

662 Fed.Appx. 515

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

**DOE**, Defendant–Appellant.

No. 15-50344

Argued and Submitted September 1, 2016 Pasadena, California

Filed October 21, 2016

Appeal from the United States District Court for the Southern District of California, Larry A. Burns, District Judge, Presiding, D.C. No. 3:12–cr–00768–LAB–1

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\*516 Before: [TASHIMA](#), [WARDLAW](#), and [BYBEE](#), Circuit Judges.

MEMORANDUM \*

**Doe** appeals the district court's denial of the parties' joint motion to **seal** an **order** denying a further reduction in sentence. We have jurisdiction pursuant to [28 U.S.C. § 1291](#), and we reverse.

[BYBEE](#), Circuit Judge, Dissenting

I respectfully dissent. In denying the motion to **seal** the **order**, the district court did not abuse its discretion by applying the “[in]correct legal rule” or applying the legal standard in a way that was “(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record.” [United States v. Hinkson](#), 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc) (citation omitted).

The district court stated both the common law standard from [Kamakana v. City & County of Honolulu](#), 447 F.3d 1172 (9th Cir. 2006), and the First Amendment test from [Oregonian Publishing Co. v. United States District Court for District of Oregon](#), 920 F.2d 1462 (9th Cir. 1990), and therefore did not apply the incorrect legal rule. Although the district court did not clearly separate its analysis of the First Amendment and common law rights regarding public access to judicial documents, the district court applied both tests and did not abuse its discretion.

The district court did not reach an outcome that was illogical, implausible, or without support in inferences that could be drawn from facts in the record. The district court rejected sealing the order because it believed there was not “any evidence that [**Doe**] has been threatened, harassed, or intimidated ... even though the [person] against whom [**Doe**] agreed to testify is now in federal prison ..., knows [**Doe's**] identify, and knows that [**Doe**] was willing to be a witness against [them].” The district court did not abuse its discretion when it found that **Doe** had failed to proffer evidence to substantiate **Doe's** claims and that any danger to **Doe** was “at best hypothetical and conjectural rather than real or actual.”

The district court abused its discretion by applying the incorrect rule of law in denying the motion to **seal** the **order**. See [United States v. Hinkson](#), 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc) (“[T]he first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion.”). Our precedent

delineates two lines of analysis regarding public access to judicial documents. *U.S. v. Bus. of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1192 (9th Cir. 2011). First, there is “a common law right ‘to inspect and copy public records and documents, including judicial records and documents.’ ” *Id.* (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). Second, there is “ ‘a First Amendment right of access to criminal proceedings’ and documents therein.” *Id.* (quoting *Press-Enter. Co. v. Superior Court of Cal. for Cty. of Riverside*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). The district court did not make clear under which analysis it proceeded, and it erroneously conflated the two tests. Under either standard, we conclude \*517 that **Doe** made the required showing to **seal** the **order**.

1. To overcome the common law right of access to judicial records and documents, **Doe** must “articulat[e] compelling reasons ... that outweigh the general history of access and the public policies favoring disclosure.” *Custer Battlefield*, 658 F.3d at 1195 (internal quotation marks omitted). **Doe's** personal safety is a “compelling reason[ ],” and **Doe** proffered evidence showing that **Doe** felt at risk of personal harm while imprisoned and that **Doe's** common-law spouse had been physically threatened during a pertinent time. The district court erroneously required **Doe** to specifically prove that **Doe** was “actually” in danger.

2. To overcome the First Amendment right of access, **Doe** must show that “(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1466 (9th Cir. 1990). Under the First Amendment's heightened standard, **Doe** was required to show a “substantial probability” of harm to **Doe's** safety.

The district court relied on its determination that the person against whom **Doe** agreed to cooperate was already aware of **Doe's** identity and that the information **Doe** sought to seal was already in the public domain. Neither justification survives close examination.

Any disclosure to the person against whom **Doe** agreed to testify was merely oral, not written, and was

made pursuant to a protective order preventing further dissemination of that information. As **Doe** and the government emphasized repeatedly, in prison an essential difference exists between unsubstantiated claims that someone has cooperated with prosecutors and actual “paper” proof, in the form of official court filings, so confirming. Persons who would retaliate against cooperators may refrain from harming or threatening a suspected cooperator absent “paper” confirmation, from courts, that the alleged cooperation took place. That the person against whom **Doe** agreed to testify was made aware of **Doe's** identity **does** not alone justify denying the motion to **seal** where such disclosure was made orally, under a protective **order**, and could not be revealed without risking a finding of criminal contempt.

The district court further erred in finding that at the time it issued its order, the electronic public docket revealed the fact of **Doe's** cooperation to the general public. As a practical matter, this information was not actually publicly available. A non-party using Public Access to Court Electronic Records (“PACER”) to unearth information about **Doe's** case might have found a document generically filed, under seal, as a “Sentencing Memorandum.” Only a party to the case would then be able to click on the document to access the title of the motion, which, to the knowledgeable user, would have alluded to the fact of **Doe's** cooperation. But a non-party seeking information about **Doe** could not have gone so far; instead, he would have had to physically travel to a courthouse and request the document there, whereupon he would have received a copy of a shell motion or order, blank except for the title of the motion. It is extremely unlikely that any prison inmate could have executed these steps. Thus it was simply not true, as a practical matter, that the fact of **Doe's** cooperation was already publicly available through PACER at the time the district court issued its order.

\*518 Finally, the district court disregarded evidence directly relevant to **Doe's** showing of a substantial probability of harm to **Doe's** safety. **Doe's** common law spouse was physically threatened shortly after **Doe's** arrest by persons **Doe** believes were motivated to prevent **Doe's** cooperation with the government. Although this incident was brought to the district court's attention in the hearings below, the district court did not address it in denying the motion to seal.

Our decision is consistent with the growing nationwide realization among courts and law enforcement offices that electronic filing has significantly increased the risk of harm cooperators face in prison. To that end, the Judicial Conference of the United States has asked courts to “consider avoiding the use of cooperators’ names in your opinions and orders, whenever practicable, or to consider taking additional actions as you see fit, consistent with the law, to obscure cooperators’ identities to ensure their safety.” *Protecting Cooperation Information*, Memorandum, Judicial Conference of the United States (Sept. 17, 2014). These circumstances demonstrate that the potential harms and risks that attend cooperating

witnesses have changed dramatically in the decades since we decided *CBS, Inc. v. United States Dist. Court for Cent. Dist. of Cal.*, 765 F.2d 823 (9th Cir. 1985). Whether under the common law or the First Amendment, **Doe** has made a showing sufficient to justify non-disclosure. Accordingly, we **order** that the district court place under **seal** its **order** denying **Doe** a further sentencing reduction.

**REVERSED.**

**All Citations**

662 Fed.Appx. 515

#### Footnotes

- \* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36–3](#).

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