

NO. 84691-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TIMES COMPANY,

Petitioner,

v.

HONORABLE SUSAN SERKO and HONORABLE BRYAN
CHUSHCOFF,

Respondents.

REPLY OF PETITIONER SEATTLE TIMES COMPANY

Bruce E.H. Johnson, WSBA #7667
Eric M. Stahl, WSBA #27619
Sarah K. Duran, WSBA #38954
Davis Wright Tremaine LLP
Attorneys for Petitioner

1201 Third Avenue
Suite 2200
Seattle, Washington 98101-3045
(206) 622-3150 Phone
(206) 757-7148 Fax

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
10 AUG 13 AM 9:17
BY RONALD R. CARPENTER
CLERK

FILED AS
ATTACHMENT TO EMAIL

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. THE SIXTH AMENDMENT DOES NOT MANDATE CATEGORICAL NON-DISCLOSURE OF POLICE RECORDS	3
A. <i>Cowles and Washington Post v. DOJ</i> Set Out The Appropriate Framework for Determining Whether Public Records Requests for Police Reports Infringe a Defendant's Constitutional Fair Trial Rights.....	3
B. The Sixth Amendment Does Not Bar Pretrial Disclosure Absent Facts Showing a Likelihood of Prejudice.....	6
C. The Record Below Contains No Evidence that Prejudicial Publicity Is Likely To Result From Disclosure of Any of the Police Records at Issue	11
III. THE RECORDS ARE SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS ACT	16
A. The Investigative Records Exemption Does Not Apply.....	16
B. The Requested Police Records Are Not Work Product.....	18
C. Allen Was Permitted To Participate Below	20
IV. THE SEALING ORDERS REMAIN IN PLACE	21
V. MANDAMUS IS AN APPROPRIATE REMEDY.....	23
VI. CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Estes v. Texas</i> , 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).....	14
<i>Gannett Co. v. DePasquale</i> , 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).....	<i>passim</i>
<i>Gentile v. State Bar of Nevada</i> , 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).....	10, 21
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).....	7
<i>Irvin v. Dowd</i> , 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).....	14
<i>Kyles v. Whitely</i> , 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).....	19, 20, 21
<i>Murphy v. Florida</i> , 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).....	14
<i>Nebraska Press Association v. Stuart</i> , 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)....	10, 12, 14, 15
<i>Press-Enterprise Co. v. Superior Court</i> , 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).....	7, 8
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).....	7
<i>Sheppard v. Maxwell</i> , 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).....	14
<i>Skilling v. U.S.</i> , 130 S. Ct. 2896 (2010).....	14

Turner v. Louisiana,
379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965)..... 15

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)..... 8

Washington Post Co. v. U.S. Department of Justice,
863 F.2d 96 (D.C. Cir. 1998)..... 1, 3, 4, 11

STATE CASES

Cowles Publishing Co. v. Pierce County Prosecutor's Office,
111 Wn. App. 502, 45 P.3d 620 (2002)..... 16, 17

Cowles Publishing Co. v. Spokane Police Department,
139 Wn.2d 472, 987 P.2d 620 (1999)..... *passim*

Dreiling v. Jain,
151 Wn.2d 900, 93 P.3d 861 (2004)..... 9, 21, 23

Federated Publications, Inc. v. Kurtz,
94 Wn.2d 51, 615 P.2d 440 (1980)..... *passim*

Limstrom v. Ladenburg,
136 Wn.2d 595, 963 P.2d 869 (1998)..... 19

Limstrom v. Ladenburg,
110 Wn. App. 133, 39 P.3d 351 (2002)..... 18

Newman v. King County,
133 Wn.2d 565, 947 P.2d 712 (1997)..... 17

Progressive Animal Welfare Society v. University of Washington,
125 Wn.2d 243, 884 P.2d 592 (1994)..... 4

Seattle Times Co. v. Ishikawa,
97 Wn.2d 30, 640 P.2d 716 (1982)..... *passim*

State v. French,
100 Wash. 552 171 P. 527 (1918)..... 23

State v. Jackson,
150 Wn.2d 251, 76 P.3d 217 (2003)..... 11

<i>State v. Jamie</i> , 168 Wn.2d 857, 233 P.3d 554 (2010).....	15
--	----

FEDERAL STATUTES

5 U.S.C. § 552(b)(7)(B).....	4
------------------------------	---

STATE STATUTES

RCW 7.16.160	23
RCW 7.16.170	24
RCW 42.17.010	4
RCW 42.56.030	4
RCW 42.56.070	4
RCW 42.56.210	4
RCW 42.56.240	16
RCW 42.56.290	18
RCW 42.56.540	5, 20, 24
RCW 42.56.550	4, 5, 23, 24

RULES

RAP 16.2(b).....	24
------------------	----

REGULATIONS

WAC 44-14-06002.....	18
----------------------	----

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.....	7, 10
U.S. CONST. amend. VI.....	<i>passim</i>
WASH. CONST. Article 1, § 22.....	5

I. INTRODUCTION

Respondent Darcus Allen depicts this case as a clash between the Sixth Amendment right to a fair trial and a mere statutory right to public records, in which the federal constitutional right automatically prevails under the Supremacy Clause. He is wrong. The fatal flaw in Allen's argument is that he has failed to demonstrate that the asserted threat to his constitutional fair trial right is real, or that blanket secrecy of the records at issue is necessary to protect that right. A defendant seeking protection from pretrial publicity must show more than a generalized apprehension about future news coverage. He must show that disclosure poses a "likelihood of jeopardy" to the fairness of the trial, *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980) (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)), and he must support this showing with evidence. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 40-41, 640 P.2d 716 (1982). The May 20 Order is unsupported by any evidence of likely prejudice.

This case can be decided under existing public records cases, including *Cowles Publishing Co. v. Spokane Police Department*, 139 Wn.2d 472, 987 P.2d 620 (1999) and *Washington Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1998). These cases provide a framework that accommodates both the right of access to public records

and a defendant's Sixth Amendment rights, by requiring the court to examine the requested records and to withhold any material that it determines, as a factual matter, poses a probable threat to the fairness of a trial. (Section II.A.) Allen relies on the U.S. Supreme Court's Sixth Amendment cases, but his reading of them is misleading and highly selective. To the extent the federal pretrial publicity cases apply at all to public records requests, they require a defendant to prove, among other things, that public access poses a "likelihood of jeopardy" to fair trial rights. In fact, the case Allen relies on most heavily – *DePasquale* – is the source of the *Ishikawa* factors. (Section II.B.) Allen stands before this Court, as he did before the trial court, with no facts to support a claim that prejudice is likely, no analysis of the trial court's ability to seat an impartial jury in his case, and no explanation for why *any* (much less *every*) police report about the Clemmons investigation must be hidden from the public. The Sixth Amendment does not prohibit disclosure in such circumstances. (Section III.C.)

Nor are the requested records exempt under the Public Records Act. Allen scarcely acknowledges *Cowles*, which squarely holds that police investigative records are presumptively subject to disclosure where, as here, the subject of the investigation has already been identified and referred for charging. His arguments about the PRA investigative records

and work product exemptions are directed primarily at records that the Times did not request – namely, the death penalty mitigation package and the files of the prosecutor. Neither exemption applies here. (Section III.)

Allen makes no attempt to defend Judge Chushcoff's June 9 order, or the subsequent sealing orders that rely on the May 20 Order. Although he ignores this issue, many of the Latanya Clemmons trial exhibits remain sealed, and this Court's intervention is required. (Section IV.)

Finally, Allen objects to this Court hearing the Times' claims on a petition for mandamus. But this Court has held that mandamus is an appropriate procedure in these circumstances. (Section V.)

II. THE SIXTH AMENDMENT DOES NOT MANDATE CATEGORICAL NON-DISCLOSURE OF POLICE RECORDS

A. *Cowles and Washington Post v. DOJ* Set Out The Appropriate Framework for Determining Whether Public Records Requests for Police Reports Infringe a Defendant's Constitutional Fair Trial Rights

The issues related to the May 20 Order can be decided entirely under *Cowles*. As discussed in the Times' opening brief, *Cowles* holds that police investigative records are presumptively subject to disclosure even in the face of an allegation that release would threaten a defendant's constitutional right to a fair trial. *Cowles*, 139 Wn.2d at 479. A trial court faced with such a claim should "review the potential [e]ffect of disclosure on the trial process," *id.* at 478, examine the records *in camera*, and

“should make that factual determination on a case-by-case basis” as to “whether nondisclosure of a document, or portions of a document” is essential to protect the trial process. *Id.* at 479.¹

The federal standard is the same. When a criminal defendant asserts a fair trial right in response to a federal records request, the constitutional right does not automatically prevail. Rather, a party asserting that disclosure would lead to prejudicial pretrial publicity must establish “that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Washington Post Co.*, 863 F.2d at 102 (construing FOIA’s investigative records exemption, 5 U.S.C. § 552(b)(7)(B)). The opponent of disclosure must show, with factual and non-conclusory evidence, that the alleged additional publicity is “of a nature and degree that judicial fairness would be compromised.” *Id.* at 101-02.

Allen does not claim that *Washington Post* is contrary to the Sixth Amendment; he simply ignores the decision. As for *Cowles*, which is directly on point, Allen attempts to distinguish the case on the ground that

¹ Consistent with the PRA, this review must start with a presumption that public records are disclosable; exemptions are construed narrowly. RCW 42.56.030, 42.17.010(11). The burden of establishing an exemption is on the party seeking nondisclosure. RCW 42.56.070(1), .550(1). Any nondisclosure must be limited to exempt material, which should be redacted, and the remaining portions of the record should be released. RCW 42.56.210(1). Finally, the basis for withholding any material must be specified in writing. RCW 42.56.070(1). See generally *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251-52, 884 P.2d 592 (1994).

the criminal defendant who was the subject of the police records there did not appear himself to dispute the newspaper's public records request.

Resp. Br. at 14. This is a distinction without a difference. Under the PRA, the release of records may be challenged either by the agency holding the records or by any individual to whom the records pertain. RCW 42.56.540, .550. The fact that the defendant did not appear in *Cowles* is irrelevant: the police agency did appear, and it raised (and this Court considered) the potential impact release of police records would have on a defendant's right to a fair trial. 139 Wn.2d at 478-79.

Allen objects that *Cowles* "does not cite" the Sixth Amendment (Resp. Br. at 14), but in fact the case directly addresses "a defendant's *constitutional right to a fair trial*[".]” 139 Wn.2d at 479 (emphasis added) (holding that this right does not "compel categorical nondisclosure of police investigative records."). This "constitutional right to a fair trial" obviously refers to rights under either the Sixth Amendment, or article 1, § 22 of the state Constitution – which "at a minimum" is as protective of an accused's fair trial rights as the Sixth Amendment. *Kurtz*, 94 Wn.2d at 60. *Cowles* holds unanimously² that the PRA procedures set forth above are sufficient to protect the constitutional right to a fair trial.

² *Cowles* was unanimous in all respects, except that two Justices would have held that police reports become presumptively disclosable after the defendant has been charged,

**B. The Sixth Amendment Does Not Bar Pretrial Disclosure
Absent Facts Showing a Likelihood of Prejudice**

Cowles is dispositive of the Sixth Amendment issues presented by the May 20 Order, and this Court need go no further. Nevertheless, because Allen relies almost entirely on U.S. Supreme Court cases regarding pretrial publicity, the Times addresses those cases here. Contrary to Allen's suggestion, none of these cases allows a defendant to deny access to public records merely by asserting the existence of his constitutional fair trial right. The case law requires a factual basis for any finding of prejudice, of the sort utterly absent in the record here.

Allen, like the May 20 Order, relies on *Gannett Co. v. DePasquale* for the proposition that a trial court has "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." 443 U.S. at 378; CP 210; Resp. Br. at 9, 13. But Allen ignores what *DePasquale* and other cases say about the showing a defendant must make in order to obtain such protection from the trial court. Indeed, the U.S. Supreme Court has expressly rejected precisely the broad reading of *DePasquale* that Allen urges this Court to adopt:

[T]his risk of prejudice *does not automatically justify refusing public access.... Through voir dire*, cumbersome as it is in some circumstances, *a court can identify those jurors whose prior knowledge of the case would disable them from*

rather than after the case is referred to the prosecutor for a charging decision. *See* 139 Wn.2d at 482 (Talmadge, J., concurring).

rendering an impartial verdict.... The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation must be narrowly tailored to serve that interest.

Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (discussing *DePasquale*, 443 U.S. at 378) (emphasis added, quotation marks omitted). Allen also ignores this Court's construction of *DePasquale*. As detailed below, in Washington, application of *DePasquale* means application of the *Ishikawa* factors.

In *DePasquale*, a newspaper challenged a court order closing a suppression hearing in a homicide case. A four-member majority held that the Sixth Amendment posed no bar to such closure orders, since its "public trial guarantee" was "created for the benefit of the defendant." 443 U.S. at 368.³ The majority opinion also held that the Sixth Amendment did not *compel* closure merely because the defendant seeks it, but that closure was justified on the facts of the case, which supported a finding that an open proceeding would pose a "reasonable probability of prejudice to these defendants." *Id.* at 392-93.

More significant for this case, five justices recognized that before a court can order closure, the defendant must show a need for secrecy. Four

³ The majority reserved the question of whether the First Amendment provides the public a right of access to criminal proceedings. *Id.* at 392. The Court later held that the public does have such a right. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 573, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Press-Enterprise*, 478 U.S. at 9.

justices joined Justice Blackmun's opinion, which would have required the defendant to prove "a substantial probability that irreparable damage to his fair-trial right will result" absent secrecy. *Id.* at 441 (Blackmun, J., concurring and dissenting).⁴ Justice Powell, whose concurring opinion was the deciding vote in *DePasquale*, thought the standard should be "whether a fair trial for the defendant is *likely to be jeopardized* by the publicity." *Id.* at 400 (Powell, J., concurring) (emphasis added). Justice Powell also found that before public access could be denied, those present must be afforded the opportunity to object to closure; the trial court must consider alternative means by which fairness of the trial could be preserved; the court must weigh the competing interest of the public and the defendant; and any denial of public access must be no further than necessary to protect the asserted purpose. *Id.* at 400-01.

Justice Powell's five factors are, of course, the now-familiar *Ishikawa* test. In *Kurtz*, this Court confronted a closure order "procedurally and factually indistinguishable" from *DePasquale*. This Court opted to resolve the case under the state constitution, noting that "it affords fair trial rights which at a minimum must provide to the accused

⁴ The full Court later adopted the "substantial probability" standard. See *Press-Enterprise*, 478 U.S. at 14 (where defendant asserts right to a fair trial, pretrial hearing may be closed only upon "specific findings" showing "substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent"); see also *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

the protection he or she enjoys under the Sixth Amendment.” *Kurtz*, 94 Wn.2d at 56, 60. The Court held that the five principles suggested by Justice Powell in *DePasquale* should be applied when a defendant claims that public access must be denied to protect against prejudicial pretrial publicity. *Id.* at 62-65. In *Ishikawa* and later decisions, this Court refined the requirements, and held that a trial court is constitutionally required to apply this test before it can deny the public access to judicial proceedings or records. *See, e.g., Ishikawa*, 97 Wn.2d at 37; *Dreiling v. Jain*, 151 Wn.2d 900, 908-09, 93 P.3d 861 (2004).

To be clear, the May 20 Order involves a public records request, not denial of access to a judicial proceeding or court records. The Times believes that while the *Ishikawa* factors can be applied to this case (*see* Pet. Br. at 35-39), it is not necessary to do so, and that the fair trial issues raised by the May 20 Order can be fully addressed under *Cowles*. Nevertheless, if the Court accepts Allen’s argument that the PRA issue should be decided under *DePasquale*, it follows that the *Ishikawa* standard also applies. The May 20 Order fails to meet this standard because, among other reasons, it did not find – and defendants have still failed to show – that release of the police records is likely to jeopardize their fair trial right; that blanket nondisclosure of the records was the narrowest

means of protecting that right; or that alternatives to nondisclosure would be inadequate.

Allen also relies on *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991), for the proposition that courts may “alleviate the potential impact of publicity” (Resp. Br. at 13), but that case is even less helpful to him than *DePasquale*. *Gentile* involved a bar disciplinary rule that prohibited lawyers from making extrajudicial statements that posed a “substantial likelihood of materially prejudicing” trial proceeding. This is a heightened standard, which Allen ignores. Moreover, *Gentile* holds only that the First Amendment does not prohibit such a restriction *on the speech of attorneys*. See 501 U.S. at 1074-76 (Rehnquist, J., majority op.). Unlike the rule at issue in *Gentile*, the May 20 Order does not restrict the speech of any attorney. To the extent this case restricts speech at all, it is that of press and its ability to publish information about the underlying criminal investigation. The standard for such a restriction is far more stringent, as *Gentile* itself notes:

[I]n order to suppress press commentary on evidentiary matters, the State would have to show that “further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court.”

Id. at 1065 (quoting *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 569, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)).

In sum, while Allen's brief addresses the existence of his Sixth Amendment right to a fair trial, it is silent on what is required to establish a threat to that right. Under the cases Allen relies on, as well as *Ishikawa* and its progeny, the trial court should have required defendants below to show, at a minimum, that publicity from disclosure of the records at issue poses a *likelihood of jeopardy* to their fair trial right that could not be avoided by any means other than blanket secrecy. Similarly, under the public records cases discussed in Section II.A above, and the change of venue cases discussed in the Times' opening brief, the defendants should have been required to show a "probability" that disclosure of the records would interfere with the trial fairness. *See, e.g., Washington Post*, 863 F.2d at 102; *State v. Jackson*, 150 Wn.2d 251, 269, 76 P.3d 217 (2003). All of these standards are compatible with the Sixth Amendment right claimed by Allen. As discussed in the next section, the defendants have failed to meet any of them.

C. The Record Below Contains No Evidence that Prejudicial Publicity Is Likely To Result From Disclosure of Any of the Police Records at Issue

Allen claims that "the trial court found a likelihood of prejudice existed should these documents be released." Resp. Br. at 16, citing CP 211. This assertion reads into the May 20 Order a finding that is not there. The Order's sole finding with respect to fair trial rights is that

“further release of investigative materials and details *may* jeopardize that [fair trial] right which in turn justifies exemption under the PRA.” *Id.*

(emphasis added). This is not a finding of likely or probable harm; it is just speculation.

Moreover, even if the May 20 Order could be read as containing a finding that prejudicial publicity was likely to result from disclosure, the Order would still fail for lack of any factual support for such a conclusion. The only “fact” cited in the Order is the judicially noticeable – and wholly unsurprising – point that news coverage of the events of November 29 has been extensive. CP 211. But “[p]retrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial.” *Nebraska Press Ass’n*, 427 U.S. at 554. The Order cites no other evidence. This is understandable, because the defendants did not submit any. “Defendants do not provide data, statistics, print or video stories to substantiate their position[.]” CP 210.

Allen’s objections to disclosure (the most extensive that were submitted to Judge Serko) may be found at CP 126-154. While he catalogs the records at issue, his specific objections are unrelated to any Sixth Amendment or pretrial publicity concern. Generally, he raises only privacy concerns of third parties; personal information that could be easily redacted; and evidentiary objections that go to admissibility, rather than

any potential prejudice to his fair trial rights. *Id.* Only two of his objections even allude to pre-trial news coverage, and those references are unsupported and unrelated to disclosure of the records at issue.⁵

The record, in short, contains no evidence at all that releasing the records requested by the Times is likely to lead to prejudicial publicity. Such prejudice cannot simply be presumed. A factual determination is required, under any standard. *See, e.g., Cowles*, 139 Wn.2d at 479 (court must make “factual determination on a case-by-case basis” to determine whether nondisclosure of police records is essential to protecting fair trial rights); *Ishikawa*, 97 Wn.2d at 41 (findings on pretrial publicity inadequate where “not substantiated by the factual findings” and where court did not consider “the actual impact of publicity on potential jurors”). Allen offers this Court no facts to suggest that the records themselves will result in prejudicial news coverage about him, or that release will make it impossible to seat a fair jury. He provides no discussion of the Pierce County jury pool, or of the trial court’s experience in seating a jury at the Latanya Clemmons trial.

Instead, Allen simply cites a handful of pretrial publicity cases. Resp. Br. 9-10. But all of the cases he cites in which a court found

⁵ *See* CP 129 (claiming that press coverage of unrelated case “invariably loops the story back to Maurice Clemmons and the individual[s] now facing charges[.]”); CP 130 (“The shooting [of Maurice Clemmons] has been covered by the media during the hearing involving the Seattle police officer responsible[.]”).

publicity sufficiently prejudicial to threaten a defendant's fair trial rights involved extreme circumstances not present here. *Irvin v. Dowd*, 366 U.S. 717, 725-26, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), involved a barrage of adverse publicity about the defendant's offer to plead guilty and his confession. *Estes v. Texas*, 381 U.S. 532, 538, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333, 353, 355, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), were cases in which the courtroom proceedings themselves were conducted in a circus-like, disruptive atmosphere. The U.S. Supreme Court has held on multiple occasions that these three cases are far outside the norm. See *Skilling v. U.S.*, 130 S. Ct. 2896, 2914, 2921-22 (2010) (in *Estes* and *Sheppard*, "media coverage manifestly tainted" the proceedings themselves, in small communities; also noting extreme facts in *Irvin*); *Nebraska Press Ass'n*, 427 U.S. at 551-52 (noting "sensational" and other problematic elements of cases like *Irvin*, *Estes* and *Sheppard*); *Murphy v. Florida*, 421 U.S. 794, 798, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975) (same cases involved "trial atmosphere utterly corrupted by press coverage."); see also *DePasquale*, 443 U.S. at 443-44 (Blackmun, J., concurring and dissenting) (in these cases "the publicity went far beyond the normal bounds of coverage").⁶

⁶ The majority opinion in *DePasquale* also detailed the news coverage at issue, 443 U.S. at 371-74, as well as facts about press circulation and the small population of the county from which the jury would be drawn. *Id.* at 371 n.1. The remaining cases cited by Allen

The U.S. Supreme Court has recognized that “[c]ases such as these are relatively rare,” and that “[i]n the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important [fair trial] right.” *Nebraska Press Ass’n*, 427 U.S. at 551, 554. This Court expressed exactly the same view in *Cowles*: “Facts regarding pending criminal prosecutions are often made public prior to trial. This rarely results in the inability to impanel a fair and impartial jury.... The general public is well aware that a person is innocent until proven guilty.” 139 Wn.3d at 479.

Accordingly, Allen’s sojourn into the U.S. Supreme Court’s pretrial publicity cases leads to exactly the same place as *Cowles*: a requirement that defendants seeking to establish a threat to the fair trial right show that disclosure poses a likelihood that the trial court will be unable to seat an impartial jury. The trial court’s determination must be supported by record evidence, and must take into account whether alternatives such as voir dire and jury instructions will suffice to manage the risks of publicity. On the record presented, the Sixth Amendment poses no bar to release of the police records sought by the Times.

all involved trials that were unfair for reasons having nothing to do with publicity. In *State v. Jamie*, 168 Wn.2d 857, 233 P.3d 554 (2010), the prejudice stemmed from the fact that defendant was tried in a courtroom located inside a jail. In *Turner v. Louisiana*, 379 U.S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965), defendant was denied a fair trial because the police officers who were the primary witnesses against him fraternized with jurors during the trial.

III. THE RECORDS ARE SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS ACT

A. The Investigative Records Exemption Does Not Apply

Allen argues that the records sought by the Times are exempt from disclosure under the PRA's investigative records exemption, RCW 42.56.240(1). But his argument is directed entirely to the mitigation package that Allen will submit to the prosecutor in September, in advance of the prosecutor's November 15, 2010, decision whether to seek the death penalty. Resp. Br. at 21. As such, the argument addresses records that are not at issue in this case. The Times *has not requested the death penalty mitigation package*. Nor has anyone else. See CP 11-12. Indeed, as Allen admits, the mitigation package does not even exist yet.

Accordingly, Allen's reliance on *Cowles Publishing Co. v. Pierce County Prosecutor's Office and Robert Yates*, 111 Wn. App. 502, 45 P.3d 620 (2002) ("*Yates*") is entirely misplaced. *Yates* involved a PRA request made *to the prosecutor* for death penalty mitigation material. *Id.* at 504. The prosecutor denied the request, and the requester sued. In holding that nondisclosure of the records was "essential to effective law enforcement," and thus exempt under RCW 42.56.240(1), the Court of Appeals cited considerations unique to death penalty mitigation packages – namely, that public disclosure would have a chilling effect on the willingness of the

defendant's family members and others to provide favorable information about the defendant for the prosecutor's consideration in making an individualized death penalty decision. 111 Wn. App. at 509-10. *Yates* says nothing about other types of investigative records, and it does not undermine the conclusion of *Cowles v. Spokane Police Department* that incident reports and investigative material gathered by *police agencies* are presumptively subject to disclosure once the defendant has been identified and referred for a charging decision. In this case, the Times requested documents from a police agency, not the prosecutor; the records sought are not death penalty mitigation records; and neither the prosecutor nor any other law enforcement agency contends that nondisclosure is essential to any law enforcement function. *Yates* is simply inapplicable.

Allen also argues that the *Cowles* presumption does not apply because the investigation of Mr. Allen's case is allegedly "ongoing," and thus all of the police reports sought by the Times are categorically exempt under *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997). As the Times explained in its opening brief, this reading of *Newman* is unsustainable in light of *Cowles*. Pet. Br. at 21-22. *Cowles* draws a bright line: while *Newman* permits categorical exemption of police records of unsolved crimes in which no suspect has been identified, *Cowles* holds that such records are presumptively subject to disclosure after "the suspect

is arrested and the case referred to the prosecutor.” *Cowles*, 139 Wn.2d at 481. Thus, the police records sought by the Times are disclosable, regardless of whether some aspect of the investigation of Allen could be deemed “ongoing.” Allen provides no evidence to overcome the presumption and, again, no law enforcement agency has asserted that nondisclosure is essential to any investigation.

B. The Requested Police Records Are Not Work Product

Allen next argues that the police records sought by the Times are exempt as prosecutor work product under RCW 42.56.290. But the Times has not asked for *any* records from prosecutor files; its request is directed solely to the Pierce County Sheriff’s Office. Moreover, the prosecutor has not asserted any work product exemption. Accordingly, even if the records were work product, the prosecutor would be entitled to waive that protection, just as it is entitled to waive any PRA exemption. *See, e.g., Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002) (“generally, a party can waive the attorney work product privilege as a result of its own actions”); WAC 44-14-06002 (PRA exemptions are permissive, not mandatory).⁷

More to the point, the police records sought by the Times are not work product. The PRA’s work product exemption applies to items that:

⁷ No Washington case has ever held records to be exempt under the PRA based on a work product claim asserted by a party other than the agency or attorney holding the privilege.

(1) show legal research and opinions, mental impressions, theories, or conclusions of the attorney or of other representatives of a party; (2) are an attorney's written notes or memoranda of factual statements or investigation; and (3) are formal or written statements of fact, or other tangible facts, gathered by an attorney in preparation for or in anticipation of litigation.

Limstrom v. Ladenburg, 136 Wn.2d 595, 611, 963 P.2d 869 (1998).

"Generally, nothing in a police investigative file would be considered attorney work product." *Cowles*, 139 Wn.2d at 478.

Allen suggests that the Court simply ignore this portion of *Cowles*, on the ground that the police and prosecutor are "constitutionally the same entity" under *Kyles v. Whitely*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Resp. Br. at 22. *Kyles* is inapposite. It involves the state's duty to disclose evidence to the defendant. *Kyles* does not mention work product, much less work product in the public records context. The decision equates the prosecutor and the police only insofar as it holds that both are responsible for wrongful suppression of evidence (a non-issue in this case, since the defendants have access to all of the records reviewed by Judge Serko). See 514 U.S. at 437-38; CP 208.

Under Allen's reasoning, police records would *always* be prosecutor work product, and the PRA's investigative records exemption would be entirely superfluous. That is not the law. "[N]ot even prosecution files are categorically exempt from disclosure." *Cowles*, 139

Wn.2d at 478 (citing *Limstrom*, 136 Wn.2d at 613). “Instead, documents are protected from disclosure to the extent they are attorney ‘work product’ under the civil discovery rules,” which is not the case with investigative files generated by police agencies in the normal course of police work. *Cowles*, 139 Wn.2d at 478. The Times request seeks only such police records, CP 95-99, and they are not work product.

C. Allen Was Permitted To Participate Below

Allen dedicates the final three pages of his brief to the “issue” of whether he was properly permitted to assert PRA objections and to seek an injunction under RCW 42.56.540. Resp. Br. at 24-26. But that issue is not disputed in this action. Allen was permitted to participate below, and to intervene (without objection from the Times) in this mandamus proceeding. The Court accordingly need not consider Allen’s arguments on this point.

Allen asserts that a prosecutor has an obligation to assert a PRA exemption even, apparently, where the prosecutor believes in good faith that no exemption applies. His sole authority on this point is *Kyles*, which he cites for the proposition that “[i]nformation in the hands of the police agency is the same as information in the hands of the prosecutor,” and that the prosecutor’s “obligations with respect to pretrial disclosure of information reaches the investigating police agency as well.” Resp. Br. at

24 (citing *Kyles*, 514 U.S. at 437). But again, *Kyles* addresses only the obligation of the police and prosecutor to disclose evidence *to a*

defendant. The case says nothing about an agency's disclosure obligations to the public, and it certainly cannot be read to suggest that prosecutors must oppose public records requests on a defendant's behalf.

Allen also suggests that a prosecutor somehow violates the ethical rules against extrajudicial statements by failing to assert PRA exemptions that a defendant thinks should be raised. No case supports this position.⁸ In any case, the Times is not soliciting any statement, or even any records, from the Pierce County prosecutor. It is seeking public records, all of which were generated by police agencies, not the prosecutor.

IV. THE SEALING ORDERS REMAIN IN PLACE

Remarkably, neither Allen nor any other Respondent has attempted to defend the June 9 *ex parte* sealing order or the other orders that sealed the once-public Clemmons trial exhibits. This Court should rule that all of the sealing orders that rely on Judge Serko's May 20 Order (rather than on the findings required by *Ishikawa* and *Dreiling*) are unconstitutional, for reasons the Times has set forth previously. *See* Pet. Br. 41-46; CP 294, 297, 362.

⁸ Allen relies on *Gentile*, 501 U.S. at 1072. But as discussed above, *Gentile* addressed only the constitutionality of a bar rule limiting a lawyer's extrajudicial statements about pending cases. Nothing in *Gentile* suggests that such rules apply to a prosecuting agency's obligations to respond to statutory requests for public records.

The following developments have occurred with respect to the Clemmons exhibits after the Times filed its opening brief. First, Judge Arend's preliminary order of July 16 had reserved a ruling on 21 of the Clemmons trial exhibits, and ordered the defendants below to file any objections to disclosure of these exhibits by July 23. CP 364. No such objections were ever filed. The July 16 Order also states that a final order would be forthcoming after August 2, but to date no final order has been entered. *Id.* Second, with respect to the separate sealing motion that Allen filed with Judge Fleming on July 22 (CP 688), the Times on August 2 filed a response demonstrating, among other things, that Allen was seeking to seal records that he had previously agreed, before Judge Arend, to unseal.⁹ See CP 297, 299, 536, 552. At a hearing held August 3, Judge Fleming declined to rule on Allen's sealing motion, finding that he lacked authority to decide it given the other pending proceedings surrounding the Clemmons exhibits. CP 767.

The trial court's files from the Clemmons trial thus remain partially sealed, on the strength of sealing orders that rely on the May 20 PRA ruling and that fail to apply the *Ishikawa* factors.

⁹ A summary of the trial exhibits and their status as of August 2 may be found at CP 652.

V. MANDAMUS IS AN APPROPRIATE REMEDY

Finally, Allen claims that mandamus is not an appropriate vehicle for deciding this case. He argues, first, that the Respondent judges had no “duty to rule in the newspaper’s favor.” Resp. Br. at 4; RCW 7.16.160. But a superior court judge has a clear duty to follow statutes, constitutional authority, and the holdings of this Court. *See, e.g., State v. French*, 100 Wash. 552, 54 P. 527 (1918) (mandamus appropriate remedy to compel judge to enter findings required by law); *Ishikawa*, 97 Wn.2d at 35. The issue is not that the Respondents declined to rule in the Times’ favor. The issue is that they failed to follow the directives of the PRA and this Court regarding the steps that must be taken before denying access to public records and to trial exhibits. Among other things, they failed to make factual findings that are required for nondisclosure under *Cowles*, and that are constitutionally mandated by *Dreiling* before trial exhibits can be sealed.

Allen also argues that the writ should be denied because the Times has adequate alternative remedies. Resp. Br. at 6-8. The alternative he suggests is a declaratory action under RCW 42.56.550. But that provision provides for judicial review after an agency has *denied* a PRA request. Allen overlooks the fact that in this case, the relevant agency (the PCSO) has no objection to disclosure, and would have released the records sought

by the Times had it not been enjoined from doing so by Judge Serko. *See* CP 417, 468-69. Accordingly, the Times has no dispute with the agency and no basis to obtain declaratory relief against it. Allen also ignores the fact that he and the other defendants moved to enjoin the release of the records under RCW 42.56.540, and did so in the context of seven separate criminal actions to which the Times was not a party (with several of the defendants objecting to any separate declaratory action). In addition, RCW 42.56.550 would provide no relief with respect to the sealing of the Clemmons trial exhibits. Accordingly, Section 550 was not an adequate remedy, and the Times has no other “plain, speedy and adequate remedy in the ordinary course of law,” RCW 7.16.170, other than a direct action against the Respondents.

Moreover, Allen’s arguments are foreclosed by *Ishikawa* and *Kurtz*, which squarely hold that lower court orders restricting public access can be challenged via a separate, original action in this Court against the judge who entered the order. “Mandamus by an original action in this court *is a proper form of action for third party challenges to closure orders* in criminal proceedings.” *Ishikawa*, 97 Wn.2d at 35 (emphasis added); *see also Kurtz*, 94 Wn.2d at 53-54 (approving newspaper’s direct action under RAP 16.2(b) against judge, challenging his orders closing court proceeding and sealing court file). As in

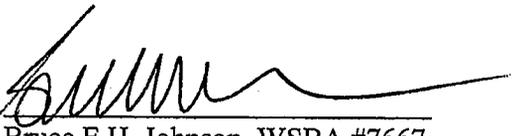
Ishikawa, a writ of mandamus is an entirely permissible means of challenging the orders at issue here.

VI. CONCLUSION

For the reasons stated here and in its opening brief, the Times respectfully asks this Court to issue a writ of mandamus compelling public access to the records sought in the Times' PRA requests and to the Latanya Clemmons trial exhibits. The record is sufficient to establish that the trial court lacked any basis for denying access to this material. Alternatively, the Court should issue instructions to the court below regarding the correct legal standard to apply to the PCSO records and the Clemmons trial exhibits.

RESPECTFULLY SUBMITTED this 13th day of August, 2010.

Attorneys for Petitioner
Seattle Times Company

By 

Bruce E.H. Johnson, WSBA #7667
Eric M. Stahl, WSBA #27619
Sarah K. Duran, WSBA #38954
1201 Third Avenue
Suite 2200
Seattle, WA 98101-3045
Telephone: (206) 757-8148
Fax: (206) 757-7148
E-mail: brucejohnson@dwt.com
ericstahl@dwt.com
sarahduran@dwt.com

DECLARATION OF SERVICE

I hereby declare that on August 13, 2010, I caused the foregoing document to be filed with the Washington State Supreme Court and arranged for copies to be served upon the following attorneys via email and U.S. Mail:

James K. Pharris
Attorney General's Office
P. O. Box 40100
Olympia, WA 98504-0100

james@atg.wa.gov

Mark Lindquist
Pierce County Prosecutor's Office
930 Tacoma Avenue S., Rm. 946
Tacoma, WA 98402-2102

mlindqu@co.pierce.wa.us

Stephen Penner
Pierce County Prosecutor's Office
930 Tacoma Avenue S., Rm. 946
Tacoma, WA 98402-2102

spenner@co.pierce.wa.us

Kevin McCann
Pierce County Prosecutor's Office
930 Tacoma Avenue S., Rm. 946
Tacoma, WA 98402-2171

kmccann@co.pierce.wa.us

Craig Adams
Legal Advisor to Sheriff
930 Tacoma Avenue S., Rm. 109
Tacoma, WA 98402-2163

cadams@co.pierce.wa.us

Mary High
Attorney at Law
949 Market Street, Ste. 334
Tacoma, WA 98402-3696

mhigh@co.pierce.wa.us

Greg Link
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

greg@washapp.org

Keith MacFie
Attorney at Law

711 Commerce Street, Ste. 210
Tacoma, WA 98402-4514

dalymac@harbornet.com

Kirk Mosley
Law Office of Kirk 'Chip' Mosley
16000 Christensen Road, Ste. 308
Tukwila, WA 98188-2928

chipmosley3@yahoo.com

John O'Melveny
Law Offices of John O'Melveny
15 N. Broadway, #A
Tacoma, WA 98403-3120

jomelveny@harbornet.com

Kent Underwood
Law Office of Kent W. Underwood
1111 Fawcett Avenue, Ste. 101
Tacoma, WA 98402-2029

kent.underwood@kunderwoodlaw.com

Grace Helen Pierre-Whitener
Whitener Rainey Writt PS
820 6th Avenue, Ste. A
Tacoma, WA 98405-5210

whitenerh@wrwattorneys.com

Sheri Lynn Arnold
Attorney at Law
P. O. Box 7718
Tacoma, WA 98417

SLArnold2002@yahoo.com

Philip Thornton
Philip E. Thornton Law Office
901 S. I Street, Ste. 201
Tacoma, WA 98405-4593

pthorntonatty@qwestoffice.net

William Hanbey
Attorney at Law
P. O. Box 2575
Olympia, WA 98507-2575

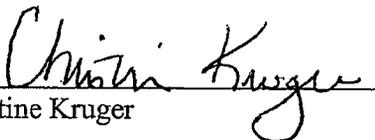
hanbeyps@olywa.net

Thomas Miller
Christie Law Group, PLLC
2100 Westlake Avenue N., Ste. 206
Seattle, WA 98109-5802

tom@christielawgroup.com

I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

EXECUTED this 13th day of August, 2010, at Seattle, Washington.


Christine Kruger