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CAPITAL CASE

No. 86084-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSEPH T. McENROE, Petitioner

PETITIONER'S OPENING BRIEF

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ORIGINAL

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2) The trial court erred in adopting LGR 15 as the protocol for all motions to seal in Mr. McEnroe's case.

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3) Does the trial court's decision to apply LGR 15 to Mr. McEnroe's anticipated request to have his trial after the trial of his co-defendant (and to any future motions to seal brought in his case) violate the federal and state constitutions by requiring the defendant to choose between seeking to obtain information important to his mitigation case in support of a life sentence and avoiding the premature

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INTRODUCTION

In Petitioner Joseph McEnroe's aggravated murder prosecution in which the State is seeking the death penalty the trial court has ordered that King County Local General Rule ("LGR") 15 will be applied to all motions to seal. LGR 15 requires a party moving for the sealing of any document to attach an unredacted original of the sensitive document to the motion to seal and if the motion to seal is denied the trial court is to immediately publicly file the unredacted original document simultaneously with filing the order denying the motion to seal. The trial court's order modified LGR 15 to allow Mr. McEnroe 30 days after denial of a motion to seal to seek discretionary review but unless an appellate court accepts interlocutory review and holds in favor of sealing, the sensitive document will sooner or later be openly filed.

More specifically, the trial court ordered that if a motion to seal is denied, Mr. McEnroe will not be allowed to avoid publication by withdrawing the sensitive document even if he abandons the primary motion with which it was offered. The trial court held that once a document has been submitted to the court it can never be withdrawn because that would be "anathema to an open and accountable system of justice."

The Court's website describes the issue presented as, "Whether a party who requests the sealing of documents submitted in support of a motion may withdraw the documents from consideration if the court denies the request to seal?"[1]

The answer to that question must be "yes" especially in the context of a capital case. Advised by a court that it will not allow sealing of a sensitive document offered in support of a motion in a capital case, a defendant should be able to choose to preserve his right to an impartial jury - which would be tainted by the release of information for which sealing had been sought - by withdrawing the document even if it means foregoing the relief sought through his primary motion. Any damage done by abandoning the latter may have a remedy at law after the trial but the publication of prejudicial information cannot be undone.

Another case currently before the Court addresses a related issue in the context of a civil case. In Clark v. Smith, et al, No. 84903-0, the Court will decide whether documents appended to a filed summary judgment

[1] Variations of the issue might be phrased: Does GR 15, regarding sealing of documents, allow the "lodging" of documents until a motion to seal is determined? Under GR 15 may a party "take back" a document if sealing is denied? If the party moving to seal believes he is seriously damaged by publication of documents he has sought to be sealed, may he avoid publication by withdrawing the primary motion which the sealed documents supported whether or not he is allowed to physically retrieve the sensitive documents?

motion but never considered by the trial court because the parties settled the case before the summary judgment motion was heard should be unsealed because the five factors listed in Seattle Times Co. v. Ishikawa, 97 Wash.2d 30 (1982) were not considered by the trial judge prior to sealing the documents.[2] GR 15 and LGR 15 (although an earlier version than applied to Mr. McEnroe) are implicated in the arguments of the Clark v. Smith parties.

ASSIGNMENTS OF ERROR

1) The trial court erred in denying Mr. McEnroe's "Motion to Waive LGR 15 for the Purpose of Filing Defendant's Motion to Seal Defendant's Motion to Have His Trial after Michele Anderson's Trial Is Complete."

2) The trial court erred in adopting LGR 15 as the protocol for all motions to seal in Mr. McEnroe's case.[3]

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[2] The Ishikawa factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Seattle Times Co. v. Ishikawa, 97 Wash.2d 30 (1982)

[3] The trial court made the same ruling regarding codefendant Anderson's future motions

3) The trial court erred in refusing to permit Mr. McEnroe to withdraw motions and documents if related motions to seal are denied.

Issues Pertaining to Assignments of Error

1) In a capital case, what are the proper procedures for a defendant submitting, and a trial court considering, motions to seal or redact pleadings and/or supporting documents the defendant believes necessary to a trial court being fully informed and able to fairly hear and decide a motion brought by a defendant? (Assignments of Error 1, 2, 3)

2) The trial court applied LGR 15 to present and future motions to seal in Mr. McEnroe's case in part because the court believed LGR is more protective of proponents of sealing than GR 15. Was the trial court wrong in interpreting this Court's GR 15 to allow for sealing of documents only AFTER said documents have been openly filed and available for perusal by other parties and the public in general? (Assignments of Error 1, 2)

3) Does the trial court's decision to apply LGR 15 to Mr. McEnroe's anticipated request to have his trial after the trial of his co-defendant (and to any future motions to seal brought in his case) violate the federal and state constitutions by requiring the defendant to choose between seeking to obtain information important to his mitigation case in support of a life sentence and avoiding the premature disclosure of confidential information regarding his mitigation strategy and highly personal information regarding himself and other potential mitigation witnesses which would not otherwise be discoverable until after the guilt phase of his trial if he is convicted of aggravated murder? (Assignment of Error 3).

STATEMENT OF THE CASE

Petitioner Joseph McEnroe and his codefendant, Michele Anderson are each charged under separate informations with six counts of

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to seal but Ms Anderson declined to seek review here.

aggravated murder. The case has been subject to intensive media scrutiny and publicity.

Proceedings against both defendants were effectively joined until the State filed a motion to sever the cases for trial on March 31, 2011. The trial court ordered the trials severed on April 28, 2011.[4] The same day the trials were severed the question arose of which defendant would be tried first. Both defendants orally indicated to the trial court he or she wanted to be tried second.

Also on April 28th, the court asked for briefing from the defendants on their reasons for wanting to be tried second. Mr. McEnroe's counsel advised the court that he wants his co-defendant to be tried first because it is highly likely that information regarding Ms Anderson's mental condition will be disclosed at her trial and, if she is convicted, her capital sentencing proceeding. Such evidence is important to Mr. McEnroe's mitigation case. In order to explain why that information is vital to Mr. McEnroe's defense the trial court needs to be advised of the theory of his mitigation, including the opinions of mental health experts, which is not discoverable under the rules for capital cases until such time as Mr.

[4] The date of severance was mistakenly typed as "April 28, 2010," in Mr. McEnroe's Motion for Discretionary Review and some other pleadings. The correct date is April 28, 2011.

McEnroe might be convicted of aggravated murder. SPRC 5. If permitted to do so, Mr. McEnroe will submit the non-discoverable information under seal. However, Mr. McEnroe cannot risk having the details of his mitigation strategy and highly sensitive information from potential mitigation witnesses, including mental health professionals, prematurely disclosed to the State or the media and general public.

The next day, April 29, 2011, the trial court advised counsel via e-mail:

> Please be aware that motions to seal are brought contemporaneously with the documents the motion to seal addresses. LGR 15 provides the procedures that Judge Ramsdell was cautioning counsel about in court yesterday.

The trial court had already exercised LGR 15(c)(3) with regard to Ms Anderson's counsels' earlier motion to withdraw from representing Ms Anderson.[5] LGR 15 (c)(3)(A)(i) requires any party seeking sealing of any document to attach the "original unredacted copy of the document(s) the party seeks to file under seal" to the motion to seal. LGR 15(c) (3)(B) provides, "If the hearing judge denies the motion to seal, the judge will file the original unredacted document(s) unsealed with an order denying

[5] Pursuant to LGR 15 the trial court filed its order denying Anderson's counsels' motion to seal documents in conjunction with their motion to withdraw simultaneously with openly filing and serving on all counsel the documents Anderson had sought to be sealed.

the motion."

After the parties were cautioned by the trial court that LGR 15 would apply to all motions to seal, Mr. McEnroe filed a "Motion to Waive LGR 15 for the Purpose of Filing Defendant's Motion to Seal Defendant's Motion to Have His Trial after Michele Anderson's Trial is Complete," ("Motion to Waive LGR 15 ") Clerk's Papers (hereafter, "CP") at 1 – 11. Mr. McEnroe asked for the following relief:

> 1) To consider and rule on the defendant's "Motion to Seal" certain documents and information prior to considering Mr. McEnroe's substantive motions regarding the order and timing of trial
>
> 2) Should the Court deny the "Motion to Seal", to allow the defendant an opportunity to seek review of the adverse ruling prior to openly filing the documents for which sealing is sought;
>
> 3) Should the Court deny the "Motion to Seal", to allow the defendant an opportunity to withdraw the substantive motions as well as the supporting documents;
>
> 4) To declare LGR 15 unconstitutional, particularly in the context of a capital case.

CP at 2.

The gist of Mr. McEnroe's argument was:

> LGR 15 was amended effective September 1, 2010, creating the Sophie's choice of failure to request necessary relief out of fear of immediate publication of damaging confidential information or risking potentially devastating publication without recourse.[6] GR

[6] LGR 15(c) was amended effective September 10, 2010, to add the following section:

> (3) Motions to Seal/Redact Filed Contemporaneously with Confidential

> 15, the statewide rule adopted by the Supreme Court regarding sealing court documents contains no such drastic consequence for parties unsuccessful in their efforts to seal sensitive documents. It appears that LGR violates GR 7 which requires local rules to be consistent with rules adopted by the Supreme Court.

CP at 5. The trial court disagreed and held,

> As written, GR 15, contemplates that a party seeking to seal a document will file the motion and document as they would any other motion and supporting documentation. Following the court's decision the clerk's office is directed to take action in conformity with the decision pursuant to subsections (4), (5), and (6).
> In short, the "uniform procedure" set forth in GR 15 assumes the court record being sealed has already been filed.

Order, p. 3, emph. in original. The court said,

> From this court's perspective, the procedure set forth in LGR 15 affords the Defendants herein greater protection than GR 15, which affords no procedure for review prior to filing the document in the record.

Order, p. 4.

Document(s). (A) Contemporaneously with filing the motion to seal, the moving party shall provide the following as working copies:
(i) the original unredacted copy of the document(s) the party seeks to file under seal to the hearing judge in an envelope for in camera review. The words "SEALED PER COURT ORDER DATED [insert date]" shall be written on the unredacted document(s). The following information shall be written on the envelope:
The case caption and cause number; a list of the document(s) under review; and the words "SEALED PER COURT ORDER DATED [insert date]."
(ii) a proposed redacted copy of the subject document(s).
(iii) a proposed order granting the motion to seal, with specific proposed findings setting forth the basis for sealing the document(s).
(B) If the hearing judge denies the motion to seal, the judge will file the original unredacted document(s) unsealed with an order denying the motion. The words "SEALED PER COURT ORDER FILED [insert date]" will be crossed out on the unredacted document(s).

Order, p. 3, emph. in original. The court said,

> From this court's perspective, the procedure set forth in LGR 15 affords the Defendants herein greater protection than GR 15, which affords no procedure for review prior to filing the document in the record.

Order, p. 4.

> GR 15 as written and interpreted by this court ... presupposes that the document already is part of the court record prior to hearing the motion to seal.

Order, p. 4.

The trial court expressly denied Mr. McEnroe's motion to waive LGR 15. The court found Mr. McEnroe's request to withdraw his motion to be tried second and supporting documents should sealing be denied "anathema to an open and accountable system of justice." The court ruled LGR 15 would be the protocol for motions to seal in both State v. McEnroe and State v. Anderson with the proviso that in the event of an unfavorable ruling the court will afford counsel a minimum of 30 days to seek review before unredacted materials are filed in the public record. Order, p. 5.

The trial court then set a due date of June 27, 2011, for Mr. McEnroe to file his response to the State's motion for Mr. McEnroe to proceed to trial before his co-defendant's trial. Mr. McEnroe advised the

trial court he cannot go forward with the response and submit the reasons he needs his trial to be first because he cannot risk his motion to seal being denied resulting in his confidential theory of mitigation and highly sensitive mitigating information being openly filed and published.

Mr. McEnroe then filed a timely notice of discretionary review. There is no trial date set at this time.[7]

The state offered to simply agree that documents submitted in support of pleadings regarding the order of trials should be sealed. See, "State's Answer to Motion for Discretionary Review," pp. 6 - 7. However, the trial court below and the commissioner here noted GR 15(c)(2) expressly states, "Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records." Given the close media attention to Mr. McEnroe's case it is highly likely there will be objection to sealing and a storm of protest if documents are sealed on the basis of a handshake between the parties.

SUMMARY OF ARGUMENT

The trial court misinterpreted GR 15 to require proponents of sealing to attach to motions for sealing unredacted originals of the documents desired to be sealed and to file both the motions to seal and the

[7] Mr. McEnroe has filed a waiver of his right to speedy trial through June 1, 2012. Proceedings against Michele Anderson are stayed pending resolution of her competency.

sensitive documents in the open court file for all to see until requests for sealing can be heard and decided by the trial court. This misunderstanding of GR 15 led the trial court to view then newly amended LGR 15 as a reasonable and liberal adaption of GR 15 in that LGR 15 allowed the original unredacted document to remain in an envelope with the trial judge until the court decides the motion to seal.

The trial court was wrong in its interpretation of GR 15. The court was right that the rule is not at all clear as to what procedures parties and courts are to follow when seeking and considering motions to seal documents. GR 15 does not spell out what a trial court should do with documents sought to be sealed before the trial court can hear and decide the motion to seal. Nor does it state exactly what is to be done if a motion to seal is denied; the rule doesn't say the document should be immediately publicly filed and it does not say whether the document, or the motion it was intended to serve, may or may not be withdrawn. The trial court's description of feeling its "feet firmly planted in the quagmire surrounding GR 15",[8] undoubtedly aptly describes the feelings of many courts and counsel confronting sealing issues.

Nonetheless, there are sufficient points of light for this Court to

[8] CP at 16.

acknowledge that "lodging" documents while courts decide motions to seal is both traditional and reasonable, and the rules contemplate the possibility of parties withdrawing documents for which sealing has been denied. This is consistent with recent cases distinguishing materials that are considered by courts in reaching the merits of controversies before them from those that are not considered for any purpose germane to deciding substantial issues.

ARGUMENT

Standard of Review: The Court is being asked to review the proper interpretation and application of court rules. Interpretation of court rules, statutes, and the Constitution are issues of law, subject to de novo review. State v. Osman, 168 Wash.2d 632, 637, 229 P.3d 729 (2010) (holding that this court reviews the interpretation of court rules de novo.) City of Redmond v. Moore, 151 Wash.2d 664, 668, 91 P.3d 875 (2004) (Constitutional challenges are questions of law and are also reviewed de novo.)

In a Capital Case the Procedure for Bringing a Motion to Seal a Sensitive Document Should Permit a Defendant to "Lodge" Sensitive Documents with the Trial Court until the Court Can Hear and Decide the Motion to Seal. If the Motion to Seal Is Denied or Insufficiently Redacted, the Defendant Should Be Permitted to Withdraw the Underlying Motion and Supporting Documents So They Are Not Made Part of the Court File. (Issue 1)

GR 15 is intended to "set forth a uniform procedure for the destruction, sealing, and redaction of court records." GR 15(a), emphasis added. The rule allows the court, any party, or any "interested person" to request a hearing to seal or redact court records. GR 15(c)(1). The rule details what the court and clerk should do if sealing or redaction is ordered and what factors the court should consider when deciding whether to grant a motion to seal or redact court records. GR 15 (c)(2). The rule explains how one goes about moving for already sealed records to be unsealed. GR 15(e).

GR 15 does not prescribe what the court is to do with documents pending decision on motions to seal or what options a party seeking sealing might have if sealing is denied. Mr. McEnroe submits that GR 15 does contemplate and allow for proponents of sealing to withdraw sensitive documents before they are filed with the court clerk. A document does not become part of the court file until it is filed with the

clerk. GR 15(b). The provisions regarding sealing expressly apply to "court records." GR 15 title. "Court records" is defined in GR 31(c)(4) as "any document, information, exhibit, or other thing that is maintained by a court in connections with a judicial proceeding ... Court record does not include data maintained by or for a judge pertaining to a particular case or party, such as ... other working papers ..."

Mr. McEnroe submits that the reason GR 15 does not address what happens to documents when a motion to seal is denied is because those documents have not yet been "filed with the clerk" GR 15(b)(1). They are not "court records" because they are not being "maintained by a court in connection with a judicial proceeding." Such documents are nothing more than "working papers" unless and until such time as the moving party elects to pursue the primary motion and have the sensitive documents considered by the court despite not being sealed. GR 31(c)(4). Otherwise, the sensitive documents for which sealing was unsuccessfully sought never become "court records" and they continue to be owned by the party who requested sealing. A motion to seal a document is preliminary to the actual filing of the document.

Allowing documents to be "lodged" with the court pending hearing and determination of a sealing motion is the rule in other jurisdictions.

See 2011 California Rules of Court, Rule 2.551. The federal courts provide for the lodging and withdrawal of documents should a motion to seal be denied.

> A motion or stipulation to seal may either be filed prior to or contemporaneously with a filing that relies on the documents to be filed under seal. If the court subsequently denies the motion to seal, the sealed document will be unsealed unless the court orders otherwise, or unless the party that is relying on the sealed document, after notifying the opposing party within three days of the court's order, files a notice to withdraw the documents. If a party withdraws a document on this basis, the parties shall not refer to the withdrawn document in any pleadings, motions and other filings, and the court will not consider it. For this reason, parties are encouraged to seek a ruling on motions to seal well in advance of filing underlying motions relying on those documents.

Western District of Washington Local Rule 5(g)(5). Emphasis added.

Allowing parties to withdraw motions and documents when a court denies a motion to seal is also consistent with this Court's decisions that tie public access to documents being considered by a court in deciding issues in the case being litigated. In Tacoma News, Inc. v. Cayce, 172 Wash.2d 58 (2011), this Court held that an in-court preservation deposition was not available to the public merely because it was conducted in a courtroom and the trial judge presided over the deposition and ruled on objections. The deposition had no bearing on resolution of

deposition was not available to the public merely because it was conducted in a courtroom and the trial judge presided over the deposition and ruled on objections. The deposition had no bearing on resolution of the judicial proceedings unless it was introduced into evidence. "In fact, as we have discussed, the deposition was never put to any use." Id. A document which is withdrawn before it is ever filed with the court clerk can never put to any use and does not implicate article I, section 10 of the Washington State Constitution.

The Trial Court Was Wrong In Holding That GR 15 Requires Documents To Be Openly Filed Until The Trial Court Can Hear And Decide A Motion To Seal. Because GR 15 Does Not Require Sensitive Documents To Be Openly Filed If A Motion To Seal Is Denied, LGR 15 Conflicts With GR 15 In Violation Of GR 7. (Issue 2)

The trial court held that this Court's GR 15 provides a mechanism to seal court records only AFTER they have been openly filed. For however many days or weeks it takes for the superior court to conduct a hearing and decide a motion to seal, according to the trial court's decision, sensitive documents will reside in open court files, inviting the perusal of other parties, media and the general public.

Common sense alone refutes this holding of the trial court. No competent attorney would openly file documents containing confidential,

embarrassing, and/or privileged material with an intention of obtaining a sealing order at some point in the future, after the cows have left the barn.[9]

This Court's definition of "sealing" refutes the trial court's holding. GR 15 (4) defines "seal." "To seal means to protect from examination by the public and unauthorized court personnel." Sealing could not serve its purpose of protecting sensitive documents from "examination by the public and unauthorized court personnel" if those documents were allowed to languish in the public court file for any amount of time. Indeed, online electronic databases, such as, ECR, JIS, and SCOMIS allow diligent reporters, opposing parties and curious members of the public access to such documents in open court files almost immediately on filing from the comfort of their own desks and living rooms.

Other rules of this Court show that GR 15 does not require open filing of sensitive document prior to a decision on sealing. GR 31(a) provides,

> Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution ...

[9] There are occasions, such as after a criminal conviction is expunged, when a party may seek to seal a court file which was previously open, and GR 15(c)(4) and (5) address that situation.

Personal privacy would be eradicated if sensitive documents had to be openly filed prior to a decision on sealing, as the trial court interpreted GR 15. Furthermore, GR 31 recognizes that public access to court records may be "restricted by federal law, state law, court rule, court order, or case law." Emphasis added. Restrictions, regardless of the source, would mean little if the trial court was correct in its holding regarding GR 15.

LGR 15 requires the open filing of sensitive documents if a motion to seal is denied. GR 7(b) provides, "All local rules shall be consistent with rules adopted by the Supreme Court ...." Similarly, GR 31(d)(2) permits local courts to make "rules governing access to court records not inconsistent with this rule." LGR 15 conflicts with GR 15 because it mandates the publication of sensitive documents which are not required to be openly filed under GR 15 and which do not meet the definition of "court records" under GR 31(4).

The Trial Court's Decision to Apply LGR 15 to Mr. McEnroe's Anticipated Pleading for His Trial to Be after the Trial of His Co-defendant (And to Any Future Motions to Seal Brought in His Case) Violates the Federal and State Constitutions by Requiring the Defendant to Choose Between His Eighth Amendment Right to Present All Relevant Mitigating Evidence in Support of a Life Sentence and His Sixth Amendment Right to an Impartial Jury. (Issue 3)

Mr. McEnroe is entitled to seek information important to his mitigation case in support of a life sentence and to avoid the premature disclosure of confidential information regarding his mitigation strategy and highly personal information regarding himself and other potential mitigation witnesses which would not otherwise be discoverable until after the guilt phase of his trial if he is convicted of aggravated murder.

With regard to pleadings on the order of trials, the trial court's order requiring unredacted confidential information to be attached to Mr. McEnroe's motion to seal chills Mr. McEnroe's right to seek mitigating evidence. Under LGR 15 if the motion to seal is denied, publication of the sensitive information is almost guaranteed. Under LGR 15 the only way Mr. McEnroe can assure sensitive, otherwise privileged information does not get released to opponents and the public is not to bring motions in any way related to that material.

Mr. McEnroe must seek mitigating evidence, (Wiggens v. Smith,

539 U.S. 510 (2003)), and he must preserve his right to trial by an unbiased jury. Under LGR 15 he cannot do one without risking the other. The United States Supreme Court has held, "... we find it intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377 (1968). See: State v. Michielli, 132 Wn.2d 229 (1997).

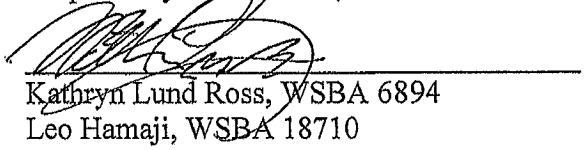
CONCLUSION

The trial court's order applying LGR 15 to all motions to seal brought by Mr. McEnroe in his defense against capital murder charges must be reversed. . The Court should clarify that Washington Court Rules prescribe lodging documents pending motions to seal.

The Court should hold that its rules on moving to have sensitive documents sealed permit Mr. McEnroe to withdraw sensitive documents and related motions if the trial court denies a motion to seal said documents

Dated: September 26, 2011.

Respectfully submitted:



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