

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. <u>95831-9</u>
	)	COA NO. 75828-4-I
vs.	)	
	)	STATE'S MOTION TO
EARL RONALD ROGERS,	)	CONSOLIDATE THIS
	)	PETITION WITH SUPREME
Appellant.	)	COURT NO. 95776-2
	)	
	)	
	)	

1. IDENTITY OF MOVING PARTY

Appellant David Trieweler has petitioned for review of the Court of Appeals opinion dated February 20, 2018. The State of Washington, Respondent, files this motion to consolidate this petition with the petition filed in State v. Rogers, No. 95776-2.

2. STATEMENT OF RELIEF SOUGHT

The State requests that this Court consolidate consideration of Trieweler's petition for review with Rogers' petition for review, because both appeals raise the same issues and the Court of Appeals issued a single opinion.

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3. FACTS RELEVANT TO MOTION

The State charged Earl Rogers with one count of felony telephone harassment for threatening to kill the victim, Manesbia Pierce, his girlfriend's mother. CP 1, 5. On November 1, 2015, the victim reported that she received five phone calls from Rogers, in which he yelled at her and threatened to come over and kill her, and "blow" her "brains out." CP 5. She was afraid that Rogers had obtained a gun and would carry out his threat. CP 5. She was visibly upset when police responded to her home, so much so that they had trouble interviewing her. CP 5. Rogers was arrested and admitted calling the victim, but denied threatening her. CP 5.

Attorney David Trieweiler initially represented Rogers. CP 8, 13, 23. When Trieweiler interviewed the victim at her home in the course of his investigation, the victim showed Trieweiler a letter that Rogers had mailed from jail to the victim's daughter, Timothea Marshall, in which Rogers apologized and offered to pay the victim money in exchange for "dropping" the charge against him. CP 7-8.

According to the victim and Marshall, Trieweiler took the only known copy of the letter with him when he left her home. CP 8; RP 5.

The victim subsequently contacted Trieweiler and asked for the letter back. CP 8-9. After the prosecutor learned of the letter's existence, the prosecutor also requested that Trieweiler return the letter to the victim or provide a copy of it to the State. CP 8-9, 14-15, 18, 20. The victim called Trieweiler in the presence of detectives and informed him that she wanted the letter back. CP 15. Trieweiler stated "I can't talk to you about this." CP 15.

The State filed a motion to compel production of the letter. CP 7-21. In response, Trieweiler contended he could not produce evidence he gathered in the course of representing Rogers. CP 23.

The court ordered the State to first serve the victim's daughter, Marshall, with a subpoena duces tecum to produce the letter. CP 34. The State issued the subpoena duces tecum. CP 109-11. Marshall provided a declaration to the court, stating that Rogers had mailed her a letter, and that she gave the letter to her

mother. CP 35-36. She stated that she had no copies of the letter.  
CP 36.<sup>1</sup>

Trieweiler was removed as Rogers' defense counsel after the presiding judge found an irreconcilable conflict of interest between Rogers and Trieweiler, and new counsel was appointed for Rogers. CP 37. The presiding judge subsequently signed a subpoena duces tecum over Trieweiler's objection, ordering him to produce "all letters, notes, memorandum or writings obtained at 103 S. 339<sup>th</sup> Circle, Unit B, Federal Way, WA 98113, from or in the presence of Manesbia Pierce, by David Trieweiler and/or his investigator, during the fall or winter of 2015." CP 51-53. Trieweiler objected. CP 54.

The criminal motions judge permitted Trieweiler to file under seal a motion and declaration to quash the subpoena. RP 14; CP 99-100. The State, although unable to know the precise contents of the motion to quash, provided briefing to the court arguing that

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<sup>1</sup> In December of 2016, Pierce provided the State with several screenshots of portions of the letter, which show that the letter was addressed to Marshall from Rogers in the King County Jail and was dated November 6, 2015, five days after the crime occurred. Although this evidence is not part of the record below, counsel believes RPC 3.3 mandates that she make this Court aware of this evidence. The screenshots do not show the entire letter.

the letter was physical evidence that does not contain attorney-client communications and is not protected by attorney-client privilege. CP 112-15, 131-36.

The court denied the motion to quash in part, requiring Trieweiler to turn over “any letter(s) (or copy of letter(s)) written by Mr. Rogers to Ms. Timothea Marshall provided to Mr. Trieweiler or his investigator by Manesbia Pierce or in her presence at 103 S. 339<sup>th</sup> Circle, Unit B, Federal Way, WA 98113 in the fall of 2015.” CP 99-100. However, the court granted the motion to quash in part by striking broader language in the subpoena requiring production of “all letters, notes, memorandum or writings obtained. . . from or in the presence of Manesbia Pierce” out of concern that the broader language, as phrased, could require production of privileged documents. CP 99-100.

The court found Trieweiler in contempt of court for failing to comply with the court’s order to produce the letter on August 25, 2016. CP 107. The court imposed a sanction of \$100 per day after 48 hours, but stayed the sanction pending appeal. CP 107. Both

Rogers and Trieweiler sought discretionary review, which was granted.

The Court of Appeals affirmed the trial court in a single unpublished decision dated February 20, 2018. The Court of Appeals ordered that on remand Trieweiler must provide the letter within 30 days of issuance of the mandate. Both Rogers and Trieweiler have now petitioned for review.

The felony harassment case remains stayed. Rogers has not yet been charged with any crimes pertaining to the letter. The statute of limitations on any crimes that were committed by Rogers in sending the letter to Pierce will run on November 6, 2018.


#### 4.   GROUNDS FOR RELIEF AND ARGUMENT

RAP 3.3(b) states that this Court may consolidate cases for the purpose of review if it would save time and expense. If two cases were consolidated by the Court of Appeals, they remain consolidated in the Supreme Court pursuant to RAP 3.3(b). These two appeals from a single ruling in a single case were linked at the Court of Appeals and then essentially consolidated when the Court

of Appeals issued a single opinion affirming the trial court. The State respectfully requests that they be formally consolidated in this Court.

Submitted this 14<sup>th</sup> day of May, 2018.

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**KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT**

**May 14, 2018 - 3:03 PM**

**Filing Petition for Review**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** Case Initiation  
**Appellate Court Case Title:** State of Washington, Respondent v. Earl R. Rogers, Appellant (758284)

**The following documents have been uploaded:**

- PRV\_Motion\_20180514150227SC497556\_8442.pdf  
This File Contains:  
Motion 1 - Consolidation  
*The Original File Name was 75828-4 STATES MOTION TO CONSOLIDATE THIS PETITION WITH SUPREME COURT NUMBER95776-2.pdf*

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