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Sep 26, 2011, 4:46 pm
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THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG,
Respondent/Cross-Petitioner,

v.

THURSTON COUNTY and the THURSTON COUNTY
PROSECUTING ATTORNEY,
Petitioners/Cross-Respondents.

**THURSTON COUNTY'S ANSWER
TO BRIEF OF AMICI CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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ORIGINAL

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Pursuant to RAP 10.2(g), Thurston County submits the following answer to the Brief of Amici Curiae, Washington Coalition for Open Government (“Amici WCOG”).

I. ARGUMENT

A. It Is Appropriate For This Court To Consider The Declarations Of Individuals With Vast Experience Involving SSOSA Evaluations/VISs As Well As Those With Direct Knowledge Of The Lerud Criminal Matter.

Amici WCOG seems to argue that because no *live* witness testified during Koenig’s motion for summary judgment, this court must disregard the *unrebutted* declarations the County provided to support its position in front of the trial court. This suggestion is not supported by the law. In this case, the County had the burden to show that disclosing the SSOSA evaluation and the VIS would impair effective law enforcement and/or cause significant harm to efficient government. The only way to answer those questions was to ask individuals experienced in SSOSA evaluations and VISs. Rather than rely on unsupported assertions by the County’s civil attorney that has never prosecuted a criminal case, let alone a sex case involving SSOSA, the County asked the experts and provided the answers to the Court. Koenig did not object or move to strike the declarations submitted by the County.

The County filed declarations from a defense attorney with SSOSA experience (CP 109), a certified sex offender treatment provider (CP 100), a crime victim specialist (CP 121), a sex crime victim specialist (CP 116), a Thurston County criminal prosecutor (CP 104), a Thurston County victim advocate (CP 277), and the victim, herself (CP 125). Only two of the seven are employees of an agency as defined by the PDA. The declarants are not offering evidence so they can get around the PDA.¹ Defense attorneys and victim advocates represent/support individuals that commonly use the PDA to obtain records.

While Amici WCOG describes the declarations as if they are prohibited in the context of a PDA summary judgment, quite the opposite is true. Declarations for summary judgment motions are common and are allowed under CR 56.

Supporting and opposing affidavits shall be made on personal knowledge... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings...

¹ Amici WCOG's arguments that citizen requesters cannot obtain declaration from an agency and that "leaving the interpretation of the [PRA] to those at whom it is aimed" is a bad idea, must be rejected in this case. See Brief of Amici WCOG at pg. 7. Only two of the seven declarations came from an agency. Further, CR 56 allows depositions to be taken; and the PRA doesn't limit discovery. Koenig could have taken depositions of or obtained declarations from agency employees within any County in the state, defense attorneys, SSOSA/VIS experts and victims to garner information.

CR 56(e). Further, it was within the discretion of the trial court to consider both the fact and expert declarations.

The trial court has wide discretion in ruling on the admissibility of expert testimony. This court will not disturb the trial court's ruling “ ‘[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable.’ ” ER 702 permits testimony by a qualified expert where “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Courts generally “ ‘interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.’ ”

Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010) (footnotes omitted). In this case, the testimony of individuals with years of experience dealing with SSOSA cases and victims of sex crimes proved helpful to the trial court. Where else could the court find answers to questions involving how disclosure of a VIS or SSOSA evaluation would impact the system? This Court should find that the trial court properly considered the declarations as they were helpful to the trier of fact.

Even the Court of Appeals in this case found the declarations useful and pointed out Koenig's failure to rebut the evidence. *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010) (review pending) (footnotes omitted). “Koenig did not rebut the substance of these declarations with any affidavits or evidence of his own.” *Koenig v. Thurston County*, 155 Wn. App. at 409. Throughout the plurality decision

and the dissenting opinion of Judge Armstrong, reliance on the declarations is clear. *Id.* at 405, 406, 407, 408, 409, 410, 411, 412, 424, 426, 427, 428, 429, 433. The court also recognized that, “[w]hen an agency claims this exemption, the courts may consider affidavits from those with direct knowledge of and responsibility for the investigation.” *Id.* at 407.

Additionally, without analysis, Amici WCOG states that the County failed to follow ER 702 when providing declarations from experts in SSOSA and VIS matters. *See* Brief of Amici WCOG at pg. 6. Upon an examination of the declarations and briefing material, it is evident that the County presented its declarants as experts. ER 702 does not require any magic words for a declarant to provide expert testimony. Instead, ER 702 provides that a witness with specialized knowledge that will assist the trier of fact is “qualified as an expert by knowledge, skill, experience, training, *or* education...” ER 702 [emphasis added]. The County declarants met this requirement.

I, ROBERT MACY, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. My practice, Robert Macy and Associates, is located at 7602 Henderson Blvd. S.E. Olympia, Washington. I have a Masters Degree in clinical psychology and marriage, family and child counseling. I have been a sex offender treatment therapist since 1974 and have been providing evaluations and treatment to the sexual

offender, their victims and their families in the state of Washington since 1979. I am one of the first treatment providers in the state of Washington to be granted certification as a Fully Certified Sex Offender Treatment Provider. My Certification number is FC0004. Since provisions were made in the State of Washington regarding the Special Sex Offender Sentencing Alternative (SSOSA) option I have been providing evaluations for those men and women who qualify for the SSOSA.

CP 100.

I, AMY I. MUTH, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. I have been a practicing attorney for six years, practicing criminal defense law exclusively;
2. I am currently employed as a staff attorney in the felony unit of The Defender Association, in Seattle, Washington;
3. I am a member of the Washington Association of Criminal Defense Lawyers ("WACDL");
4. WACDL is a non-profit organization with over 1000 members — criminal defense lawyers and related professionals — in Washington State;
5. WACDL provides continuing legal education seminars and other services to assist our members with their defense practice, and represents defense bar interests in the legislature and other policy forums;
6. I presently serve as the co-chair of WACDL'S Joint Legislative Committee with the Washington Defender Association;
7. I am also a WACDL board member;
8. In addition, in the 2006 Legislative Session, I did substantial work for the WACDL Legislative Committee in reviewing, preparing handouts for, and testifying on a substantial number of the 80+ sex offender bills which were offered that session;

9. As a defense attorney, a substantial portion of my practice concentrates on representing individuals accused of sex crimes;

10. I have sought, and obtained, the Special Sex Offender Sentencing Alternative ("SSOSA") for several of those clients;

CP 109-110.

I, CATHERINE A. CARROLL, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. I am an attorney and the Legal Director at the Washington Coalition of Sexual Assault Programs and have been since 2002.

2. I provide training and consultation to advocates and attorneys throughout the state and nationally on legal issues relating to sexual violence.

3. I have been working in the field of violence against women for fifteen years.

4. In my capacity as Legal Director, I have also participated in drafting amicus briefs on issues of importance to survivors of sexual assault, including privacy rights as it relates to our state Public Records Act.

5. I believe the privacy protections afforded survivors of sexual violence are fundamental to healing from being sexually victimized and must be respected.

6. Having worked with more than a thousand victims, I have experienced the devastating and humiliating impact of these crimes upon victims.

CP 116-117.

I, KIM H. CARROLL, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. I have been a Victim Advocate for the Thurston County Prosecuting Attorney's office for 10 years. I am a Nationally Credentialed Advocate at the advanced level with designations of Child Abuse, Domestic Violence,

Sexual Assault and Comprehensive Victim Intervention
Specialist.

CP 277.

I, DAVID L. JOHNSON, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. I am the Executive Director of the Washington Coalition of Crime Victim Advocates ("WCCVA"), which represents the interests of crime victims and professional service providers working with crime victims throughout the state of Washington. This is a non-profit corporation which represents over 85 member agencies, which include victim advocates from county prosecutor victim/witness units, community sexual assault programs, domestic violence programs, homicide survivor support groups, therapists, child advocacy centers, regional crime victim service centers, tribal governments, the Washington State Attorney General's office, the FBI, the US Attorney's Office, local police agencies, and several state programs that work with crime victims (e.g., Department of Corrections Victim Services Program, DSHS Victim Notification Program, and the Crime Victim Compensation Program.)

2. I have a Bachelor of Science degree in Liberal Arts from Excelsior College in Albany New York, and have attended over 1,100 hours of individualized law enforcement training certified by the Arizona Law Enforcement Advisory Council (presently called Arizona Peace Officer Standards and Training -POST), and classes in 'Forensic Pathology' and 'Behavioral Treatment of Sex Offenders' presented by the University of Arizona. I have served as the executive director of the Washington Coalition of Crime Victim Advocates for two years as the chief operating officer of an IRS approved Chapter 501c3 non-profit organization. Prior to my work with WCCVA, my employment experience includes over fourteen (14) years in law enforcement with the Tucson Police Department in Arizona, including over eight (8) years as a police detective working with the victims of sexual assault,

four (4) years as the head of the adult sexual assault detail supervising the work of seven (7) police detectives and two (2) civilian employees. During my tenure, the Tucson Police Department Adult Sexual Assault detail investigated approximately 300-350 forcible rapes per year and a variety of other sexual offenses that occurred within the city limits of Tucson, Arizona. As part of that assignment, I taught a perennial course in the collection of evidence in rape cases to 4th year medical students at the University of Arizona College of Medicine. I also served nearly two years on loan to the Arizona Department of Public Safety as a class manager with the Arizona Law Enforcement Training Academy (ALETA) – a multi-agency staffed institution offering basic certification training to police officers from the Arizona Department of Public Safety and over 30 different police agencies across the State of Arizona.

CP 121-122.

I, JON TUNHEIM, am over the age of eighteen, am competent to testify herein and have personal knowledge of the following:

1. I am a duly appointed Deputy Prosecuting Attorney in and for Thurston County Washington and have been so since November of 1990. For the past 11 years, I have specialized in the prosecution of cases assigned to our Special Victims Team. These cases include sexually based offenses and cases involving allegations of child abuse. Currently, I am assigned to the position of Chief Deputy Prosecuting Attorney.

CP 104.

It should have been clear from the declarations that the County was relying on the experience and training of the declarants. If it wasn't clear from the declarations, it should have been clear from the County's briefing and argument.

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And I think the declarations speak for themselves in that we have years and years of experience with SSOSA and with victims represented in these declarations. They have a declaration from a research attorney that assists in public disclosure cases. There's no apparent experience that he has representing victims of sex crimes, prosecuting victims of sex crimes, dealing with SSOSA. What these declarants with years and years of experience say is that if you give this information out, it is going to have a big effect on this law enforcement tool. It's going to jeopardize the SSOSA system because they're going—the treatment providers that they know once the prosecutor has it, these documents are going to be given out, they're going to have to tell their client that. They can't just say, hey, give us all your private information, we'll keep it confidential. They can't say that. And that's, from what I understand, what they've been saying. And if they do tell them that, they're not going to get the same information, they might not even get participation in the SSOSA program, and that's straight from the declarations of these experienced individuals. Verbatim Report of Proceedings (VRP) p. 29-30, 20:16.

The other argument is I have declarations from folks that have years and years of experience in the system that say promising a redaction to these individuals will not work. VRP p 38, 4:7.

Thurston County's Response To Motion For Summary Judgment

This is supported by the excerpts of professionals that work with crime victims. CP 163 (*Response* p. 8, lines 15-16).

As the excerpts from professionals that deal with victims on a daily basis clearly show, disclosing VISs to anyone that makes a request will have a chilling affect on the

victim's willingness to participate in this essential law enforcement process. CP 166 (*Response* p. 11, lines 1-3).

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Thurston County's Response

The evidence presented to the trial court shows nondisclosure of these two private, sensitive documents is necessary for the protection of privacy and is essential for effective law enforcement. *Thurston County's Response* p. 1.

While the County has presented a multitude of evidence from professionals who work with crime victims and the SOSSA program, Koenig has failed to provide any competent evidence supporting his claims. *Thurston County's Response* p. 5.

Finally, Koenig's veiled attempt to discredit the experienced professionals that provided declarations supporting the County must be disregarded. All of the County's declarations regarding the VIS came from professionals with many years of experience working with crime victims. Koenig failed to provide one piece of evidence refuting the County's experienced witnesses regarding VISs. Koenig's attack on the credibility of the County's experienced witnesses is baseless and unsupported. Instead of initiating an evidentiary hearing, Koenig opted for a motion for summary judgment in which he failed to provide any credible evidence rebutting the County's experienced witnesses. Koenig failed to provide any evidence from professionals that work with victims of crime. Instead, Koenig filed a declaration of another attorney that has worked on PRA cases. CP 212. Koenig has not provided any evidence that challenges the veracity and accuracy of the County's evidence. *Thurston County's Response* p. 15.

As the excerpts from professionals that deal with victims on a daily basis show, disclosing VISs to anyone who makes a request will have a chilling effect on the victim's willingness to participate in this essential law enforcement process. *Thurston County's Response* p. 18.

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Thurston County's Petition For Review

³ It must be pointed out that for Koenig's motion for partial summary judgment, only the County provided declarations from experts with SSOSA experience. *Petition for Review* p. 7 (footnote 3).

Jon Tunheim, a Thurston County Deputy Prosecuting Attorney for the past 17 years, agrees that disclosing SSOSA evaluations will have a harmful effect on effective law enforcement. *Petition for Review*, p. 10.

Catherine A. Carroll, legal director at the Washington Coalition of Sexual Assault Program since 2002, provides additional analysis. *Petition for Review*, p. 10.

The judge that sealed the SSOSA evaluation, the treatment provider, the deputy prosecutor involved in the case, and the Washington Association of Criminal Defense Lawyers all agree that a sexual deviancy evaluation is extremely private and should not be provided to the public through a public disclosure request. *Petition for Review*, p. 13.

Robert Macy has a masters degree in clinical psychology and marriage, family and child counseling, is a sex offender treatment therapist and is a Fully Certified Sex Offender Treatment Provider. CP 100. The Declaration of Robert Macy provides a comprehensive description of what a SSOSA psychosexual evaluation includes and entails. *Petition for Review*, p. 13.

Thurston County also provided the Declaration of Amy Muth, an attorney who represents individuals accused of sex crimes. CP 110. Amy Muth has vast experience regarding SSOSA psychosexual evaluations and provides a description on how evaluations are used and what information they contain. *Petition for Review*, p. 15.

The SSOSA evaluation in question was provided by Robert Macy, a Fully Certified Sex Offender Treatment Provider, who has been a sex offender treatment therapist since 1974. *Petition for Review*, p. 17-18.

Thurston County's Reply To Respondent Koenig's Answer To Petition For Review

While the County has presented a multitude of evidence from the victim, the deputy prosecuting attorney involved in the matter and professionals who work with crime victims, Koenig failed to provide any competent evidence supporting his claims. Instead of providing his own declarations, Koenig's only defense is to describe the County's witnesses who signed declarations under penalty of perjury as grossly exaggerating, biased and self serving; i.e., perjurers. *Reply* p. 1.

Finally, Koenig's veiled attempt to discredit the experienced professionals that provided declarations supporting the County must be disregarded. All of the County's declarations regarding the VIS came from professionals with many years of experience working with crime victims. Koenig failed to provide one piece of evidence refuting the County's experienced witnesses regarding VISs. Koenig's attack on the credibility of the County's experienced witnesses is baseless and unsupported. Instead of initiating an evidentiary hearing, Koenig opted for a motion for summary judgment in which he failed to provide any credible evidence rebutting the County's experienced witnesses. Koenig failed to provide any evidence from professionals that work with victims of crime. Instead, Koenig filed a declaration of another

attorney that has worked on PRA cases. CP 212. Koenig has not provided any evidence that challenges the veracity and accuracy of the County's evidence. *Reply* p. 10.

As the excerpts from professionals that deal with victims on a daily basis show, disclosing VISs to anyone who makes a request will have a chilling effect on the victim's willingness to participate in this essential law enforcement process.

The following excerpts from the victim and professionals that work with victims make it clear that redaction for this unique document will not work. *Reply* 17.

As the excerpts above show, the County has always stated that the declarants were experienced and had special knowledge derived from training and experience. Koenig never objected to, nor moved to strike, the County's declarations in the trial court; therefore, he has waived any objections.²

B. The Only Evidence In The Record Provides That Non-Disclosure Of The VIS Is Essential To Protect The Victim's Right To Privacy.

Arguing that disclosure of the VIS does not violate the victim's right to privacy, Amici WCOG compares the case at hand to cases involving records created by agency employees (police officers). Amici WCOG argues that because documents created by agency employees only require the redaction of names, that should suffice in this case. The County

² One additional option Koenig had available was to strike his motion for summary judgment if he felt additional discovery was necessary. *City of Lakewood v. Koenig*, 106 Wn. App. 833, 889-891, 250 P.3d 113 (2011) ("The Rules of Civil Procedure apply in a PRA action" which provide for discovery opportunities. *Id.* at 889-891.).

has addressed this argument in its prior briefing to this Court. *See* Thurston County's Reply to Koenig's Answer at pg. 5-10. Filling out a VIS is a voluntary action by the victim. A police officer has a duty to create an investigative report. As the victim herself stated, "I would not have provided a Victim Impact Statement if I had been told that the statement would be a public document to be given to any and all who asked for it." CP 126. As presented in the County's previous briefing, this is supported by the declarants with victim advocacy experience. *See* Thurston County's Reply to Koenig's Answer at pg. 5-8, 11-13, 17-18. Recognizing that a victim would not be forthright given public disclosure of the VIS, Koenig suggests that a victim limit a VIS to facts that are not offensive to the victim.

Unlike the content of a police report, the victim has total control over the content of a VIS. The victim is not required to include any information that the victim does not wish to disclose...

Because the VIS is intended to be disclosed in open court, it should not contain factual details that would be highly offensive to a reasonable victim...

See Brief of Appellant to Court of Appeal, Pg. 19. Even Koenig acknowledges the difference between a voluntarily provided document by a victim and a police report created by a police officer in his or her official capacity. In the case at hand, Koenig was provided the police reports.

Finally, as stated in the answer to the brief of Amici Newspapers regarding the SSOSA, there is public interest in the VIS. However, this Court specifically defined when the standard of “legitimate concern to the public” is met.

Interpreting “legitimate” to mean “reasonable,” we have also held that where “the public interest in efficient government could be harmed significantly more than the public would be served by disclosure,” the public concern is not legitimate and disclosure is not warranted.

Koenig v. City of Des Moines, 158 Wn.2d 173, 185, 142 P.3d 162 (2006).

Clearly, there is more to the analysis than whether the public may be interested in the records. The County has provided argument as to why nondisclosure of the VIS meets this test in its prior briefing to this Court and will not repeat the argument here. *See* Thurston County’s Reply to Koenig’s Answer at pg. 9-10.

C. Nondisclosure Of The VIS Is Essential To Effective Law Enforcement.

Amici WCOG does not provide any new argument different from Koenig nor Amici Newspapers (the Allied Daily Newspapers of Washington, The Washington Newspaper Publishers Association, the Seattle Times, and the Walla Walla Union-Bulletin) with regard to the effective law enforcement prong of RCW 42.56.240(1). The County relies on its previous briefing to this Court and to Amici Newspapers in response

to this argument by Amici WCOG. *See* Thurston County's Reply to Koenig's Answer at pg. 10-19; Thurston County Answer to Brief Of Amici Newspapers at pg. 7-11.

The argument provided in the previous briefing makes reference to the declarations which show disclosing VISs to anyone who makes a request will have a chilling effect on the victim's willingness to participate in this essential law enforcement process. In fact, the victim herself stated, unequivocally, that she would *not* have provided a VIS if she had known the statement would be considered a public document and given to anyone who asked for it. CP 126. Proper sentencing is *essential* to effective law enforcement; and obtaining a truthful VIS is important for the proper administration of justice as it is needed for sentencing decisions and recommendations.

Finally, Amici WCOG makes the argument that the VIS is available to the judge and is in the court file and, therefore, protecting it does not advance effective law enforcement. This leaves out several uncontested facts that are in the record for this case. First, the VIS was sealed in this matter prior to sentencing. CP 153, CP 132. Second, many VISs are sealed. CP 123. In this case, the VIS was not available to just anyone through the court. While the underlying parties have stipulated that the court's sealing of the records does not create an exemption for the

PAO (CP 253), it does provide factual evidence that the VIS was not available to be viewed and that the judge found it sensitive enough to seal. The trial court and court of appeals correctly decided that nondisclosure of the VIS was essential to effective law enforcement.

D. Koenig Should Not Be Granted Fees If This Court Upholds The Trial Court's Summary Judgment Order.

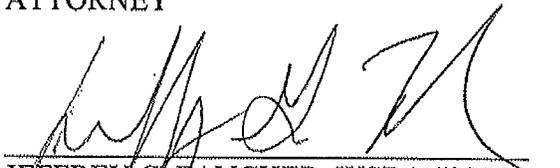
RCW 42.56.550(4) only grants costs to a party that prevails seeking the right to inspect public records. If Koenig is not successful in requiring the County to disclose the VIS and/or the SSOSA evaluation, he should not recover fees as the prevailing party. Amici WCOG misunderstands the County's argument regarding Mr. Lerud's health care information (SSOSA evaluation). Since the inception of the case, the County has stated that disclosure of the SSOSA evaluation would violate Mr. Lerud's right to privacy under RCW 42.56.240(1). The County used the health care information analysis to strengthen its argument regarding "the right to privacy" issue. *See* Thurston County's Petition for Review at pg. 2 (Issues 1 and 2); pg. 17-19. The County has not now, and has never before, argued for nondisclosure exclusively under ch. 70.02 RCW. The County should not be penalized for strengthening its arguments made to the trial court.

II. CONCLUSION

For the reasons stated above and in its previous briefing to this Court, the County prays this Court finds the VIS and SSOSA evaluation in this case exempt under the Public Disclosure Act.

DATED this 26th day of September, 2011.

JON TUNHEIM
THURSTON COUNTY PROSECUTING
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I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Signature: 