to fair trial. Hence, Richardson must demonstrate a serious and imminent threat to a compelling interest.

Speculative concerns such as those regarding future employment are not sufficient to establish a serious and imminent threat to an important interest as required by Ishikawa. In State v. McEnry, Division Two overturned a superior court's sealing of the record based on a trial court finding that allowing public access to the records “may cause [defendant] harm in his future personal or business life” after the conviction was vacated. McEnry, 124 Wn. App. at 922. The Court of Appeals held that

the trial court failed to correctly apply Ishikawa, and that defendant “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.

Here, speculative or not, there has been no compelling interest asserted that is threatened by the unsealing of the records in question. As a politician and teacher, Siegel would anticipate that Richardson may argue that unsealing of the record in this case may affect his ability to obtain future employment or attain political office. However, not only are these concerns speculative and of the type rejected in McEnry, but they were not asserted below, and could not have formed the basis of the Court’s ruling which contained no finding of a compelling interest.

Further, simply because a conviction has been vacated does not mean that the defendant has a right to privacy as to the information contained within those files. A defendant must offer justification as to any asserted privacy interest beyond simply stating that conviction was vacated.

Although RCW 9.94A.640(3) grants an offender the right to state that he or she has never been convicted, it does not explicitly authorize trial courts to seal an offender’s criminal court records without first considering the public’s constitutional right of access. We know of no court of record that has interpreted RCW 9.94A.640(3) in this manner, and if the legislature had intended to provide

absolute protection from dissemination of court records despite article 1, section 10 of the Washington Constitution, it would have so stated.

**McEnry**, 124 Wn. App. at 927. Even an expunged conviction does not automatically give rise to a privacy interest:

An expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual's criminal record, the underlying object of expungement remains public. Court records and police blotters permanently document the expunged incident, and those officials integrally involved retain knowledge of the event. An expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection.

**Eagle v. Morgan**, 88 F.3d 620, 626 (8th Cir. 1996), quoting **Nilson v.**

**Layton City**, 45 F.3d 369, 372 (10th Cir.1995). **See also Stidham v.**

**Peace Officer Standards And Training**, 265 F.3d 1144, 1155 (10th Cir.

2001):

[A]llegations that Appellant raped a young woman and assaulted a Tooele resident are also not so protected. Certainly, such information is sensitive in nature and considerably stigmatizes Appellant. However, as we have previously noted, "a validly enacted law places citizens on notice that violations thereof do not fall into the realm of privacy," and "[c]riminal activity is thus not protected by the right to privacy."

In **Eagle v. Morgan**, the City Auditor attempted to assert that it was an invasion of his right to privacy for police officers to release information pertaining to a prior felony conviction that had been

expunged. Similar to the present case, in Eagle the City Auditor pled guilty to a crime—in Eagle felony theft, here, a sex crime with a minor—and took a deferred sentence. Eagle, 88 F.3d at 622. In Eagle, the conviction was expunged, here the conviction was vacated pursuant to a deferred sentence. Id. However, as the Eagle Court pointed out, even though a defendant in such cases can legally act as if a conviction never occurred, it does not create a privacy interest in records pertaining to the underlying conviction. Id. at 626 (“An expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual’s criminal record, the underlying object of expungement remains public.”).

Therefore, the Court here should ignore any privacy interest asserted by Richardson to the extent that he attempts to argue that the record should remain sealed because the trial court vacated the conviction. The fact that the conviction has been vacated simply does not create a justification to infringe on the public’s constitutional right to observe the Courts. This is especially true when, as discussed above, a trial court has vacated a conviction and sealed the record pertaining to a sex offence with no justification on the record for the decision to do so.

Further, this case is not likely appropriate for expungement or deletion as the case involved a deferred sentence. The Washington State

Criminal Records Privacy Act, Ch. authorizes “[c]riminal history record information which consists of nonconviction data only shall be subject to deletion from criminal justice agency files[.]” However, it goes on to state that “the criminal justice agency maintaining the data may, at its option, refuse to make the deletion if: (1) The disposition was a deferred prosecution or similar diversion of the alleged offender[.]” RCW 10.97.060. Here, Richardson received a deferred sentence. CP 87.

**b) The sealing is dramatically over-restrictive of the public’s right of access.**

The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

Dreiling, 151 Wn.2d at 914 (citing Ishikawa, 97 Wn.2d at 38). Hence, in order to protect the right of the public to review the actions of the judiciary, the public must be deprived of access solely to those portions of the record which are necessary to protect the compelling interest asserted. The extremely strong policy considerations favoring access to courts must only be infringed to the least extent necessary:

The common law presumption of open judicial records is grounded in the generalized belief that **maximum public access to all governmental information provides the people, the governed**, with the information to understand the functioning of their government and to evaluate the performance of public servants. Furthermore, an informed public is in a better position to exercise the freedom to choose intelligently those who will govern.

Cowles, 96 Wn.2d at 589 (emphasis added). This policy was repeated by this Court in Dreiling v. Jane:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests and any limitation must be carefully considered and specifically justified.

Dreiling, 151 Wn.2d at 903-04

Here there is no indication whatsoever that the trial court ever considered any less restrictive means than those employed here. In fact, the restriction on access here was the most restrictive means possible—full sealing of all records and docket information. The court never considered redaction of records in this action. See CP 106-107 (Order denying Motion to Unseal); CP 87 (Order of Dismissal); CP 90 (Order to Seal); and CP 92-93 (Order Vacating Conviction).

The extent of the sealing here prevented the public from any observation of the Court, and—should the public even discover that this case occurred—from determining any purported bases for sealing this file and vacating the conviction. This dramatic overredaction violates the mandates of Ishikawa and alone justifies reversal.

**c) The public has a constitutional right to access documents related to the sealing of criminal convictions**

In sealing the records, or maintaining a prior sealing, the court must weigh the competing interests of the proponent of closure and the public. Dreiling, 151 Wn.2d at 914 (citing Ishikawa, 97 Wn.2d at 38). Here, the trial court did not account for any public interest in access to the records in question. See CP 90 and CP 106-107. Again, the lower court's failure to account for the constitutional right of access to the courts justifies overturning the trial court.

**d) In addition to overbreadth, the order is indefinite in duration**

Any order sealing records "must be no broader in its application or duration than necessary to serve its purpose." Dreiling, 151 Wn.2d at 914 (citing Ishikawa, 97 Wn.2d at 39). Quite simply, the sealing of this action contains absolutely no reference to temporal limitation, again in violation of the constitutional right of access to the courts.

**2. The trial court failed to comply with the requirements for sealing under GR 15.**

Additionally, the trial court violated the mandates of GR 15, which further justifies reversal. Failure to comply with the provisions in GR 15 is reversible error. See In re Marriage of R.E., 144 Wn. App. at 405 ("In these aspects the order does not comply with GR 15. We therefore remand

to the court commissioner for further review in light of the above discussion.”).

First, the lack of written findings by the trial court justifying sealing is a clear violation of GR 15(c)(2), which demands that the trial court “[make] and [enter] written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in the court record.” These written findings must be filed with the trial court, under GR 15(c)(5)(C), and remain open to the public under GR 15(c)(4). All of these requirements are missing in the immediate case. See CP 107 (Court stating with no further analysis that “the Intervenor's Motion to Unseal the court file under the provisions of GR 15, the Washington State Constitution, and applicable case law, is hereby DENIED.”).

Second, under GR 15(c)(3), the trial court must consider redaction when deciding to seal or unseal—there is no indication this was done here. The trial judge must also identify with specificity the rights at risk and the less restrictive alternatives considered—neither of which occurred here where there are simply no findings justifying sealing. The absence of this high level of specificity makes meaningful review impossible—which is exactly why compliance with Ishikawa is required. Because courts are

presumed open, the propriety of the sealing is presumptively invalid if there are no specific findings justifying it.

Third, GR15 (c)(5)(C) mandates that sealing orders themselves, in addition to the justification therefore, shall remain open. GR 15 (c)(5) states that “[w]hen the clerk receives a court order to seal specified court records the clerk shall ... File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.” Here, every order and document filed was placed under seal. In turn, any potential reasons justifying the sealing were themselves sealed—though in this case there were none. Therefore, the Court violated one of the central tenets of GR 15 depriving the ability of the public to vet the justification for sealing of court records for validity.

Fourth, GR 15 mandates that portions of the record still be accessible in the case of a vacated criminal conviction:

Procedures for Vacated Criminal Convictions. In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notification "DV" if the case involved domestic violence, the adult or juvenile's name, and the notation “vacated.”

GR 15(d). Therefore, even if the sealing in this matter had been proper, the extent of the sealing did not comply with GR 15. Prior to the Supreme Court’s September 21, 2011, Ruling ordering the King County Superior

Court to unseal portions of the docket pertaining to Siegel's intervention, no information on the underlying criminal case was publicly accessible. The public could not even verify that a case with the applicable cause number existed with the Court.

All of these violations of GR 15 are grounds for reversal; however, even if this Court were to conclude that the procedures used by the trial court in the immediate case somehow complied with GR 15, that conclusion would not equate to a finding that such procedures pass the constitutional standard established in Ishikawa. See State v. Waldon, 148 Wn. App. 952, 962, 202 P.3d 325 (2009) ("We conclude that revised GR 15, standing alone, does not meet the constitutional benchmark established by Ishikawa."), *pet. for rev. denied*, 166 Wn.2d 1026, 217 P.3d 338 (2009). In Waldon, the Division One Court of Appeals concluded that the standard for court closure or sealing, both before and after the significant 2006 amendments to GR 15, was set in Ishikawa, 166 Wn.2d at 37-39. Division One methodically delineated the deviations between GR 15 and Ishikawa, and concluded that the revised GR 15 "cannot constitutionally serve as a stand-alone alternative to Ishikawa." Id. However, Division One also ruled that GR 15 can be harmonized with Ishikawa in order to remain constitutional—but in doing so, made clear that it is not sufficient for a party advocating closure or sealing to comply only with GR 15. Id.

Division One's holding in Waldron is sound. Thus this Court should hold that Ishikawa is the proper standard for determining whether documents should be sealed or unsealed; to the extent that Richardson argues that the Court complied with GR 15, this is not adequate, even if true. See CP 106-107 (solely addressing GR 15 by name, and then referring to "the Washington State Constitution, and applicable case law").

**3. Sealing of the Docket is an Unconstitutional Restriction on Access**

The Court in this matter improperly sealed the docket with no analysis. The court docket is part of the court record and the same standards applicable to the sealing of pleadings necessarily apply to the sealing of the docket as well. See Indigo, 151 Wn. App. at 949-50 (applying tests of Ishikawa and GR 15 in determining whether to allow redaction of SCOMIS index, stating "In sum, GR 15 authorizes courts to redact information in SCOMIS, and GR 15 and the Ishikawa factors together provide the legal standard for evaluating Rousey's motion to redact her name from the SCOMIS index"). Not only must sealing of the docket be subject to the same standards for sealing as any other court record, but the docket provides the only tool for the public can track sealed matters. Here, the sealing of the docket was erroneous as the Court did not apply the proper tests or enter any findings justifying the sealing.

a) **Dockets are Court Records subject to a presumption of openness.**

Indigo treats the analysis of sealing docket information as essentially any other court file. 151 Wn. App. at 949-50. This follows the federal case law on the issue determining that docket information qualifies as court records and should be subject to the same constitutional right of access as pleadings. See, e.g., Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 96 (2nd Cir. 2004) (discussed below). Therefore, as part of the analysis required by Ishikawa, the justification for sealing would likely be diminished in the docket context as dockets give little information about the underlying action or allegations and yet are essential to the public's ability to determine an action existed at all and to document actions of courts taken in connection therewith.

b) **Dockets are the Mechanisms through Which the Public Can Exercise its Constitutional Right of Access.**

Without access to the information contained in the Court's docket, the public is deprived of any meaningful method of exercising its constitutional right to access and observe the functioning of the Court.

**[T]he ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible.** In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment.

Hartford, 380 F.3d at 93 (emphasis added). The Court in Hartford held that “docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them.”

In U.S. v. Valenti, the Eleventh Circuit ruled that it was unconstitutional to maintain a dual-docket system, which separately tracked closed and non-closed proceedings, as it deprived the public of the constitutional right of access to the courts. U.S. v. Valenti, 987 F.2d 708 (11th Cir. 1993). The Court stated:

In this case, **the sealed docket completely hid from public view the occurrence of closed pretrial bench conferences and the filing of in camera pretrial motions.** These events remained hidden until a Times reporter happened to be present to observe a closed bench conference. The Middle District's dual-docketing system can effectively preclude the public and the press from seeking to exercise their constitutional right of access to the transcripts of closed bench conferences. Thus, we hold that the Middle District's maintenance of a dual-docketing system is an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings.

...  
[T]he Middle District's use of a public and a sealed docket to note criminal proceedings is an unconstitutional infringement on the right of the public and press to seek the release of in camera motions and transcripts of closed bench conferences

Id. at 715 (emphasis added). Because sealed dockets prevent any public scrutiny as there is no meaningful method for the public to even be aware

of the closed proceedings or filings in order to challenge their closure, the maintenance of sealed dockets should be declared unconstitutional.

Finally, in **Hartford**, the Court addressed the fact that dockets could be sealed, but they must follow the applicable standards for restricting access to Court records, stating “[o]f course, this presumption is rebuttable upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest.”

In Washington, sealing of court records must comply with the **Ishikawa** and GR 15 standards, therefore sealing of docket information must be held to the same standards. This does not mean that specific documents or proceedings cannot be sealed if they properly meet the **Ishikawa** constitutional standards and GR 15 requirements, but the de facto sealing of the docket fully deprives the public of its constitutional right to observe the courts.

**c) Sealing of the Docket did not comply with Ishikawa or GR 15.**

All of the reasons discussed above regarding the trial court’s failure to abide by the mandates of **Ishikawa** and GR 15 in sealing the pleadings pertaining to this case apply equally to the sealing of the docket, if not more so.

Any potentially asserted interest of Richardson in sealing docket entries is less than that of sealing substantive court pleadings due to the limited information contained within the docket. Docket entries do not discuss the substance of the underlying crime, or release details of the allegations. The docket merely states what was filed and when. In this case even the cause number and title of the case were shielded from public access. Any purported interest in sealing the records is lessened when performing the Ishikawa analysis which requires that the sealing be the done in the least restrictive manner possible.

Conversely, the public's interest in access to the docket is of paramount importance. Without access to the docket, the public has no method by which to track court proceedings to know whether to challenge the actions of the Court. Again, as the Second Circuit stated in Hartford, "the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible." Hartford, 380 F.3d at 93.

The procedural history of this case is a prime example of how sealing of the docket leads to great difficulties in asserting the public's constitutional right of access to the courts. The sealing of the docket in this matter has caused multiple unnecessary motions to be filed—first a motion for access to records filed in this Court, which was followed by a motion

for reconsideration in the Superior Court when the unsealing was not adequate to create the appellate record. Additionally, this case now occupies two dockets with overlapping “sub” numbers, and numerous documents are addressed in multiple dockets, one of which allows public access and one of which does not. All of the documents filed in Cause Number 11-2-40383-1 are also filed in 93-2-02331-2, yet remain sealed and inaccessible in the 93 cause number.

Finally, and perhaps most troubling, is the fact that the sealing order entered by the Court in 2002 created a scenario whereby any new filing in this matter was immediately sealed and shielded from public view with no consideration whatsoever. When Siegel moved to intervene in this matter, his motion was immediately sealed. Every subsequent pleading was immediately placed under seal. There was no analysis performed whatsoever that even purported to justify the immediate sealing of these documents, nor could there be as there is no arguable rationale that a motion to intervene to move to unseal is subject to sealing.

**E. Siegel Should Have Been Allowed to Appeal as a Matter of Right.**

Under RAP 2.1(a), there are two methods for seeking review of superior court decisions. The first is review as a matter of right and the second is discretionary review. This Court granted discretionary review of

this matter, but review of sealing orders (or orders denying unsealing) filed by intervenors, whose sole purpose it to challenge the propriety of sealing of records of proceedings, should be considered appealable as a matter of right.

RAP 2.2(a) sets forth the decisions of the superior court that are reviewable as a matter of right. Relevant here, RAP 2.2(a) states, in part, that both final judgments and decisions determining action are appealable as a matter of right. Specifically, under RAP 2.2(a)(1), “final judgment” is defined as “[t]he final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.” Further, under RAP 2.2(a)(3), “decision determining action” is defined as “[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.”

Here, in this long-over criminal matter, Siegel should have been permitted to appeal as a matter of right because the denial of his unsealing motion effectively disposed of the only aspect of the case to which Siegel has any rights. Siegel was permitted to intervene to challenge the propriety of sealing—he was not granted leave to intervene for any other issue. CP 39 (“Mike Siegel is hereby authorized to file a motion to vacate the prior sealing order entered in the above matter[.]). It is clear from the timeline

of the case, and the Superior Court's orders allowing intervention and denying unsealing, that the singular purpose of Siegel's intervention was to prevent the continued sealing of court records—there are no further issues to be determined.

If review is not allowable as a matter of right in this circumstance, the Court is effectively barring review of any decision on intervention to unseal court records, something that has been expressly authorized by this and the lower Appellate Courts—forcing intervenors to rely on potential discretionary review. See, e.g., State v. Mendez, 157 Wn. App. 565, 238 P.3d 517 (2010) (expressly rejecting the argument that a separate action must be initiated to challenge the sealing of court records in a criminal action); Yakima County, 170 Wn.2d at 801 (allowing intervention and ruling by trial court on Motion to Unseal while criminal matter is pending appeal, without leave of the appellate court, and stating “We hold that a limited intervention to revisit a prior sealing decision under GR 15(e) is a proper procedure for nonparties to use in a criminal case when a trial has been completed and we modify [State v. Bianchi] to the extent it is contrary.”)

To refuse appellate review in the current matter ignores the right of a member of the public to intervene in a criminal matter to seek unsealing and the fact the unsealing issues may operate independently of the

criminal proceedings following a determination of guilt or innocence. See People v. Kelly, 397 Ill.App.3d 232, 243, 921 N.E.2d 333 (2009) (allowing interlocutory appeal of denial of motion to unseal and stating, “[i]f we are going to permit intervention, then we need to also permit some path to review. It cannot be that important first amendment issues are decided by trial courts and then insulated from further review. That makes no sense.”) (emphasis added). If, as in Yakima County v. Yakima Herald-Republic, an intervenor can obtain a ruling on whether to continue sealing records while the underlying criminal matter is pending appeal, an intervenor is certainly permitted to seek review of an order denying a motion to unseal when the criminal case is over. Again, the underlying criminal matter here is not only over, it is over and the record regarding the proceeding has been vacated and sealed. There can be no doubt that Siegel is entitled to appeal as a matter of right the trial court’s denial of his motion to unseal as there can be no argument that this was not a final order.

**F. There is No Right to Publicly Funded Counsel in an Unsealing Proceeding.**

“Where there is no constitutional or statutory right to counsel at public expense and where there is no constitutional or statutory right to a waiver of fees and payment of costs, there is no right, simply because of

the fact of indigency, to appointment of counsel on appeal or to waiver of fees and payment of costs.” In re Grove, 127 Wn.2d 221, 240, 897 P.2d 1252 (1995). Though there are certain statutorily delineated circumstances in which indigent litigants are provided counsel in civil proceedings, and criminal defendants possess a Sixth Amendment right to counsel, this unsealing proceeding is civil in nature and there is no statutory right to publicly funded counsel in unsealing proceedings. See, e.g. Grove, 127 Wn.2d 221 (right to counsel in child dependency proceedings, and no right to counsel in workers’ compensation claim); King, 162 Wn.2d at 174. (no right to counsel in dissolution proceeding); State v. Durnell, 16 Wn. App. 500, 558 P.2d 252 (no right to counsel in hearing declaring defendant to be an habitual traffic offender and revoking license and lack of counsel did not require dismissal of the subsequent criminal conviction); State v. Stone, --- Wn. App. ---, 2012 WL 12376, (January 4, 2012) (right to counsel in legal financial obligations hearing, resulting in jail time).

Further, this Court appears to have implicitly agreed that there is no right to publicly funded counsel in such matters as it denied Richardson’s Motion for Expenditure of Public Funds on February 9, 2012. Nonetheless, as the trial court entered an Order after this appeal was accepted appearing to grant Richardson the right to have a public defender appointed to represent him in this matter, this Court should address this

issue to provide guidance to future courts and clarity for the public at to when its tax dollars may be used to provide legal defense. See CP 121.

**1. There is No Constitutional Right to Public Funded Counsel in an Unsealing Proceeding.**

Though originally taking place within a cause number pertaining to a criminal matter, proceedings pertaining to the unsealing of court records pertaining to a criminal case are civil in nature—particularly when, as here, the criminal case is long over. Even in criminal cases, “there is no federal or state constitutional requirement that an indigent defendant receive the assistance of appointed counsel where there is no possibility of incarceration.” State v. Long, 104 Wn.2d 285, 292, 705 P.2d 245 (1985). Because there is no risk of incarceration here, there is no constitutional right to publicly funded counsel.

Additionally, as the Appellate Court in State v. Mendez recognized, “concerns about third party involvement disrupting a ‘pending’ criminal case are not present in a closed case such as this one.” State v. Mendez, 157 Wn. App. 565, 578, 238 P.3d 517 (2010). Once a criminal case has been closed for the purposes of potential criminal penalties, the case should be treated as civil in nature even though it may still bare a “criminal” cause number.

**2. Public Funding is Inappropriate in Sealing Disputes.**

Though “[t]his court has the inherent power to waive the fees and costs of litigation in civil cases in those *rare* cases where justice demands it[,]” the Court should decline to do so here. **In re Grove**, 127 Wn.2d at 241 (emphasis in original). “There is a presumption that civil litigants do not have a right to appointed counsel unless their physical liberty is at risk.” **King**, 162 Wn.2d at 395. In the Federal context,

This presumption can be overcome when the **Mathews** balancing factors weigh heavily enough against that presumption. Those factors are “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

**King**, 162 Wn.2d at 395 (citing **Mathews v. Eldridge**, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

This Court has held that in cases where a litigant is attempting to obtain publicly funded counsel, “a litigant must prove indigency, good faith in bringing the appeal, probable merit of the issues raised and, further, that a miscarriage of justice has occurred.” **In re Grove**, 127 Wn.2d at 241 (citing **In re Lewis**, 88 Wn.2d 556, 559, 564 P.2d 328 (1977); **Housing Auth. v. Saylor**, 87 Wn.2d 743, 739, 557 P.2d 321

(1976); **Bowman v. Waldt**, 9 Wn. App. 562, 571, 513 P.2d 559 (1973)).

Further, the Court in determining whether to allow for publicly-funded counsel “may properly consider not only the interests of the indigent litigant, but the interest of the general public and other affected individuals as well. **Id.** at 241.

When, as here, an allegedly indigent individual seeks publicly funded counsel to defend, rather than bring, an appeal which has no risk of incarceration and where the interests of the public are as strong as those asserted here—the constitutional right to open Court proceedings—the Court should not appoint publicly funded counsel. It does not appear Richardson even established indigency pursuant to the trial court’s form as he indicated two mortgages and two car payments and yet apparently falsely claimed not to own a home or car, **See** CP 150-53.

**G. Siegel Seeks Attorney’s Fees and Costs**

If this Court deems Siegel the prevailing party in this matter, he respectfully seeks attorney’s fees under RCW 4.84.080 and RAP 18.1. If the Court determines that the below sealing of the records pertaining to this matter, then Siegel is the substantially prevailing party, and he respectfully seeks an award of costs under RAP 14.2 and RAP 14.3.

## VI. CONCLUSION

For the foregoing reasons, Siegel respectfully requests that this Court overturn the lower court's denial of Siegel's Motion to Unseal. Additionally, because there were no factual findings below, and therefore this Court sits in the same position as the lower court, Siegel also requests that this Court order that all sealed records immediately unsealed, and the docket for King County Superior Cause No. 93-102331-2 be immediately unsealed and made available to the public. Siegel urges the Court to obtain the sealed records and docket from the trial court for purposes of its review.

Respectfully submitted this 13th day of February, 2012.



Attorneys for Mike Siegel.

By /s/Michele L. Earl-Hubbard  
Michele L. Earl-Hubbard, WSBA #26454  
Chris Roslaniec, WSBA #40568  
2200 Sixth Avenue, Suite 770  
Seattle, WA 98121  
Telephone: (206) 443-0200  
Facsimile: (206) 428-7169

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on February 13, 2011, I delivered a copy of the foregoing Brief of Appellant to:

Matthew Richardson,  
14807 Rivergrove Drive,  
Sumner, WA 98390  
Via U.S. Mail

James Morrissey Whisman  
King County Prosecutor's Office  
516 Third Avenue, W-554  
Seattle, WA 98104  
Jim.Whisman@kingcounty.gov  
Via email per agreement and U.S. Mail

Dated this 13th day of February, 2012, at Seattle, Washington.



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Chris Roslaniec

# APPENDIX A

return

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 MATTHEW H. RICHARDSON, )  
 )  
 Respondent, )  
 )  
 MIKE SIEGEL, )  
 )  
 Intervenor/Appellant. )

No. 85665-6

DECLARATION OF CHRIS ROSLANIEC

DELIVERED TO  
 W-554  
 ON MAR 28 2011 @  
 BY [Signature]  
 ABC LEGAL MESSENGERS

I, Chris Roslaniec, hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct:

1. I am of legal age, have personal knowledge of the facts set forth herein, and am competent to testify.
2. I am an associate attorney with Allied Law Group LLC, counsel for Intervenor/Appellant Mike Siegel ("Siegel").
3. Allied Law Group was not involved in this matter at the trial level, but has since entered into the case following the denial of the Motion to Unseal records.
4. Our office has tried repeatedly to obtain information about the instant case including a copy of the docket. We have searched

all of the usual sources, searching by name, case numbers, as well as initials. No results are found. It is as if the original docket and cause number have been deleted entirely from the system.

5. On March 28, 2011, our office, through our paralegal Jean Larsen, contacted the King County Superior Court regarding recent activity in State of Washington v. Matthew Richardson (King County Superior Court Cause #93-1-02331-2) in an attempt to acquire true and correct copies of pleadings related to the attempt by our client to unseal court records in this matter – the subject of this appeal.

6. Jean spoke with “Melissa” at the Clerk’s office as to how she might go about obtaining copies of pleadings recently filed at the King County Superior Court in State of Washington v. Matthew Richardson (King County Superior Court Cause #93-1-02331-2), including those filed by our client, as the docket is not accessible via King County’s Electronic Court Records Online.

7. Melissa stated that the docket was “completely sealed” and that she was not able to discuss the details of the docket over the phone.

8. Melissa further told Jean that in order to give any directions regarding access to the docket, Melissa said she would need to see a copy of the court order sealing the docket; as such a court order would describe the specific details regarding limitations on access to the court docket and its contents.

9. We have obtained several of the orders in this case as attachments to filings by Richardson served upon Siegel in connection with the unsealing motions, and the orders contain no such instructions.

10. The sealing order or orders in this case are apparently sealed themselves and cannot be located through a court file, docket, or obtained from the court as we have been denied access to any filings.

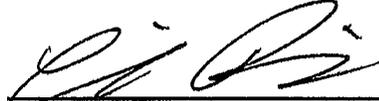
11. Lastly, Melissa told Jean that one of the attorneys who signed the original sealing order would need to come to the Clerk's Office, with proof of identification, before Melissa would be able to give any further information.

12. Mr. Siegel intervened in this case in 2010 to unseal court records. He was not a party to the 2002 sealing order and thus his attorneys at trial and now on appeal did not sign the 2002 order.

13. Therefore, we have been unable to obtain any official documents from the Court or even confirmation of docketed events or the dates records were filed, their names, or their docket numbers. Appendices attached to Siegel's Statement of Grounds and Motion for Discretionary Review are the most accurate copies of pleadings that Allied Law Group and Siegel have been able to obtain. All documents from this case not filed by Siegel are copies of documents served upon Siegel in connection with the unsealing motion in 2010.

I declare under penalty of perjury under the laws of the State of  
Washington that the forgoing is true and correct.

DATED: March 28, 2011 at Seattle, Washington.

  
CHRIS ROSLANIEC

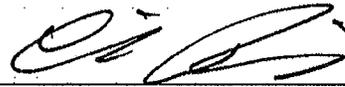
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on March 28, 2011, I delivered a copy of the foregoing Declaration of Chris Roslaniec to:

Hon. Dan Satterberg  
King County Prosecuting Attorney's Office  
King County Courthouse, Room W554  
516 Third Avenue  
Seattle, WA 98104  
via legal messenger

Klaus O. Snyder & Kelly J. Faust Sovar  
Snyder Law Firm  
920 Alder Avenue  
Suite 201  
Sumner, WA 98390-1406  
via email with backup via U.S. Mail pursuant to agreement

Dated this 28th day of March, 2011, at Seattle, Washington.



Chris Roslaniec

# APPENDIX B

RONALD R. CARPENTER  
SUPREME COURT CLERK

SUSAN L. CARLSON  
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT  
STATE OF WASHINGTON



TEMPLE OF JUSTICE  
P.O. BOX 40929  
OLYMPIA, WA 98504-0929

(360) 357-2077  
e-mail: [supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)  
[www.courts.wa.gov](http://www.courts.wa.gov)

March 11, 2010

Hon. Kathy M. Eaton, Clerk  
Yakima County Superior Court  
1728 Jerome Avenue  
Yakima, WA 98901

Re: Supreme Court No. 82229-8 - Yakima County v. Yakima Herald Republic  
Yakima County No. 05-1-00459-8.— State v. Jose Luis Sanchez, Jr.

Dear Clerk:

Enclosed is a copy of the Order to Supplement the Record, signed by the Associate Chief Justice on this date in the above referenced case. The order directs the Yakima County Clerk to transmit to this Court as supplemental clerk's papers a copy of all sealing orders in Yakima County No. 05-1-00459-8 by Judge C. James Lust. The orders will be filed at this Court under seal and only the Supreme Court Justices are allowed access to those orders.

Sincerely,

Susan L. Carlson  
Supreme Court Deputy Clerk

LB:lb

Enclosure as stated

cc: Michele Lynn Earl-Hubbard  
Christopher Roslaniec  
David Norman  
Greg Overstreet  
Brendan Monahan  
Susan Wilk  
Gregory Charles Link

David L. Donnan  
Paul Edward McIlrath  
Stefanie Jean Weigand  
Terry Dee Austin  
Kenneth W. Harper

THE SUPREME COURT OF WASHINGTON

YAKIMA COUNTY, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 THE YAKIMA HERALD REPUBLIC, )  
 )  
 Appellant, )  
 )  
 and )  
 )  
 JOSE LUIS SANCHEZ, JR., )  
 )  
 Other Interested Party. )

NO. 82229-8

ORDER TO  
SUPPLEMENT THE RECORD

Yakima County Nos.  
08-2-02337-0 & 08-2-02355-8

FILED  
2010 MAR 11 PM 1:18  
CLERK OF SUPERIOR COURT  
YAKIMA COUNTY  
WA

The Court heard oral argument in this matter on March 9, 2010, and determined that the record is not sufficiently complete to permit a decision on the merits of the issues presented for review without inclusion of the sealing orders entered in Yakima County No. 05-1-00459-8 by Yakima County Superior Court Judge C. James Lust. Therefore, the record in this matter should be supplemented.

IT IS HEREBY ORDERED that the Yakima County Superior Court Clerk shall, immediately upon receipt of this order, transmit to this Court as supplemental clerk's papers a copy of all sealing orders entered in Yakima County No. 05-1-00459-8 by Yakima County Superior

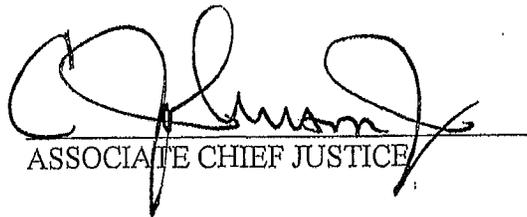
581/169

Page Two  
ORDER  
No. 82229-8

Court Judge C. James Lust. Upon receipt of the supplemental clerk's papers, the Supreme Court Clerk is directed to file them under seal and only allow access by the Justices of this Court.

DATED at Olympia, Washington this \_\_\_\_\_ day of March 2010.

For the Court



ASSOCIATE CHIEF JUSTICE