

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 12-0556

JOHN DOE	:	ON APPEAL FROM THE CLINTON
	:	COUNTY COURT OF APPEALS
Plaintiff-Appellant	:	
	:	TWELFTH APPELLATE DISTRICT
vs.	:	
	:	COURT OF APPEALS
BRANDON BRUNER	:	CASE NO. ca2011-9423
	:	
Defendant-Appellee	:	

BRIEF OF AMICI CURIAE

NATIONAL CENTER FOR VICTIMS OF CRIME, NATIONAL CRIME VICTIM LAW INSTITUTE, THE JUSTICE LEAGUE OF OHIO, OHIO COALITION FOR BATTERED WOMEN, OHIO NOW EDUCATION AND LEGAL FUND, OHIO ALLIANCE TO END SEXUAL VIOLENCE, BUCKEYE REGION ANTI-VIOLENCE ORGANIZATION, CRIME VICTIM SERVICES, CLEVELAND RAPE CRISIS CENTER AND OHIO VICTIM WITNESS ASSOCIATION IN SUPPORT OF APPELLANT JOHN DOE.

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II. STATEMENTS OF INTEREST

A. GENERAL STATEMENT OF INTEREST

This case involves the fundamental rights of privacy of all victims of crimes of a personal or intimate nature, such as rape and child sexual abuse, and their ability to access the courts for redress of harm. Amici come together to support Plaintiff-Appellant John Doe as he seeks to exercise his right to access the courts while maintaining his fundamental right to privacy.

Amici submit that reviewing courts can, and should, reconcile the competing interests of the various parties and allow victims of crimes of a personal or intimate nature to pursue justice pseudonymously.

B. INTEREST OF AMICUS CURIAE *NATIONAL CENTER for VICTIMS of CRIME*

The National Center for Victims of Crime (NCVC) is a nonprofit advocacy organization committed to advancing the rights of crime victims and their families and to helping victims of crime rebuild their lives. The NCVC advocates for victims' rights, trains professionals who work with victims, and serves as a trusted source of information on victims' issues.

C. INTEREST OF AMICUS CURIAE *NATIONAL CRIME VICTIM LAW INSTITUTE*

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization whose mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training, technical assistance to attorneys, promotion of the National Alliance of Victims' Rights Attorneys, research and analysis of developments in crime victim law and provision of information on crime victim law to crime victims and other members of the public. NCVLI actively participates as amicus curiae in cases

involving crime victims' rights nationwide.

D. INTEREST OF AMICUS CURIAE *THE JUSTICE LEAGUE OF OHIO*

The Justice League of Ohio (TJLO) is a non-profit legal clinic serving victims throughout Ohio. TJLO is dedicated to helping ensure that the constitutional, statutory, and unalienable rights of victims of violent crime are upheld throughout the criminal justice process. The goal of TJLO is to restore faith and balance in the criminal justice process. TJLO works to uphold victims' rights across the state of Ohio, to raise awareness in Ohio about the prevalence of victim rights violations and the need for proper criminal justice responses, and to assist victims of violent crime including victims of sexual violence.

E. INTEREST OF AMICUS CURIAE *ACTION OHIO COALITION FOR BATTERED WOMEN*

ACTION OHIO Coalition For Battered Women is a statewide nonprofit domestic violence coalition which strives to help create a society where family violence is no longer acceptable and all persons have equal access to power and resources. Its mission is to promote quality programs, services and resources to survivors of domestic violence, enabling their empowerment and self-determination in order to heal and live free from fear. ACTION OHIO believes that maintaining anonymity is frequently necessary for victims so they may feel and be safe from threats and acts of violence and regain power and control over their own lives.

F. INTEREST OF AMICUS CURIAE *OHIO NOW EDUCATION AND LEGAL FUND*

Ohio NOW Education and Legal Fund is a statewide nonprofit organization dedicated to promoting equal rights for women and girls in Ohio through education, research, and legal and legislative remedies. Ohio NOW Education and Legal Fund believes that maintaining anonymity is especially critical to victims of sexual assault - the majority of whom are female. Growing up

female in America requires that females maintain vigilance regarding their personal safety from childhood through old age to minimize their risks of becoming sexual assault victims. As result, women and girls face limitations and barriers in their daily lives that interfere with their pursuit of career and lifelong achievements.

G. INTEREST OF AMICUS CURIAE *OHIO ALLIANCE TO END SEXUAL VIOLENCE*

The Ohio Alliance to End Sexual Violence (OAESV) is a coalition of sexual assault, allied organizations, and individuals throughout Ohio working to eliminate all forms of sexual violence. OAESV provides support, advocacy, and policy information to organizations working to advocate for the rights and need of survivors and co-survivors of sexual violence. OAESV believes that all victims/survivors have the right to privacy through anonymous filing to protect and ensure their safety, to protect them from enduring victim-blaming comments that communities often cast on them, to decrease barriers to reporting sex crimes and to provide them with these options in order to come forward and have the justice system hold perpetrators accountable.

H. INTEREST OF AMICUS CURIAE *BUCKEYE REGION ANT-VIOLENCE ORGANIZATION*

Buckeye Region Anti-Violence Organization (BRAVO) is a non-profit advocacy organization that works to eliminate violence perpetrated on the basis of sexual orientation and/or gender identification, domestic violence, and sexual assault through prevention, education, advocacy, violence documentation, and survivor services, both within and on behalf of the lesbian, gay, bisexual, and transgender communities. BRAVO comes together with the other Amici to support Plaintiff-Appellant John Doe because this case involves the fundamental rights of all victims to privacy and to access the courts for redress of harm.

I. STATEMENT OF INTEREST OF AMICUS CURIAE *CRIME VICTIM SERVICES*

The mission of Crime Victim Services (CVS) is to help victims prevail over the trauma of their victimization by assisting and advocating for safety, healing, justice, and restitution. CVS serves three thousand persons annually who have been victimized in Allen and Putnam Counties, Ohio. CVS asserts that the right to privacy-filing under a pseudonym is a critical safety and trauma reducing option for many victims and that such filings serve the public interest by allowing crime victims limited protections as they seek redress in the criminal and civil court processes.

J. STATEMENT OF INTEREST OF AMICUS CURIAE *CLEVELAND RAPE CRISIS CENTER*

Cleveland Rape Crisis Center (CRCC) is a non-profit organization that supports survivors, promotes healing and prevention and creates social change. CRCC serves over twenty thousand women, men and children annually. As an organization that advocates for individuals who have been victims of sexual assault, CRCC supports victims' rights to privacy and to action through the civil legal process.

K. STATEMENT OF INTEREST OF AMICUS CURIAE *OHIO VICTIM WITNESS ASSOCIATION*

The Ohio Victim Witness Association (OVWA) is a statewide organization whose mission is to advocate for the safety, healing, justice, and financial recovery of victims and witnesses; and the establishment and protection of victims' rights to fairness, dignity, and respect so that victims may receive quality services. OVWA supports the use of privacy options for victims when needed for their emotional and physical safety as they seek justice in the criminal and civil courts.

II. STATEMENT OF FACTS

Amici Curiae adopt the Statement of Facts as presented by Plaintiff-Appellant John Doe.

III. ARGUMENT

PROPOSITION OF LAW NO. 1:

PERMITTING A VICTIM OF CRIME TO PROCEED PSEUDONYMOUSLY
REMOVES A BARRIER TO CIVIL JUSTICE.

The issue presented herein is a case of first impression in this Court, whether victims of a certain crimes of a personal or intimate nature may file a civil case using a pseudonym.

The U.S. Supreme Court has not specifically ruled on whether civil plaintiffs may proceed by pseudonym; however, it has impliedly approved the use of pseudonyms in a myriad of cases considering many various issues where use of the litigants' names could compromise their privacy rights. *See generally, Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)

This issue involves two competing concerns: (1) the common law presumption in favor of open courtrooms and (2) the need to allow victims of certain crimes of a personal or intimate nature, such as rape and child sexual abuse, access to justice without revictimizing them or infringing on their constitutionally protected right to privacy. Noaker, Patrick *Using Pseudonyms In Sexual Abuse Cases*, Bench & Bar of Minnesota (February 2012) at17.

A. Denying Victims of Crimes Of A Personal or Intimate Nature Such As Rape and Child Sexual Abuse The Right To Proceed Pseudonymously Is Contrary To The Interests Of Justice

Child sexual abuse is a significant problem in our society. Statistics differ slightly but agree generally that approximately one in every three to four women and one in five to six men are sexually abused as children. Mary Gail Frawley-O'Dea, *Perversion of Power: Sexual Abuse*

in the Catholic Church 6-7 (Vanderbilt University Press 2007); *What Do U.S. Adults Think About Child Sexual Abuse? Measures of Knowledge and Attitudes Among Six States, Stop It Now!*,⁷ (2010), www.stopitnow.org/rdd_survey_report ("Nearly 30% of women and 14% of men reported on the survey that they had been sexually abused as children. The percentage of adults in our survey who experienced sexual abuse in childhood is consistent with prevalence rates established in other research with adults."). While statistics differ slightly,¹ the numbers are staggering regardless of the study looked to.

Undeniably, the public interest in stopping child sexual abuse is substantial. However, only a very small percentage of such victims ever report their abuse to the authorities, making detection and prevention extremely difficult. R.F. Hanson, et al., *Factors Related to the Reporting of Childhood Sexual Assault*, 23 *Child Abuse & Neglect* 559-569 (1999) (noting that in the U.S., only 12% of child sexual abuse is reported to authorities). If the goal of stopping child sexual abuse is to be achieved, perpetrators must be identified and prosecuted. This goal will only be achieved when victims feel comfortable and protected when they come forward. Allowing victims to proceed pseudonymously furthers that goal.

Victims of child sexual abuse who do choose to bring civil suits do so for a variety of reasons: "to recover damages for emotional distress; [to] gain public acknowledgment of the seriousness of the defendant's conduct that is not reflected in the crime or conviction or in a prosecutor's discretionary decision not to spend resources on prosecution; and [to] reveal facts

¹ J. Briere and D.M. Elliot, *Prevalence and Psychological Sequence of Self-Reported Childhood Physical and Sexual Abuse in General Population*, 27 (10) *Child Abuse & Neglect*, 1205-1222 (2003) (finding that as many as one in three girls and one in seven boys will be sexually abused at some point in their childhood).

not allowed into evidence in a criminal trial.” *Protecting Victims’ Privacy Rights: The Use Of Pseudonyms In Civil Law Suits*, Bulletin of National Crime Victim Law Institute (July 2011).

It is well-settled that child sexual abuse inflicts lifelong harm. Laura P. Chen, B.S., et al., *Sexual Abuse and Lifetime Diagnosis of Psychiatric Disorders*, 85 (7) *Mayo Clin. Proc.* 618 (July 2010) (concluding that a history of sexual abuse is associated with increased risk of lifetime diagnosis of multiple psychiatric disorders). Victims are routinely psychologically disabled by the abuse and need to be protected from public embarrassment and shame even into adulthood. Numerous studies establish that it typically takes years and often decades for survivors of child sexual abuse to disclose their abuse to anyone, let alone the justice system. Thus, victims face serious psychological disorders and need protection even as adults. *See*, Mic Hunter, *Abused Boys*, 59 (Ballantine Books, 1991) (“some of the effects of sexual abuse do not become apparent until the victim is an adult and a major life event, such as marriage or birth of a child, takes place. Therefore, a child who seemed unharmed by childhood abuse can develop crippling symptoms years later and can have a difficult time connecting his adulthood problems with his past.”). Accordingly, many such victims will not pursue their claims or report their abuse to authorities if they fear public embarrassment resulting from disclosure of their identities. Allowing such victims to proceed pseudonymously would alleviate that concern.

The Sixth Circuit in *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998) considered the right of a victim who was raped as an adult to proceed pseudonymously and concludes that “a constitutional right to nondisclosure of certain types of private information” exists in such cases, reasoning as follows:

Crimes of sexual violence necessarily include a nonconsensual sexual act. The crime of rape, for example, cannot be separated from the sexual act itself. For this

reason, a historic social stigma has attached to victims of sexual violence. In particular, a tradition of “blaming the victim” of sexual violence sets these victims apart from those of other violent crimes. Releasing the intimate details of rape will therefore not only dissect a particularly painful sexual experience, but often will subject a victim to criticism and scrutiny concerning her sexuality and personal choices regarding sex. This interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws and to advocate against the publication of rape victims' names. * * * Publicly revealing information regarding these [portions of our personhood] exposes an aspect of our lives that we regard as highly personal and private

Bloch at 686.

The Sixth Circuit has already recognized in *Bloch* that a woman who was raped as an adult would be embarrassed and averse to discussing the details of her non-consensual sexual abuse, and therefore allowed her to proceed pseudonymously. Without doubt the same analysis must apply to victims of who were sexually abused as children.

Denying child abuse victims the right to proceed pseudonymously would put many in the impossible position of pursuing justice only at the cost of revealing not only the horrible details of their abuse, which they would prefer to forget, but also their names and other identifying information. Faced with such a choice, many victims would decide the “price” of filing, i.e. public disclosure of their personal information, is simply too high and would choose to forego filing even meritorious claims. *See, Protecting Victims’ Privacy Rights, supra* at 2. Denying a right to pseudonymity would effectively slam the courtroom doors in the faces of many deserving victims.

B. Denying Victims Of Crimes Of A Personal or Intimate Nature Such As Rape and Child Sexual Abuse The Right To Proceed Pseudonymously Unnecessarily Infringes On Their Fundamental Right To Privacy

As a matter of law, victims’ privacy rights are protected by the U.S. Constitution.

Although the Constitution does not explicitly mention the right to privacy, it is well-settled that

such a right exists. *See generally, Roe v. Wade, supra*. More specifically, *Whalen, supra* identifies two legal principles stemming from the right to privacy rooted in the Fourteenth Amendment of the U.S. Constitution: (1) a person's right to make certain personal choices, exemplified in *Roe v. Wade, supra* and (2) a person's right to control the nature and extent of information released about himself. (*Whalen* at 599-600) These rights surely encompass the right to non-disclosure of identifying information even where disclosure of private facts is necessary, such as in the prosecution of a civil suit.

Plaintiff John Doe's interest in proceeding pseudonymously in this case springs from his fundamental right to privacy, specifically, his interest in the non-disclosure of personal information in the case stemming from his sexual abuse as a child.

In addition to *Bloch, supra*, the Sixth Circuit has upheld a litigant's right to proceed pseudonymously in other kinds of sensitive cases. *Doe v. Porter*, 370 F.3d 558 (6th Cir.2004) affirms the right of parents to pseudonymously pursue a §1983 Establishment Clause action against a school board to enjoin the teaching of the Christian Bible in public schools. Noting that “[R]eligion is perhaps the quintessentially private matter”, the *Porter* court concluded that:

[T]he district court did not abuse its discretion by granting protective order allowing parents and their minor children to litigate pseudonymously, given that the subject matter of the action forced parents to reveal their beliefs about religion, a particularly sensitive topic that could subject them to considerable harassment.

Porter at 560.

Amici assert that details of any person's sexual experiences are also “sensitive topics” and “quintessentially private matters” deserving of the protection of pseudonymous pleading accorded in *Porter*.

Other jurisdictions uphold the rights of victims of rape or sexual abuse to proceed

pseudonymously. See e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 527 n.2 (1989) (referring to rape victim by her initials, “in order to preserve [her] privacy interests”) (internal citation omitted); see also, *Gueits v. Kirkpatrick*, 618 F. Supp. 2d 193, 199 n.1 (E.D.N.Y. 2009) (stating that the court would not use the rape victim’s name “out of respect for her dignity and privacy,” as protected by the Crime Victims’ Rights Act); see also, *State v. Burney*, 276 S.E.2d 693, 698 (N.C. 1981) (allowing court closure, stating “[o]bviously, rape and other sexual offense cases involve matter of the most sensitive and personal nature”).

C. The Common Law Presumption In Favor Of Open Courtrooms May Be Overcome In The Interest Of Protecting Certain Fundamental Privacy Interests

Civ. R. 10(A) requires that civil complaints must state the names and addresses of all parties. The well-recognized presumption in favor of naming parties to a lawsuit stems from the common law doctrine of open courtrooms, primarily based on notions of fairness to the defendant. However, the presumption in favor of open courtrooms is not absolute. Depending on the circumstances of the case, other Sixth Circuit cases have found that the victim’s right to privacy may override that presumption. See, eg. *Porter, supra*, which affirms the right of parents to pseudonymously pursue a §1983 Establishment Clause action against a school board to enjoin the teaching of the Christian Bible in public schools. See also, *J.P. v. DeSanti*, 653 F.2d 1080, 1090-1091 (6th Cir.1981) (in analyzing informational right-to-privacy claims, certain privacy interests which are “fundamental” or “implicit in the concept of ordered liberty” may be deserving of the protection of anonymity.)

Other circuits have followed the lead of *Roe v. Wade* and *Whalen, supra*. For example, the Fourth Circuit in *James v. Jacobson*, 6 F.3d 233, 240 (4th Cir.1993) addressed concerns relating to anonymity and dissemination of juveniles’ personal information:

[T]hough the general presumption of openness of judicial proceedings applies to party anonymity as a limited form of closure *** it operates only as a presumption and not as an absolute, unreviewable license to deny. The rule rather is that under appropriate circumstances anonymity may, as a matter of discretion, be permitted. This simply recognizes that privacy or confidentiality concerns are sometimes sufficiently critical that parties or witnesses should be allowed this rare dispensation.

The court in *James* explained the general policy as follows:

[I]t is clear that the principal factor counseling against anonymity for the district court was the risk of unfairness to the defendant. Two principal concerns of the court are expressed on the record *** The first was that the very knowledge by the jury that pseudonyms were being used would convey a message to the fact-finder that the court thought there was merit to the plaintiffs' claims of intangible harms. *** The second was that pseudonymity would unfairly impede defendant's ability to impeach the plaintiffs' credibility.

James at 240-241.

However, the court went on to conclude that “[I]n some cases the general presumption of open trials—including identification of parties and witnesses by their real names—should yield in deference to sufficiently pressing needs for party or witness anonymity. *See also, Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir.1981) (“The crucial interests served by open trials *** are not inevitably compromised by allowing a party to proceed anonymously.”); *see also, Doe v. Evans*, 202 F.R.D. 173, 176 (E.D. Pa. 2001) (“although the public certainly has an interest in the issues Mary Doe’s complaint raises, protecting her identity will not impede the public’s ability to following the proceedings); *see also, Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (recognizing a state’s legitimate interest in protecting rape victims’ privacy may outweigh defendant’s constitutional right to confrontation).

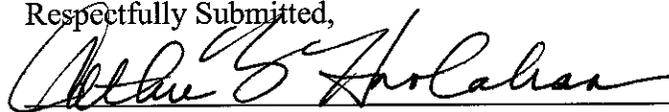
Finally, as discussed in *James*, sacrificing victims’ privacy rights in the interest of affording fairness to defendants is simply not necessary. Assuming reasonable prophylactic

measures are taken, such as disclosure under seal of names and personal information to the parties necessary to the preparation of a proper defense, proffers and curative jury instructions, harm to civil defendants would be negligible. When those safeguards are in place, publication of victims' names would serve no penological purpose and would be unnecessary.

V. CONCLUSION

The psychological damage caused by crimes of a personal or intimate nature, such as rape or child sexual abuse, is so profound that many victims find it difficult to even acknowledge and deal with the crime itself, much less talk about the abuse with others or to take the steps to seek relief in court. Assuming the existence of adequate safeguards to protect the interests of the both the defendants and the public, the rights and interests of these victims in being able to access courts to seek redress of harm and to do so without sacrificing their fundamental right to privacy surely outweighs the presumption in favor of open courtrooms. As a matter of public policy, allowing victims of such crimes to proceed pseudonymously furthers the interests of justice because it opens the courtrooms doors to many victims who would otherwise be unable to proceed without that protection of their fundamental right to privacy.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief Of Amici Curiae In Support of Plaintiff-Appellee John Doe was served this 27th day of August, 2012 by ordinary U.S. Mail, postage prepaid, upon:

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