

2012 MAY 18 AM 10: 09

No. 87350-0

---

---

**WASHINGTON SUPREME COURT**

---

---

LOUIS CHAO CHEN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
12 MAY 21 AM 8:23  
BY RONALD R. CARPENTER  
CLERK

---

---

**MOTION FOR DISCRETIONARY REVIEW**

---

---

BARRY FLEGENHEIMER  
Bell Flegenheimer  
119 1<sup>st</sup> Avenue S  
Suite 500  
Seattle, WA 98104  
206-621-8777

TODD MAYBROWN  
Allen, Hansen & Maybrown, P.S.  
600 University Street  
Suite 3020  
Seattle, WA 98101  
206-447-9681

RAYMOND McFARLAND  
119 1<sup>st</sup> Avenue S  
Suite 500  
Seattle, WA 98104  
206-467-6690  
Counsel for Appellant Louis Chao Chen

**TABLE OF CONTENTS**

**1. IDENTITY OF PETITIONER.....1**

**2. DECISION BELOW .....1**

**3. ISSUES PRESENTED FOR REVIEW .....1**

**4. STATEMENT OF THE CASE.....2**

**5. ARGUMENT.....9**

**A. Introduction.....9**

**B. The Court’s Order enjoining the prosecutor from releasing a competency evaluation is in direct conflict with its Order denying the defendant’s motion to seal the competency evaluation report. Considering the plain language of RCW 10.77.210 preventing release of such reports to anyone other than designated individuals and the threat to a defendant’s right to privacy caused by disclosure of a competency evaluation, as a matter of law competency reports must be sealed.....10**

**C. In refusing to seal the competency report the superior court 1) committed an obvious error which would render further proceedings useless; and 2) committed probable error which substantially alters the status quo and substantially limits Dr. Chen’s freedom. Further, the trial court has certified the issue for review recognizing that there is no standard practice among superior court judges with respect to the issue of whether competency reports should be sealed. This inconsistency creates uncertainty for attorneys advising clients considering undergoing competency evaluations as to whether the report will be available only to those listed in RCW 10.77.210 or will be made available to the public.....15**

**6. CONCLUSION .....20**

**TABLE OF AUTHORITIES**

**Cases**

*Koenig v. Thurston County*, 155 Wn.App. 398, 229 P.3d 910 (2010),  
    *review granted* 170 Wn.2d 1020, 245 P.3d 774 (2011) .....2, 18, 19

*People v. Pokovich*, 141 P.3d 267 (Cal. App. 2006) .....17

*Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982)13, 14

*State v. DeLauro*, 163 Wn.App. 290, 258 P.3d 696 (2011).....13

**Statutes**

RCW 10.77 .....10

RCW 10.77.050 .....10

RCW 10.77.060(1)(a) .....10

RCW 10.77.065 .....1, 6

RCW 10.77.205 .....10

RCW 10.77.210 .....1, 7, 9, 10, 11, 12, 13, 14, 15, 19

RCW 10.95.040 .....2

RCW 4.24.550 .....10

RCW 42.56.070(1).....7

RCW 70.02 .....5

United States Code, Title 42, Section 1320.....5

**Rules**

ER 410 .....2

GR 15.....	12, 13
RAP 2.3 (b).....	15
RAP 2.3(b)(4) .....	8

1. IDENTITY OF PETITIONER

Appellant, Dr. Louis Chao Chen, asks the Court to grant discretionary review of the trial court decision described in Part 2 below.

2. DECISION BELOW

Dr. Chen asks this Court to review the decision of the King County Superior Court, recorded in its April 9, 2012 Order on Motion to Seal Forensic Psychological Report, denying Dr. Chen's motion to seal Western State Hospital's Competency Evaluation Report. *See* Order on Motion to Seal Forensic Psychological Report attached as Appendix A.

3. ISSUES PRESENTED FOR REVIEW

A. Should discretionary review be granted where the court certified that its Order on Motion to Seal Forensic Psychological Evaluation involves a controlling question of law to which there is substantial grounds for a difference of opinion and in so ruling recognized that courts rule inconsistently on the issue and need appellate guidance?

B. By denying Dr. Chen's motion to seal the Western State Hospital competency report, thereby ignoring the plain language of RCW 10.77.065 and 10.77.210, that specifically limits dissemination of the reports, did the court commit obvious error that renders further proceedings useless where the harm done by public filing of this private information cannot be remedied by appeal from the final judgment?

C. Should discretionary review be granted where the court committed probable error and altered the status quo by denying Dr. Chen's motion to seal the Western State Hospital competency report, contrary to the plain language of RCW 10.77.065 and 10.77.210 that specifically limit dissemination of such reports, thereby causing damage to Dr. Chen's privacy interests that cannot be remedied by appeal from the final judgment?

D. Should discretionary review be granted where the court committed probable error that altered the status quo by ordering a competency exam, over the defense objection, and then making public the results of the compelled competency evaluation, thereby causing an irrevocable loss of statutorily and constitutionally protected privacy?

E. Should discretionary review be granted where the court's order denying the sealing of the compelled competency report, while granting the defense motion to enjoin the PDA request, involves a controlling question of law as to which there is substantial ground for differences of opinion, as evidenced by inconsistent handling of such issues by trial courts, and where the issue is inextricably related to a PDA issue currently before this Court in *Koenig v. Thurston County*, No. 84940-4?

4. STATEMENT OF THE CASE<sup>1</sup>

On August 16, 2011, the King County Prosecuting Attorney filed an Information charging the appellant, Dr. Louis Chao Chen, with two counts of Aggravated First Degree Murder based upon incidents that occurred sometime between August 8, 2011 and August 11, 2011. Dr. Chen entered a plea of not guilty to all charges. Dr. Chen initially faced the possibility of a sentence of death or life without the possibility of parole. The defense provided the prosecution with a "Mitigation Package" in the hopes of convincing the prosecution not to file a Notice of Special Sentencing Proceeding pursuant to RCW 10.95.040.<sup>2</sup> After evaluating

---

<sup>1</sup> These facts, along with the procedural history, are summarized in the Declaration of Todd Maybrown, attached as Appendix B.

<sup>2</sup> The information contained within this Package is generally protected from disclosure pursuant to ER 410.

the case, including the information contained within the Mitigation Package, the King County Prosecuting Attorney concluded that the death penalty is not appropriate given the circumstances of this case.

In reviewing the Mitigation Package, the prosecutors learned that Dr. Chen was suffering from psychosis. On September 28, 2011, the defense confirmed that a psychiatrist retained by the defense, Dr. Mark McClung, had evaluated Dr. Chen on several occasions and ultimately concluded that Dr. Chen was not competent to proceed at that time. Thereafter, on October 19, 2011, Dr. McClung again concluded that Dr. Chen remained incompetent to stand trial. Dr. McClung also reported that Dr. Chen was being treated with psychiatric medications and that he was showing early stages of improvement in his mental condition. Dr. McClung opined that, with appropriate medications, Dr. Chen's competency should be restored within 4-5 weeks.

On October 25, 2011, the State filed a "Motion to Address Defendant's Competency and to Toll the Time of Trial." The parties appeared for hearing on the State's motion on October 28, 2011. Defense counsel acknowledged that Dr. McClung had raised questions about Dr. Chen's competency. However, defense counsel also informed the Court that Dr. Chen's condition was improving – and that he would likely be competent in a short period of time. At the prosecutor's request, the

Court signed an Order directing that Dr. Chen be evaluated at Western State Hospital (“WSH”).

On November 17, 2011, the parties returned to Court and reported that Dr. Chen had yet to be transported to WSH. At the same time, the defense provided an updated letter report from Dr. McClung confirming that Dr. Chen had continued to make significant improvements and that, in his opinion, Dr. Chen was now competent to proceed. Thus, the defense argued that there was no longer any need to proceed with a competency evaluation. The State objected and refused to waive the statutory requirement of an evaluation by at least two experts. The Court then concluded that any WSH evaluation should be completed in the King County Jail, and an order was entered to that effect.

The parties returned to court once again on December 19, 2011. The defense objected to the competency evaluation and again emphasized that Dr. Chen was being compelled to participate in this process. The defense objected to the State’s request for a court order allowing WSH to obtain a complete copy of Dr. Chen’s medical and mental health records and argued that any competency evaluation report must be sealed.<sup>3</sup>

---

<sup>3</sup> The State’s motion was specifically directed towards the medical records maintained at Harborview Medical Center. However, the defense also objected to any

Counsel argued then, and has consistently argued, that these records are privileged and must be protected under the Constitution, HIPPA (42 U.S.C. § 1320) and Washington's Medical Records Privacy Act (RCW 70.02 *et seq.*).

After considering these matters, the Court granted the State's motion for disclosure of the medical records but also entered a Protective Order regarding the disclosure of the WSH report. *See* App. C (Protective Order at 7-9).

Two representatives of WSH, Drs. Margaret Dean and Daniel Ruiz-Paredes, met with Dr. Chen at the King County Jail on December 29, 2011. These doctors reviewed a copy of Dr. Chen's private medical records from Harborview Medical Center. Somehow, they also obtained a copy of Dr. Chen's records from the King County Jail. On January 11, 2012, WSH faxed a copy of its report to defense counsel. In that report, the representatives of WSH confirmed that Dr. Chen was currently competent to proceed to trial.

After reviewing the WSH competency evaluation report, defense counsel renewed the motion to seal. *See* Defendant's Motion to Redact and Seal Competency Evaluation Report, attached as Appendix C.

---

attempt to obtain Dr. Chen's records from any other source or provider, including the King County Jail.

Defense counsel also argued that the Court should redact certain sections of the report before it was distributed pursuant to RCW 10.77.065.<sup>4</sup> The defense provided the Court a redacted and unredacted copy of the report for *in camera* review.

On January 26, 2012, the Court confirmed that Dr. Chen was competent to proceed to trial. The Court put over the issue regarding sealing and/or redaction to a hearing on March 29, 2012. At the time of that hearing, the Court notified the parties that it had signed an Order denying the motion to seal. *See* App. A. The Court also advised the parties that it had agreed to some, but not all, of the redactions proposed by the defense.

Meanwhile, on or about March 30, 2012, Q13Fox sent the King County Prosecuting Attorney a public disclosure request seeking “access to the physiological (sic) evaluation for Louis Chen.” *See* App. B at 9. Although this request is somewhat confused – as there is no indication that the prosecutors possess any “physiological evaluation” – the Court presumed that Q13Fox was actually seeking disclosure of the prosecution’s copy of the WSH evaluation report.

---

<sup>4</sup> Consistent with the Court’s Protective Order, the defense also provided the State with a redacted version of the WSH report. To counsel’s knowledge, this is the only version of the WSH report in the possession of the King County Prosecuting Attorney.

The parties next appeared in court on April 5, 2012. The defense then confirmed that it intended to file a motion for discretionary review of the Court's Order on Motion to Seal Forensic Psychological Report and urged the Court to refrain from filing the redacted WSH evaluation report before Dr. Chen had any opportunity to obtain review of this Order. The State agreed that a stay was appropriate in light of these circumstances. The parties also notified the Court that this issue was likely to be further complicated by the Public Records Act ("PRA") request of Q13Fox. The Court stayed disclosure of that WSH report pending a hearing on PRA request.

The defense then moved to enjoin the prosecution from disclosing this evaluation to Q13Fox or any other person. On April 20, 2012, the Court granted the motion to enjoin, finding that the evaluation report is exempt from public disclosure under RCW 10.77.210 as incorporated in the PRA through RCW 42.56.070(1) and that public disclosure of the evaluation report is not warranted because Dr. Chen did not voluntarily submit to the competency examination and was ordered to participate in the competency evaluation process. *See* Order Granting Defendant's Motion to Enjoin Prosecuting Attorney from Releasing Competency Evaluation Report, attached as Appendix D. The court acknowledged that the earlier ruling refusing to seal the WSH report was inconsistent with the

ruling enjoining the prosecutor from releasing the report. Recognizing the need for appellate clarification of these issues, the Court encouraged the prosecuting attorney to join both matters for review.

On May 16, 2012, the Court certified this issue for appellate review. *See* Court's Certification of Issue Pursuant to RAP 2.3(b)(4), attached as Appendix G. The Court stated that judges in King County Superior Court are issuing inconsistent rulings on motions to seal WSH competency evaluation reports, noting that some judges seal the reports as a matter of course, other judges refuse to seal or redact at all as a matter of course, while others redact to varying degrees. The Court stated that prosecutors routinely argue that the entire report should be filed while the defense routinely argues that the entire report should be sealed, and that appellate guidance would be very helpful to the trial courts.

The Court's recognition of the need for appellate guidance is reinforced by Daron Morris and Louis Frantz, felony supervisors of two of King County's public defender agencies. *See* Appendices E and F. These experienced criminal defense practitioners state that competency is an often recurring issue and that historically, these reports were routinely sealed or not even filed due to the sensitive nature of the information in them. These attorneys report that in the last few years, the trial courts have been making inconsistent decisions about filing, redacting or sealing

the reports, echoing the observations of the trial court in its decision to certify this issue for appellate review. Mr. Frantz and Mr. Morris also discuss the myriad problems caused by both the public filing of the reports and the inconsistent handling of the issue by the trial courts.

5. ARGUMENT

**A. Introduction.**

Discretionary review is necessary to address an important issue regarding the public disclosure of court ordered mental health competency evaluation reports. The plain language of controlling statutes prohibits public dissemination of such reports. Although the weighing of the competing interests of the defendant and the public is typically required by the trial courts, considering the plain language of RCW 10.77.210 and the threat to a defendants' rights to privacy caused by disclosure of competency evaluations, as a matter of law all competency reports must be sealed.

As recognized by the trial court in its certification of the issue for discretionary review, and echoed in the attached declarations of counsel, there is a lack of uniformity in the manner in which trial courts address this often recurring issue. Where some courts consistently seal these reports, some file the reports and others redact to varying degrees. This inconsistency causes confusion for defendants and for the attorneys

advising them. It also results in an impermissibly inconsistent enforcement and/or waiver of fundamental privacy rights. Trial courts need appellate court guidance to insure the uniform protection of the fundamental right to privacy. Discretionary review is necessary to resolve the inconsistency in a manner that protects fundamental rights to privacy and the rights to a fair trial.

**B. The Court's Order enjoining the prosecutor from releasing a competency evaluation is in direct conflict with its Order denying the defendant's motion to seal the competency evaluation report. Considering the plain language of RCW 10.77.210 preventing release of such reports to anyone other than designated individuals and the threat to a defendant's right to privacy caused by disclosure of a competency evaluation, as a matter of law competency reports must be sealed.**

RCW 10.77 governs court proceedings when competency is at issue in a case. In Washington, no incompetent person "shall be tried, convicted or sentenced for the commission for an offense so long as such incapacity continues." RCW 10.77.050. Failure to observe procedures adequate to protect this right is a denial of due process. When there is reason to doubt a defendant's competency the court must order an examination and report. RCW 10.77.060(1)(a). The governing statute strictly limits access to the information in the report to the court:

Except as provided in RCW 10.77.205 and 4.24.550 regarding the release of information concerning insane

offenders who are acquitted of sex offenses and subsequently committed pursuant to this chapter, *all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records...*

RCW 10.77.210 (emphasis added). Thus, pursuant to RCW 10.77.210, the facility completing the competency evaluation is to provide the report to only seven persons/entities: the committed person, his attorney, his physician, supervising corrections officer, prosecutor, court, protection agency or other expert showing need.

The trial court recognized the import of this statute in granting Dr. Chen's motion to enjoin the prosecutor from disclosing the competency evaluation to Q13Fox or any other third party. *See* App D. The court barred disclosure to the press despite its earlier ruling denying the Defendant's motion to seal. As conceded by the trial court, the rulings are in conflict. The court's denial of defendant's motion to seal renders RCW 10.77.210 meaningless. While RCW 10.77.210 provides that a very limited number of persons are to have access to a competency report, all persons (including potential jurors and members of the media) would have access to the report once it is placed in the court file.

RCW 10.77.210 must be considered in concert with court rules governing when it is appropriate to seal documents or close courtrooms, constitutional mandates favoring open courts and case law setting forth standards for sealing documents. Nevertheless, in enacting RCW 10.77.210, the legislature clearly intended to severely restrict the public's right of access to competency reports and requires that these documents not be publicly disseminated despite the general principles favoring open courts.

General Rule ("GR") 15 establishes the procedure and standards for sealing court records. Under this rule, the trial court may order that records be sealed if it makes and enters written findings that the sealing is justified by a compelling privacy or safety concern that outweighs the public interest in access. In setting forth the sufficient privacy or safety concerns that may be weighed against the public interest, GR 15 lists "the sealing or redaction is permitted by statute" as the first basis for sufficient privacy or safety concerns to be weighed against the public interest.

RCW 10.77.210 prevents competency evaluations from being made public. It is thus a statute that not only "permits" sealing as was contemplated by GR 15, but in effect requires it; if such reports were not sealed they would be in the court file and readily available to the public.

Therefore, pursuant to GR 15, RCW 10.77.210 provides sufficient proof of a privacy or safety concern to be weighed against the public interest.<sup>5</sup>

GR 15 must also be considered within the context of the state laws favoring open courts as well as those laws placing limits on the public's right of access. In *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), this Court set forth a five-part balancing test to determine whether to seal or redact a court document.

Prior to entering its Order denying Dr. Chen's motion to seal, the trial court attempted to apply the *Ishikawa* standards to weigh the competing interests of the defendant and the public, and concluded that sealing the report was not necessary to protect the defendant's interests, and instead redacted certain sections of the report. In its ruling, however, the court failed to recognize the import of RCW 10.77.210, which prevents release of a competency report to anyone other than a few interested persons. Furthermore, the court's ruling cannot be squared with its later conclusion that the prosecuting attorney must not disclose this report to Q13Fox or any other person.

---

<sup>5</sup> Appellant recognizes that a panel of Division One rejected a somewhat similar argument in *State v. DeLauro*, 163 Wn.App. 290, 258 P.3d 696 (2011). On remand the trial court appropriately concluded that the DeLauro's competency evaluator's report be sealed. App F at 3-5.

Although *Ishikawa* contemplates a weighing of the competing interests of the defendant and the public by the trial court in making its ruling, the plain language of RCW 10.77.210 and the threat to a defendant's rights to privacy caused by disclosure of a competency evaluation leads to only one reasonable conclusion: competency reports should be sealed. Competency evaluations invariably reference details of personal information contained in confidential medical and mental health records, list currently observed symptoms of mental illness and set forth diagnostic findings that under all other circumstances would be considered confidential and privileged. Without question failure to seal such a report would jeopardize a defendant's privacy rights.

A ruling other than one that seals all competency reports would render RCW 10.77.210 without purpose and result in the same inconsistent rulings as have come about in this case. An order preventing the report from being released to a third party serves no purpose if the report is in the court file.

It is also significant that in this case Dr. Chen's expert testified that Dr. Chen was initially incompetent but over the course of months became competent as psychotropic medications were administered. In this case, Dr. Chen's counsel did not seek a competency evaluation; rather the prosecution sought the evaluation and Dr. Chen was compelled to

participate in the process over defense objection. Thus, Dr. Chen was forced to answer highly sensitive questions about his health and to provide medical and mental health records as part of an evaluation he did not request, and the court now expects to make public portions of a competency report that contains information that would otherwise be confidential and privileged. Having such information available to the public would severely compromise Dr. Chen's right of privacy and his right to a fair trial.

**C. In refusing to seal the competency report the superior court 1) committed an obvious error which would render further proceedings useless; and 2) committed probable error which substantially alters the status quo and substantially limits Dr. Chen's freedom. Further, the trial court has certified the issue for review recognizing that there is no standard practice among superior court judges with respect to the issue of whether competency reports should be sealed. This inconsistency creates uncertainty for attorneys advising clients considering undergoing competency evaluations as to whether the report will be available only to those listed in RCW 10.77.210 or will be made available to the public.**

Pursuant to RAP 2.3 (b) discretionary review may be accepted under the following circumstances:

- (1) The superior court has committed an obvious error which would render further proceedings useless;
- (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

- (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
- (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

In this case, the superior court's failure to seal the competency report was an obvious error which would render further proceedings useless. If the competency report is not sealed and is open to the public Dr. Chen's sensitive, private and privileged information will be disclosed. Once such information is revealed, Dr. Chen's right of privacy can never be restored.

The superior court's failure to seal the competency report was also probable error that substantially alters the status quo and limits Dr. Chen's freedom to act. Failure to seal the competency report alters the status quo because a myriad of confidential medical and mental health information that would otherwise be private will now become part of the public record. Further, the failure to seal substantially limits Dr. Chen's freedom to act because once such highly personal and sensitive information is part of the record and available to the public his privacy rights have been lost. Speaking metaphorically, this "bell cannot be un-rung" and the "genie cannot be forced back in the bottle." The release of such confidential

information would also affect Dr. Chen's freedom to act because the availability of such information would unfairly disclose defense strategy.<sup>6</sup>

The superior court has certified that the issue of whether competency reports should be sealed is one in which there is a substantial ground for a difference of opinion, and stated that this has resulted in wildly conflicting rulings with respect to sealing of such reports. *See App. G.* This causes confusion and uncertainty for attorneys trying to advise their clients who might undergo competency examinations as to whether, and to whom, the reports will be released.

The declarations of supervisors from two King County public defender agencies, Daron Morris and Louis Frantz, echo the superior court's comments in certifying this issue. These lawyers state: 1) until recently, standard practice was for superior court judges to seal competency reports; 2) currently there is no standard practice regarding this issue -- some routinely file, some routinely seal and others redact to varying degrees; and 3) the inconsistent treatment of this issue causes problems and confusion for defendants and the attorneys advising them regarding whether there is any confidentiality to the competency

---

<sup>6</sup> The defense has consistently argued that none of this information should be disclosed to the prosecuting attorney. Moreover, relying upon *People v. Pokovich*, 141 P.3d 267 (Cal. App. 2006), the defense argued that this "compelled" information may not be used at trial. The superior court did not issue any definitive ruling on this issue.

evaluation process. *See* App. E and F. The current state of affairs is untenable, as it undermines due process by compromising the validity and accuracy of competency determinations.

Because failure to seal competency reports poses a serious risk to a defendant's right of privacy and to a fair trial, this Court needs to establish a clear rule regarding sealing of these reports. Many persons are uncomfortable sharing mental health information, and it is not uncommon for those with mental illness to be unusually guarded about their condition and about revealing their condition to others. Knowing that a report may be available to the public could make a person more reluctant to participate in a competency evaluation, which could result in some defendants resisting their attorneys' efforts to raise competency concerns, resulting in some defendants being tried while incompetent. To protect defendants' privacy rights and the right to a fair trial, it is essential that in all cases such reports be sealed.

Underscoring the importance of the issue of whether competency reports should be treated as documents open to the public, this Court is currently considering a similar issue in *Koenig v. Thurston County*, 155 Wn.App. 398, 229 P.3d 910 (2010), *review granted* 170 Wn.2d 1020, 245 P.3d 774 (2011). In *Koenig*, this Court is addressing whether special sex offender sentencing alternative ("SSOSA") evaluations held by the

prosecuting attorneys offices are exempt from disclosure under the Public Records Act. Like the issue presented here regarding whether competency evaluations should be disseminated to the public, this Court in *Koenig* is addressing whether SSOSA evaluations should be exempt from disclosure. Both types of evaluations contain highly private details about defendants.

In fact, the issue presented for exemption from the public disclosure of competency reports is far more compelling. In cases involving allegations of sexual misconduct, a defendant may choose to undergo a sexual deviancy evaluation and then, with the advice of counsel, voluntarily disclose that evaluation to the prosecutor and the Court in an effort to obtain an alternative sentence. By contrast, in most circumstances (as in this case), a defendant is compelled to participate in a competency evaluation process. Such an evaluation is rarely used in attempt to obtain a favorable sentence; rather, it is needed to insure a fundamental due process guarantee. Involuntary relinquishment of privacy by making public compelled competency evaluations certainly presents an issue of equal, if not greater importance, than the issue this Court has accepted review of in *Koenig* involving SSOSA evaluations.

Ultimately, the trial court's order denying the sealing of Dr. Chen's competency report was clear error. The court ignored the clear dictates of RCW 10.77.210. Discretionary review is required to remedy this error

and address an often recurring issue of great importance involving due process and privacy rights where currently trial courts are inconsistent in protecting these fundamental rights.

After rendering its ruling, the superior court certified that discretionary review is warranted in this case. In fact, the court acknowledged that the superior courts are in need of appellate court guidance to properly evaluate and resolve these important legal issues.

6. CONCLUSION

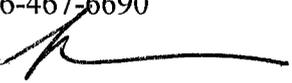
For the foregoing reasons, and the interests of justice, discretionary review should be granted.

DATED this 18 day of May, 2012.

Respectfully submitted,

  
\_\_\_\_\_  
BARRY FLEGENHEIMER, WSBA # 11024  
119 First Avenue S., Suite 500  
Seattle, WA 98104  
206-621-8777

  
\_\_\_\_\_  
RAYMOND C. MCFARLAND, WSBA # 12257  
119 First Avenue S. Suite 500  
Seattle, WA 98104  
206-467-6690

  
\_\_\_\_\_  
TODD MAYBROWN, WSBA #18557  
600 University Street, Suite 3020  
Seattle, WA 98101  
206-447-9681

**PROOF OF SERVICE**

Paula Smeltzer swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 18<sup>th</sup> day of May, 2012, I sent by U.S. Mail, postage prepaid, one true copy of the Motion for Discretionary Review to attorney for Respondent:

Donald Raz  
Deputy Prosecuting Attorney  
King County Prosecutor's Office  
516 Third Ave., W554  
Seattle, WA 98104

One copy was hand delivered to Appellant Louis Chen.

DATED at Seattle, Washington this 18<sup>th</sup> day of May, 2012.

  
\_\_\_\_\_  
Paula Smeltzer  
Paralegal to Todd Maybrown

# APPENDIX A



competent and lifted the stay. The order was agreed in form and substance. Defense counsel moved to seal the WSH report, and the State objected.

The issue now before the court is whether the report should be sealed.

In consideration of defendant's motion, the court reviewed Ch.70.02 RCW, RCW 10.77.210, RCW 10.77.065, GR 15, and 31, and Article 1 sections 7, 10 and 22 of the Washington Constitution, as well as *Seattle Times v. Ishikawa*, 97 Wash.2d 30 (1982), *Dreiling v. Jain*, 151 Wash.2d 900 (2004), and *State v. Momah*, 167 Wash.2d 140, 217 P. 3d 321 (2009). Additionally, while GR 22 does not apply, it does provide some guidance to the court.

The Supreme Court addressed sealing records in *Seattle Times v. Ishikawa*, 97 Wash.2d 30 (1982) and articulated the factors a trial court must consider before it can seal records.

1. The proponent of closure and/or sealing must make some showing of need.

The defendant has done so in this case.

- a. The defendant has constitutionally protected rights of privacy and to a fair trial. These are compelling concerns. Indeed, they are among the most basic rights guaranteed by our State constitution.
- b. The defendant was ordered by the court to participate in a competency evaluation. It was not voluntary.
- c. The report contains information about the defendant's social, criminal, medical and psychiatric history, disclosure of which may cause significant harm to the defendant's right to privacy.
- d. Chapter 70.02 RCW is entitled Health Care Information Access and Disclosure and contains legislative findings:

(1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests. RCW 70.02.005(1).

(3) It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

Health care information is defined as "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. RCW 70.02.010(7).

The legislature has stated that individuals have a fundamental interest in protecting the privacy of health care information. The fact that a person has been accused of a crime, in and of itself, does not mean that privacy right is forfeited. The records reviewed by the evaluator and the report itself fit within the definition of "health care information". The legislature recognizes the danger of disclosure of that information except in limited circumstances.

2. Anyone present when the sealing motion is made must be given an opportunity to object.

The State has objected. The court infers that defendant did not give notice of the motion to seal to the alleged victim's family; such failure is not fatal to defendant's motion. First, a complainant is not among those entitled to receive a copy of the

report under Chapter 10.77. Second, the rights of victims have been addressed in

Article 1 section 35 of the State Constitution:

Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend.

An alleged victim tells the prosecutor he or she wants to be notified of a hearing, and the prosecutor may then notify the alleged victim of the hearing.

3. The court should analyze whether the requested method is the least restrictive means available and effective in protecting the interests threatened.

The court determines, in this case, that the appropriate remedy is to redact the report. Those portions of the report necessary to the court's finding that the defendant is competent will be left unredacted. The bulk of the report is analogous to the material produced in discovery in *Dreiling v. Jain*, 151 Wash.2d 900, 210 (2004): "As this information does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure."

4. The court must weigh the competing interests of the defendant and the public.

Defendant was ordered to undergo an evaluation. His status is not entirely unlike a party in a domestic relations or guardianship proceeding who was forced to participate in a parenting evaluation or for whom there was a CPS referral. In the latter context GR 22 provides any reports must be filed under seal. The defendant has a privacy interest in his medical, psychological and social history. The public does not have an unfettered right to that information simply because the defendant was accused of a crime. Should any of the information in the report be the basis of a

subsequent claim for relief from a decision by the court or trier of fact, the issue of whether or how much of the report should be sealed may be revisited.

5. The order must be no broader in its application or duration than necessary.

The entire report will not be sealed. The parts which were relevant to the court's determination of the issues whether the defendant is competent will not be redacted.

GR 15, adopted in 1989, addresses sealing and redacting records and provides that the court consider whether the sealing or redaction is permitted by statute. RCW 10.77.210(1) expressly limits the use and distribution of forensic mental health evaluations: "all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records." Although the statute continues to list additional health and law enforcement officers who may receive copies of the report, nowhere does it suggest the report be made available either to the victim or to the public.

The State's argument that RCW 10.77.210 merely limits to whom Western State can distribute the report but does not also limit the prosecutor, defense lawyer and court in their distribution of the report would make the statute meaningless and is rejected.

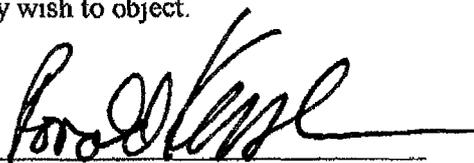
The issue of whether information contained in the WSH report may be admissible at trial is not before this court, and is distinct from the issue of whether the report should be filed in the public record.

Accordingly, the defendant's motion to seal the report in its entirety is denied. The court will file the redacted report, stayed pending defendant's motion for discretionary review. The

portions of the report that were considered by the Court in signing the order finding the defendant competent will not be redacted. On the court's motion, an unredacted copy of the entire report will be filed, under seal, available only for appellate review or for release should the court unseal the document. The clerk is directed to review the court file to assure that the original WSH reports have been properly sealed.

Plaintiff shall notify the complainant's family, if any, of this order and shall schedule a hearing should the complainant's family wish to object.

DATED April 9, 2012

  
\_\_\_\_\_  
RONALD KESSLER, Judge

# APPENDIX B



1 the information contained within the Package, the King County Prosecuting Attorney  
2 concluded that this would not be an appropriate case for the death penalty.

3           3. In reviewing the Mitigation Package, the prosecutors learned that Dr. Chen  
4 was suffering from psychosis. On September 28, 2011, the defense confirmed that a  
5 psychiatrist, Dr. Mark McClung, had evaluated Dr. Chen on several occasions and ultimately  
6 concluded that Dr. Chen was then not competent to proceed. Thereafter, on October 19,  
7 2011, Dr. McClung again concluded that Dr. Chen remained incompetent to stand trial. Dr.  
8 McClung also reported that Dr. Chen was being treated with psychiatric medications and that  
9 he was showing early stages of improvement in his mental condition. Dr. McClung opined  
10 that, with appropriate medications, Dr. Chen's competency should be restored within 4-5  
11 weeks.  
12

13  
14           4. On October 25, 2011, the State filed its "Motion to Address Defendant's  
15 Competency and to Toll the Time of Trial." The parties appeared for hearing on the State's  
16 motion on October 28, 2011. Defense counsel acknowledged that Dr. McClung had raised  
17 questions about Dr. Chen's competency. However, defense counsel also informed the Court  
18 that Dr. Chen's condition was improving -- and that he would likely be competent in a short  
19 period of time. This Court then signed an Order directing that Dr. Chen be evaluated at the  
20 Western State Hospital ("WSH") and scheduled a competency return date for November 17,  
21 2011.  
22

23           5. On November 17, 2011, the parties returned to Court and reported that Dr.  
24 Chen had yet to be transported to WSH. At the same time, the defense provided an updated  
25 letter report from Dr. Mark McClung confirming that Dr. Chen had continued to make  
26 significant improvements and that, in his opinion, Dr. Chen was now competent to proceed.

*DECLARATION OF TODD MAYBROWN  
RE PUBLIC DISCLOSURE REQUEST - 2*

Allen, Hansen & Maybrown, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1 Thus, the defense argued that there was no longer any need to proceed with a competency  
2 evaluation. The State objected and refused to waive the statutory requirement of an  
3 evaluation by at least two experts. This Court then concluded that any WSH evaluation  
4 should be completed in the King County Jail.

5  
6 6. The parties returned to Court once again on December 19, 2011. The defense  
7 objected to the competency evaluation and again emphasized that Dr. Chen was being  
8 compelled to participate in this process. The defense objected to the State's motion for a  
9 Court order allowing WSH to obtain a complete copy of Dr. Chen's medical and mental  
10 health records. See Defendant's Response to State's Motion to Provide Records to Western  
11 State Hospital.<sup>1</sup> Counsel argued then, and has consistently argued, that these records are  
12 privileged and must be protected under the constitution, HIPPA (42 U.S.C. § 1320) and  
13 Washington's Medical Records Privacy Act (RCW 70.02 *et seq.*). Thus, the defense also  
14 made a motion to seal the WSH competency evaluation report in its entirety. See Defendant's  
15 Response to State's Motion to Provide Records to Western State Hospital at 9-18 (discussing  
16 GR 15 and *Ishikawa* factors).

17  
18 7. After considering these matters, the Court granted the state's motion for  
19 disclosure of the medical records but also entered a Protective Order which provides in  
20 pertinent part:  
21

22 1. The Department of Social & Health Services (DSHS), Western State  
23 Hospital (WSH), and its employees, including but not limited to Dr. Margaret  
24 Dean, shall not disclose or reveal in any manner the contents of, or any  
information contained in, the Harborview Medical Center (HMC) records  
provided pursuant to the above-referenced Order to any third party whatsoever,

25  
26 <sup>1</sup> The State's motion was directed towards the medical records maintained at Harborview Medical  
Center. However, the defense also objected to any attempt to obtain Dr. Chen's records from any  
other source or provider, including the King County Jail.

1 including but not limited to any employees or attorneys of the King County  
2 Prosecuting Attorney's Office.

3 2. Dr. Dean and WSH may reference information contained in the HMC  
4 records in its report to the court on the competency of the defendant, but only  
5 to the extent that such information is necessary for inclusion in the report.

6 3. Dr. Dean and WSH shall not deliver the completed report pursuant to the  
7 procedures set forth in RCW 10.77.065 pending further Order of this Court.  
8 Rather, Dr. Dean and WSH shall first deliver its completed report to Dr.  
9 Chen's defense counsel only to allow defense counsel an opportunity to review  
10 the report and to request any necessary redactions of the report or sealing  
11 before any report is delivered to the Court, the prosecutor or any other person  
12 or facility. Should defense counsel determine that no redactions of the report  
13 are necessary, the defense will inform WSH that distribution of the report  
14 pursuant to RCW 10.77.065 may proceed. Should defense counsel determine  
15 that redactions of the report are necessary, the defense will provide a copy of  
16 the unredacted report and their suggested redactions to the court for in camera  
17 review and set a hearing before this court. Upon the court's ruling on the  
18 request for redactions, WSH will be informed what may be distributed.

19 Order (dated December 19, 2011).

20 8. Two representatives of WSH, Drs. Margaret Dean and Daniel Ruiz-Paredes,  
21 met with Dr. Chen at the King County Jail on December 29, 2011. These doctors reviewed a  
22 copy of the medical records from the Harborview Medical Center. Somehow, they also  
23 obtained a copy of Dr. Chen's records from the King County Jail. Thereafter, on January 11,  
24 2012, WSH faxed a copy of its report to defense counsel. In that report, the representatives of  
25 WSH confirmed that Dr. Chen was currently competent to proceed to trial.

26 9. Later, after reviewing the WSH competency evaluation report, defense counsel  
renewed the motion to seal. *See* Defendant's Motion to Redact and Seal Competency  
Evaluation Report. Defense counsel also argued that the Court should redact certain sections  
of the report before the report was distributed pursuant to RCW 10.77.065.<sup>2</sup> Pursuant to this

<sup>2</sup> Consistent with the Court's Protective Order, the defense also provided the State with a redacted version of the WSH report. To counsel's knowledge, this is the only version of the WSH report in the possession of the King County Prosecuting Attorney.

*DECLARATION OF TODD MAYBROWN  
RE PUBLIC DISCLOSURE REQUEST - 4*

Allen, Hansen & Maybrow, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1 Court's Protective Order, and consistent with Local Rule GR 15, the defense provided the  
2 Court a redacted and unredacted copy of the report for *in camera* review.

3 10. This Court scheduled a competency return date for January 26, 2012. At that  
4 time, the Court confirmed that Dr. Chen was competent to proceed to trial. The Court put  
5 over the issue regarding sealing and/or redaction to a hearing on March 29, 2012. On or about  
6 March 22, 2012,<sup>3</sup> the Court signed an Order denying the motion to seal but ordered that  
7 certain information contained in the report be redacted prior to filing. *See* Order on Motion  
8 to Seal Forensic Psychological Report.  
9

10 11. Meanwhile, on or about March 30, 2012, Q13Fox sent the King County  
11 Prosecuting Attorney a public disclosure request seeking "access to the physiological (sic)  
12 evaluation for Louis Chen." Appendix A (Q13Fox's PRA Request). Defense counsel was  
13 first notified of this request on April 3, 2012. Although this request is somewhat confused,  
14 the parties believe that Q13Fox is actually seeking disclosure of the prosecution's copy of the  
15 WSH evaluation report. *See id.*  
16

17 12. The parties again appeared before this Court on April 5, 2012. The defense  
18 then confirmed that it intended to file a motion for discretionary review of this Court's Order  
19 on Motion to Seal Forensic Psychological Report and urged the Court to refrain from filing  
20 the redacted WSH evaluation report before Dr. Chen had any opportunity to obtain review of  
21 this Order. The State agreed that a stay was appropriate in light of the circumstances. The  
22

23  
24  
25 <sup>3</sup> The Order is dated March 22, 2012, but it was not provided to Counsel until March 30, 2012. The  
26 Order was filed, without a copy of the Court's proposed redactions, a few days later. *See* Order  
Staying Filing of the Court's Redacted Version of WSH's January 5, 2012 Evaluation Report and the  
Disclosure of Defense's Proposed Redacted Competency Evaluation Report.

*DECLARATION OF TODD MAYBROWN  
RE PUBLIC DISCLOSURE REQUEST - 5*

Allen, Hansen & Maybrown, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1 parties also notified the Court that this issue was likely to be further complicated by the PRA  
2 request of Q13Fox.

3 13. Thereafter, this Court stayed disclosure of that report pending a hearing on  
4 these matters. See Order Staying Filing of the Court's Redacted Version of WSH's January 5,  
5 2012 Evaluation Report and the Disclosure of the Defense's Proposed Redacted WSH  
6 Competency Evaluation Report.  
7

8 14. The defense now moves this Court to enjoin the prosecution from disclosing  
9 this evaluation to Q13 Fox or any other person. Dr. Chen maintains that such disclosure  
10 would violate RCW 10.77.065, RCW 70.02 et seq., RCW 10.77.210, RCW 70.48.100, RCW  
11 42.56.050, RCW 42.56.230, RCW 42.56.540, Article I, Section 7 of the Washington  
12 Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution.  
13

14  
15 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF  
16 WASHINGTON THAT THE FOREGOING IS TRUE AND ACCURATE TO THE BEST  
OF MY KNOWLEDGE.

17 DATED this 13 day of April, 2012.

18  
19   
20 \_\_\_\_\_  
Todd Maybrow, WSBA #18557  
Attorney for Defendant

21  
22  
23  
24  
25  
26  
*DECLARATION OF TODD MAYBROWN  
RE PUBLIC DISCLOSURE REQUEST - 6*

*Allen, Hansen & Maybrow, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681*

# APPENDIX A

DANIEL T. SATTERBERG  
PROSECUTING ATTORNEY



Office of the Prosecuting Attorney  
CIVIL DIVISION  
W400 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9015  
FAX (206) 296-0191

April 3, 2012

Todd Maybrown  
Allen, Hansen & Maybrown, P.S.  
One Union Square  
600 University Street, Suite 3020  
Seattle, Washington 98101-4105

ALLEN, HANSEN & MAYBROWN

APR 05 2012

COPY RECEIVED

Re: Q13FOX Public Records Request

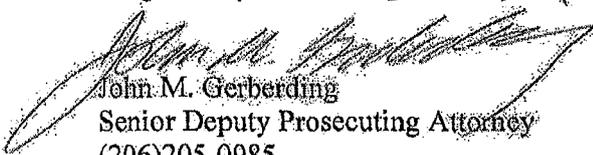
Dear Mr. Maybrown:

Our office has received a public records request from Q13FOX for the January 5, 2012 Forensic Psychiatric Evaluation (Evaluation) of Louis Chen. (Copy of request attached). As you know, we do not have a complete copy of this Evaluation; we only have the redacted version the defense provided to our office on January 24, 2012.

The purpose of this letter is to provide you with notice and an opportunity, per RCW 42.56.520 and .540, to seek an order prohibiting our office from releasing the redacted version of the Evaluation to Q13FOX. If you do not obtain a Superior Court order enjoining our office from releasing the redacted version of the Evaluation by April 20, 2012, we intend to release this record to Q13FOX.

Thank you for your consideration.

For DANIEL T. SATTERBERG  
King County Prosecuting Attorney

  
John M. Gerberding  
Senior Deputy Prosecuting Attorney  
(206)205-0985



Q13 FOX  
1813 Westlake Ave N  
Seattle, WA 98109  
206-674-1305

3/30/2012

## RECORDS REQUEST

Dear Records Officer:

Pursuant to the state public records act, RCW 42.56.010, I request access to a copy of the physiological evaluation for suspect Louis Chen in the homicide case in Seattle in 2011. I would like to receive these records electronically if available in that format.

As a journalist making a request for this information and seeking the records in a timely fashion, I would appreciate communication via telephone or email rather than by mail. It is acceptable to release portions of the request as they become available rather than waiting for the complete request before releasing. Also if you have questions about this request, please contact the Q13 FOX newsroom at 206-674-1305 or via email at [mstanton@tribune.com](mailto:mstanton@tribune.com). Any assignment editor will be able to assist you.

I agree to pay reasonable duplication fees for the processing of this request. If the cost is greater than \$25, please notify me via phone.

If my request is denied in whole or part, please provide a written explanation that includes a justification of all deletions by reference to specific exemptions of the act. Also, please provide all segregable portions of otherwise exempt material.

Thank you for your assistance.

Sincerely,

Michael Stanton  
Assignment Editor  
Q13 FOX News  
Desk: 206.674.1409  
News: 206.674.1305  
Fax: 206.674.1713  
[mstanton@tribune.com](mailto:mstanton@tribune.com)  
[www.Q13FOX.com](http://www.Q13FOX.com)

# APPENDIX C

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

LOUIS C. CHEN,

Defendant.

NO. 11-1-07404-4 SEA

DEFENDANT'S MOTION TO  
REDACT AND SEAL COMPETENCY  
EVALUATION REPORT

COMES NOW the Defendant, Louis Chen, by and through undersigned counsel, and hereby moves this Court to redact and seal the competency evaluation report recently completed by representatives of Western State Hospital. This motion is made pursuant to Local Rule GR 15 and the Sixth and Fourteenth Amendments of the United States Constitution. This motion is also supported by the Defendant's Response to State's Motion for the Defense to Provide Records (dated December 12, 2011), as well as the records and proceedings previously had herein.

**I. FACTUAL BACKGROUND**

On August 16, 2011, the State filed an Information charging the defendant, Dr. Louis Chen, with two counts of Aggravated First Degree Murder based upon incidents that occurred sometime between August 8, 2011 and August 11, 2011. Dr. Chen has entered a plea of not guilty to all charges. After evaluating the case, the State chose not to file a Notice of Special Sentencing Proceeding pursuant to RCW 10.95.040.

*DEFENDANT'S MOTION TO REDACT AND  
SEAL COMPETENCY EVALUATION REPORT - 1*

**Allen, Hansen & Maybrown, P.S.**  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1           During the ensuing months, defense counsel advised the prosecution that Dr. Chen  
2 was clearly suffering from psychosis. On September 28, 2011, the defense confirmed that a  
3 psychiatrist, Dr. Mark McClung, had evaluated Dr. Chen on several occasions and ultimately  
4 concluded that Dr. Chen was then not competent to proceed. Thereafter, on October 19,  
5 2011, Dr. McClung again concluded that Dr. Chen remained incompetent to stand trial.  
6 However, Dr. McClung also reported that Dr. Chen was being treated with psychiatric  
7 medications and that he was showing early stages of improvement in his mental condition.  
8 Dr. McClung opined that, with appropriate medications, Dr. Chen's competency should be  
9 restored within 4-5 weeks.  
10

11           On October 25, 2011, the State filed its "Motion to Address Defendant's Competency  
12 and to Toll the Time of Trial." The parties appeared for hearing on the State's motion on  
13 October 28, 2011. Defense counsel then acknowledged that Dr. McClung had raised  
14 questions about Dr. Chen's competency. However, defense counsel also informed the Court  
15 that Dr. Chen's condition was improving – and that he would likely be competent in a short  
16 period of time. This Court then signed an Order directing that Dr. Chen be evaluated at the  
17 Western State Hospital ("WSH") and scheduled a competency return date for November 17,  
18 2011.  
19

20           On November 17, 2011, the parties returned to the Court and reported that Dr. Chen  
21 had yet to be transported to WSH. At the same time, the defense provided an updated letter  
22 report from Dr. Mark McClung confirming that Dr. Chen had continued to make significant  
23 improvements and that he was now competent to proceed. Nonetheless, the State refused to  
24 waive the statutory requirement of an evaluation by at least two experts and this Court  
25 concluded that any WSH evaluation should be completed in the King County Jail.  
26

1 The parties returned to Court once again on December 19, 2011. At that time, the  
2 Court entered a Protective Order which provides in pertinent part:

3 1. The Department of Social & Health Services (DSHS), Western State  
4 Hospital (WSH), and its employees, including but not limited to Dr. Margaret  
5 Dean, shall not disclose or reveal in any manner the contents of, or any  
6 information contained in, the Harborview Medical Center (HMC) records  
7 provided pursuant to the above-referenced Order to any third party whatsoever,  
8 including but not limited to any employees or attorneys of the King County  
9 Prosecuting Attorney's Office.

10 2. Dr Dean and WSH may reference information contained in the HMC  
11 records in its report to the court on the competency of the defendant, but only  
12 to the extent that such information is necessary for inclusion in the report.

13 3. Dr. Dean and WSH shall not deliver the completed report pursuant to the  
14 procedures set forth in RCW 10.77.065 pending further Order of this Court.  
15 Rather, Dr. Dean and WSH shall first deliver its completed report to Dr.  
16 Chen's defense counsel only to allow defense counsel an opportunity to review  
17 the report and to request any necessary redactions of the report or sealing  
18 before any report is delivered to the Court, the prosecutor or any other person  
19 or facility. Should defense counsel determine that no redactions of the report  
20 are necessary, the defense will inform WSH that distribution of the report  
21 pursuant to RCW 10.77.065 may proceed. Should defense counsel determine  
22 that redactions of the report are necessary, the defense will provide a copy of  
23 the unredacted report and their suggested redactions to the court for in camera  
24 review and set a hearing before this court. Upon the court's ruling on the  
25 request for redactions, WSH will be informed what may be distributed.

26 Appendix A (Order dated December 19, 2011).

Two representatives of WSH, Drs. Margaret Dean and Daniel Ruiz-Paredes, met with  
Dr. Chen at the King County Jail on December 29, 2011. Thereafter, on January 11, 2012,  
WSH faxed a copy of its report to defense counsel. In that report, the representatives of WSH  
confirmed that Dr. Chen was currently competent to proceed to trial.

After reviewing the WSH competency evaluation report, defense counsel has  
determined that this Court should redact certain sections of the report before the report is  
distributed pursuant to RCW 10.77.065. Pursuant to this Court's Protective Order, and

1 consistent with Local Rule GR 15, the defense has provided the Court a redacted and  
2 unredacted copy of the report for *in camera* review.

3 This Court has scheduled a competency return date for January 26, 2012. At that time,  
4 it is anticipated that the Court will conclude that Dr. Chen is competent to proceed.  
5

## 6 II. DISCUSSION

### 7 A. This Report Should be Redacted

8 Notwithstanding objections from the defense, this Court has ordered that a  
9 competency evaluation should proceed and that representatives of WSH would be provided  
10 access to the private medical records of Dr. Chen. Before allowing this disclosure, the Court  
11 noted that defense counsel would be provided an opportunity to move for redactions of  
12 otherwise privileged information that might be included in the report. The WSH report does,  
13 in fact, include references to Dr. Chen's private medical records and other privileged and  
14 sensitive information.<sup>1</sup> Accordingly, the defense is now moving this Court to redact all  
15 references to this information from the report before it is delivered to the prosecutors and  
16 other persons listed in RCW 10.77.065.  
17

18 When reviewing the WSH competency evaluation report, the Court will conclude that  
19 removal of the redacted information will in no way impair the State's ability to evaluate these  
20 matters and prepare for the upcoming court hearing. The only issue that is pending before  
21 the Court is whether Dr. Louis Chen is currently competent to proceed to trial. The redacted  
22 information sheds no bearing upon that key question and it does not undermine the now  
23 unanimous conclusion that Dr. Chen is sufficiently competent at this time.  
24

25  
26 <sup>1</sup> In addition to records that were obtained from Harborview Medical Center, the report  
discusses medical records that were somehow obtained from the King County Jail.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

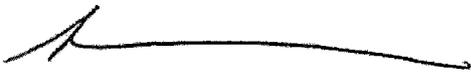
**B. This Report Should be Sealed**

The defense has previously argued that the WSH competency evaluation report ought to be sealed pursuant to Local Rule GR 15 and the due process clause of the federal and state constitutions. *See* Defendant’s Response to State’s Motion for the Defense to Provide Records at 9-19. In that pleading, the defense laid out a detailed analysis of the numerous interests at play – including the factors set forth in *Seattle Times v. Ishikawa*, 97 Wn.2d 30 (1982).

The defense will not repeat those arguments here. However, it is noteworthy that Local Rule GR 15 acknowledges that sealing of a document may be appropriate where sealing or redaction furthers “a protective order entered under CR 26(c).” Local Rule GR 15(c)(2)(B). Here, consistent with this Court’s previous ruling, this report should be sealed and should not be made available to the public.

In the alternative, and at a bare minimum, the unredacted report should be sealed so the redacted information is not otherwise disclosed. Such a ruling is particularly appropriate where this evaluation was compelled by this Court and where Dr. Chen had no opportunity to limit the use of his otherwise private and sensitive medical information.

DATED this 24<sup>th</sup> day of January, 2012.



TODD MAYBROWN, WSBA #18557  
Attorney for Defendant

# **APPENDIX A**

FILED  
KING COUNTY, WASHINGTON  
DEC 19 2011  
SUPERIOR COURT CLERK

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

SUPERIOR COURT FOR THE STATE OF WASHINGTON  
KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

LOUIS CHAO CHEN,

Defendant.

No. 11-1-07404-4 SEA

PROTECTIVE ORDER  
RESTRICTING USE OF MEDICAL  
RECORDS PROVIDED FOR  
COMPETENCY EVALUATION

IT IS HEREBY ORDERED that this court's Order Directing Harborview Medical Center to Provide Defendant's Medical/Mental Health Records to Western State Hospital for Purpose of Competency Evaluation, entered December 15, 2011, is subject to this Protective order as follows:

1. The Department of Social & Health Services (DSHS), Western State Hospital (WSH), and its employees, including but not limited to Dr. Margaret Dean, shall not disclose or reveal in any manner the contents of, or any information contained in, the Harborview Medical Center (HMC) records provided pursuant to the above-referenced Order to any third party whatsoever, including but not limited to any employees or attorneys of the King County Prosecuting Attorney's Office.
2. Dr Dean and WSH may reference information contained in the HMC records in its report to the court on the competency of the defendant, but only to the extent that such information is necessary for inclusion in the report.
3. Dr. Dean and WSH shall not deliver the completed report pursuant to the procedures set forth in RCW 10.77.065. Rather, Dr. Dean and WSH shall first deliver its completed report

PROTECTIVE ORDER RESTRICTING USE OF MEDICAL  
RECORDS PROVIDED FOR COMPETENCY  
EVALUATION - 1

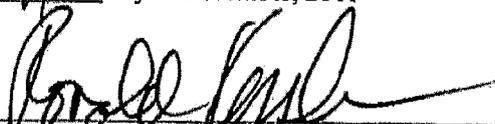
LAW OFFICE OF  
RAYMOND C. MCFARLAND  
119 FIRST AVENUE SOUTH, SUITE 500  
SEATTLE, WA 98104  
TEL (206) 467-6690 FAX (206) 682-3002  
RAY@MCFARLANDLEGAL.COM

ORIGINAL

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

to Dr. Chen's defense counsel only to allow defense counsel an opportunity to review the report and to request any necessary redactions of the report or sealing before any report is delivered to the Court, the prosecutor or any other person or facility. Should defense counsel determine no redactions of the report are necessary, the defense will inform WSH that distribution of the report pursuant to RCW 10.77.065 may proceed. Should defense counsel determine that redactions of the report are necessary, the defense will provide a copy of the unredacted report and their suggested redactions to the court for in camera review and set a hearing before this court. Upon the court's ruling on the request for redactions, WSH will be informed what may distributed.

DONE IN OPEN COURT this 19 day of December, 2011

  
\_\_\_\_\_  
THE HONORABLE RONALD KESSLER, Judge

Presented by:

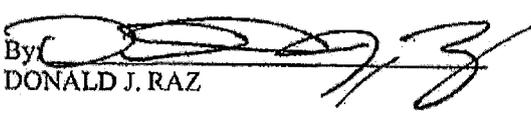
  
\_\_\_\_\_  
RAYMOND C. MCFARLAND  
WSBA No. 12257  
Attorney for Defendant

  
\_\_\_\_\_  
BARRY L. FLEGENHEIMER  
WSBA No. 11024  
Attorney for Defendant

  
\_\_\_\_\_  
TODD MAYBROWN  
WSBA No. 18557  
Attorney for Defendant

Approved for Entry; Notice of Presentation Waived:

DANIEL T. SATTERBERG  
KING COUNTY PROSECUTING ATTORNEY

By   
\_\_\_\_\_  
DONALD J. RAZ

PROTECTIVE ORDER RESTRICTING USE OF MEDICAL RECORDS PROVIDED FOR COMPETENCY EVALUATION - 2

LAW OFFICE OF  
RAYMOND C. MCFARLAND  
119 FIRST AVENUE SOUTH, SUITE 500  
SEATTLE, WA 98104  
TEL (206) 467-6690 FAX (206) 682-3002  
RAY@MCFARLANDLEGAL.COM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

WSBA No. 17287  
Senior Deputy Prosecuting Attorney

**PROTECTIVE ORDER RESTRICTING USE OF MEDICAL  
RECORDS PROVIDED FOR COMPETENCY  
EVALUATION - 3**

LAW OFFICE OF  
**RAYMOND C. MCFARLAND**  
119 FIRST AVENUE SOUTH, SUITE 500  
SEATTLE, WA 98104  
TEL. (206) 467-6690 FAX (206) 682-3002  
RAY@MCFARLANDLEGAL.COM

# APPENDIX D

**FILED**  
KING COUNTY, WASHINGTON  
MAY 08 2012  
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

LOUIS C. CHEN,

Defendant.

NO. 11-1-07404-4 SEA

ORDER GRANTING DEFENDANT'S  
MOTION TO ENJOIN PROSECUTING  
ATTORNEY FROM RELEASING  
COMPETENCY EVALUATION REPORT

THIS MATTER having come on regularly before this Court on the Defendant's Motion to Enjoin Prosecuting Attorney from Releasing Competency Evaluation Report, and the Court having reviewed the parties' pleadings and considered the arguments of counsel, now, therefore,

THE COURT HEREBY FINDS AND CONCLUDES that:

1. The January 5, 2012 Forensic Psychiatric Evaluation of defendant Louis Chao Chen is exempt from public disclosure under RCW 10.77.210 as incorporated in the Public Records Act through RCW 42.56.070(1); and

2. Public disclosure of the Forensic Psychiatric Evaluation is not warranted because the defendant did not voluntarily submit to evaluation by the doctors from Western State Hospital and, instead, this Court ordered the defendant to participate in the competency evaluation process.

IT IS HEREBY ORDERED that:

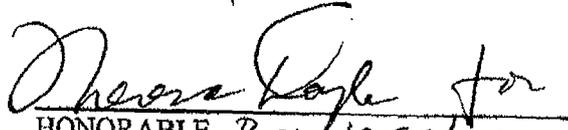
*ORDER GRANTING MOTION TO ENJOIN PROSECUTOR FROM  
RELEASING COMPETENCY EVALUATION REPORT - 1*

Allen, Hansen & Maybrown, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

1 1. Defendant's Motion to Enjoin Prosecuting Attorney from Releasing  
2 Competency Evaluation is GRANTED; and

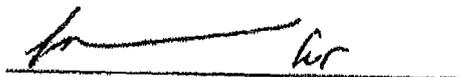
3 2. The King County Prosecuting Attorney is ordered not to release the defense-  
4 redacted copy of the January 5, 2012 Forensic Psychiatric Evaluation of Louis Chao Chen or  
5 any other version of that Evaluation that the King County Prosecuting Attorney may receive,  
6 to Q13Fox or to any other party, until further order of the court.  
7

8 DONE IN OPEN COURT this 7 day of May, 2012.

9  
10   
11 HONORABLE Row Kessler  
12 Superior Court Judge

12 Presented by:

13   
14 Todd Maybrown, WSBA # 18557

15   
16 Barry Flegenheimer, WSBA # 11024

17   
18 Raymond McFarland, WSBA # 12257  
19 Attorneys for the defendant

20 Approved as to Form:

21   
22 Janine Joly, WSBA # 27314  
23 Deputy Prosecuting Attorney

24   
25 Don Raz, WSBA # 17287  
26 Senior Deputy Prosecuting Attorney

ORDER GRANTING MOTION TO ENJOIN PROSECUTOR FROM  
RELEASING COMPETENCY EVALUATION REPORT - 2

Allen, Hansen & Maybrown, P.S.  
600 University Street, Suite 3020  
Seattle, Washington 98101  
(206) 447-9681

# APPENDIX E

## **DECLARATION OF DARON MORRIS**

Daron Morris declares:

1. I am an attorney licensed to practice in the State of Washington (WSBA No. 32524) and am competent to testify. The matters set forth in this declaration are based on my personal knowledge and belief.
2. I am the Felony Supervisor and Deputy Director for The Defender Association, one of the public defender firms in Seattle. I have practiced criminal law in Seattle for approximately 11 years. There are approximately 22 lawyers working in the Felony Division of The Defender Association and they handle over 1500 felony cases per year.
3. Competency evaluations, in which criminal defendants are evaluated by psychiatrists at Western State Hospital (WSH) to determine their competency to stand trial, are very common in felony cases in King County Superior Court. In my experience, the number of competency evaluations required in King County has increased in recent years. I do not have exact statistics but I am aware that WSH reports that they conducted a total of over 1500 competency evaluations of criminal defendants in 2011 (for all counties that WSH serves).
4. Up until just a few years ago, judges would typically file written WSH competency evaluations under seal or would not file them at all. This practice was not considered controversial in light of the sensitive, privileged mental health information contained in those reports.
5. In light of recent cases and concerns about open courts, this practice has changed in the last few years, but the current practice among judges in King County is inconsistent. Some judges will seal or redact these reports, while other judges will not.

6. This inconsistent treatment of WSH competency reports and the risk that information in a WSH report may end up publicly available in the court file present problems for both criminal defendants undergoing competency evaluations and the attorneys representing and advising them. When there is a risk that anything a defendant says during a competency evaluation may end up publicly available in a competency evaluation report that is filed in the court file, defendants will be discouraged from fully and candidly participating in the evaluation, or may refuse to participate altogether. This undermines the due process protections intended by the competency evaluation procedure.

7. Many defendants are floridly incompetent and their attorneys cannot effectively advise them regarding the lack of confidentiality of the process. The limited dissemination of the reports mandated by RCW 10.77.065 (1)(a)(i) provided some protection for the privacy rights of these defendants but this protection is lost when the report is publicly available in the court file.

8. The risk that information in a WSH report may end up publicly available in the court file also damages the attorney-client relationship in these cases. Criminal defendants undergoing competency evaluations are often distrustful of their attorneys and many are being ordered to participate in the competency evaluation process against their wishes. This distrust and the concerns these defendants have increase when they are advised that anything they say may end up publicly available in the court file. Any palliative effect of being able to advise the client that these reports are essentially confidential is lost.

9. Redacting these reports is not a workable remedy because sensitive confidential information is often interwoven with the conclusions that judges rely upon and judges unwilling to seal these reports feel this sensitive information should remain unredacted because they relied upon it in reaching their decision about competency.

10. A clear ruling from this Court that dissemination of WSH competency evaluation reports should be limited to those parties specified in RCW 10.77.065 (1)(a)(i) and should not be publicly available in the court file best serves the due process protections intended by the competency evaluation procedure and the rights and responsibilities of the attorneys and defendants participating in the procedure.

THIS DECLARATION IS MADE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON.

SIGNED this 15th day of May, 2012 at Seattle, Washington.



---

DARON MORRIS

# APPENDIX F

## Declaration of Louis A. Frantz

Louis A. Frantz, declares as follows:

I am licensed to practice law in the State of Washington, WSBA # 12326. I was admitted to the bar in 1982. I am competent to testify and the matters addressed in this declaration are based on my personal knowledge and belief.

I am the supervisor at Associated Counsel for the Accused (ACA). I supervise the felony unit at the Regional Justice Center in Kent. I currently supervise eight attorneys. I have been the supervisor for 4 years. Prior to this position I was a Senior Attorney at ACA. I have been a public defender for 27 years; 16 of which have been spent in a felony practice.

My office does not keep statistics on the number of clients who require competency evaluations. Based on my experience I would estimate that 5% to 10% of our felony clients require a competency evaluation from Western State Hospital (WSH). Some clients have their competency restored only to decompensate later; these clients may require more than one evaluation. Competency is an issue for a number of other clients but the question is resolved, usually by using a retained expert, without the need for an evaluation by WSH.

In King County, for many years, the evaluations from WSH were not filed in the court file. I believe this was due to the sensitive nature of the information in the evaluations. In my experience, when evaluations were filed, they were also frequently sealed, particularly in more serious cases. I represented a client beginning in 2001 who was charged with aggravated murder. The evaluations were always filed, there were multiple evaluations in the case, and the court granted the defense motion to seal based in part on RCW 10.77.210. The court considered GR 15 and the Ishikawa factors before deciding to seal the evaluations.

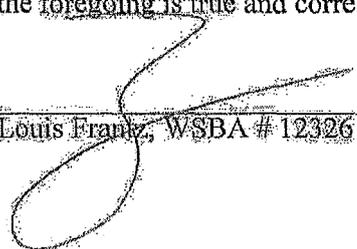
However, over the past few years, the court's response to WSH competency evaluations has changed. Some judges required that evaluations be filed while others did not. The issue of filing the evaluations was resolved in State v. DeLauro, 163 Wn. App. 290 (2011). In DeLauro, on remand, the reasons the trial court relied upon in declining to file the evaluation were used to support the trial court's ruling to seal the evaluation. See attached. There is not a uniform approach by the court's in responding to the motions to seal the competency evaluations; some courts will seal the evaluations, others will not and some will redact varying amounts of information. If there is a uniform approach regarding redaction by the Superior Court judges, I'm not aware of it.

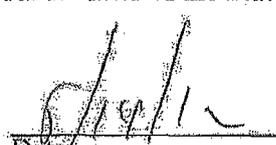
The diverse rulings by the trial courts have made a difficult situation even more complex. Defense counsel usually seeks to establish some level of trust with the client. That is always difficult with clients who are mentally ill. It is even more difficult when we are unable to assure a client to what extent, if at all, the information they provide to the WSH evaluators will be kept confidential. This can make clients less willing to share

information with the evaluator, which limits the accuracy of the evaluation. Additionally, with some clients, the disclosure of the evaluation will exacerbate their paranoia, making it more difficult to establish trust and work effectively with the client.

Unfortunately, many clients are so mentally ill they are not able to understand or properly consider the ramifications of being committed to WSH. At the conclusion of the evaluation, the report is submitted to the court and, depending on the court, filed and not sealed or redacted. Confidential information regarding the client is then made public simply because the client is too mentally ill to proceed to trial. If the client is incompetent the client never has the opportunity to understand what has happened or to provide any response to the court's decision not to seal the evaluation.

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

  
Louis Frank, WSBA # 12326

  
Date

**FILED**  
KING COUNTY, WASHINGTON

MAR 07 2012

SUPERIOR COURT CLERK  
REVEF LY ANN ENEBRAD  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff	)	No. _09-1-02387-1 KNT
	)	
v.	)	MOTION AND ORDER TO SEAL
CHARLES DELAURO	)	DOCUMENTS
	)	
	)	(ORS)
Defendant	)	CLERK'S ACTION REQUIRED

MOTION

The defendant, by and through his attorney of record, Louis Frantz, moves that the documents referenced below be placed under court seal. The documents listed are records or reports which were generated pursuant to RCW 10.77. RCW 10.77.210 limits the release of all records and reports made pursuant to that chapter. RCW 10.77.210 states in part:

. . . Except as provided in RCW 10.77.205 and 4.24.550 regarding the release of information concerning insane offenders who are acquitted of sex offenses and subsequently committed pursuant to this chapter, all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records. All records and reports made pursuant to this chapter shall also be made available, upon request, to the department of corrections or the indeterminate sentence review board if the person was on parole, probation, or community supervision at the time of detention, hospitalization, or commitment or the person is subsequently

MOTION AND ORDER TO SEAL DOCUMENTS

1 convicted for the crime for which he or she was detained, hospitalized, or  
 2 committed pursuant to this chapter.

3 RCW 10.77.210 (Emphasis added).

4 A statutory basis exists to seal the records listed :

- 5 1. Western State Hospital evaluation dated September 22, 2009.

6 DATED this 16<sup>th</sup> day of February 2012.

7 Louis A. Frantz, WSBA # 12326  
 8 Attorney for Defendant

9 **FINDINGS OF FACT**

- 10 1. The defendant was ordered to Western State Hospital (WSH) by the court. The  
 11 defendant had no discretion in whether to go to WSH.  
 12 2. At the time of the evaluation the defendant was told the evaluation was not  
 13 confidential but he was not told that it would be available to the public.  
 14 3. At the time he was informed the evaluation was not confidential he was  
 15 incompetent and his ability to understand that information was compromised.  
 16 4. Competency was not contested and an agreed order finding the defendant  
 17 competent was entered. There was no contested hearing regarding the  
 18 defendant's competency.  
 19 5. The evaluation, if not sealed, would be accessible to other inmates and could put  
 20 the defendant at risk of harm.  
 21 6. Redaction of the defendant's statement would not address the courts concerns  
 22 since the statements of the evaluators rely on and relate back to the statements of  
 23 the defendant.  
 7. There were no objections from members of the public to the sealing and the  
 defendant was not in custody or on supervision so notice to DOC was not  
 required.

**CONCLUSIONS OF LAW**

1. The lack of advisement that the evaluation could be made public, the defendant's  
 inability to decline to go to WSH and the risk to the defendant if other inmates  
 obtained the evaluation supports sealing the evaluation.  
 2. The sealing is statutorily authorized since RCW 10.77.210 limits the release of all  
 records and reports generated by Western State Hospital pursuant to a  
 competency evaluation.

**MOTION AND ORDER TO SEAL DOCUMENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

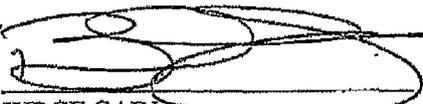
- 3. The statutory limitation on dissemination of the records and reports provides, pursuant to GR 15, a sufficient compelling privacy interest which outweighs the public interest in access to these records.
- 4. Redaction of the evaluation would not be feasible or effective since information provided by both the defendant and the evaluator would need to be completely redacted.
- 5. The public interest in an agreed finding of competency is limited and is outweighed by the defendant's privacy and safety concerns.

**ORDER**

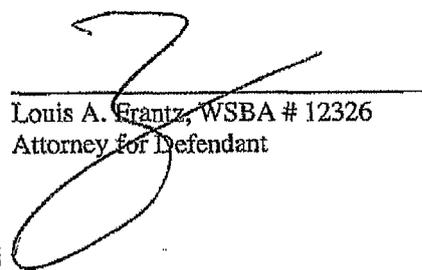
Now, therefore, it is hereby ordered that the following documents be placed under court seal. The documents shall not otherwise be disclosed to the public or the state absent further order of the court. However, this order does not limit the dissemination of any documents or records pursuant to RCW 10.77.210.

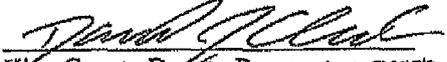
- 1. Western State Hospital evaluation dated September 22, 2009

SO ORDERED this 7<sup>th</sup> day of February 2012.

  
 JUDGE GAIN

*Objections to seal noted on the record.*

  
 Louis A. Grantz, WSBA # 12326  
 Attorney for Defendant

  
 King County Deputy Prosecutor ~~2022~~

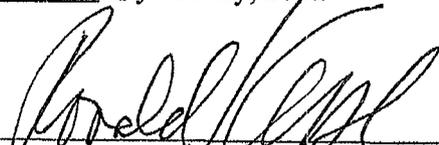
**MOTION AND ORDER TO SEAL DOCUMENTS**

# APPENDIX G



1 is substantial ground for a difference of opinion and that immediate appellate review of this  
2 Order may materially advance the ultimate termination of litigation on this issue by  
3 resolving whether the competency evaluation report should be sealed

4 DONE IN OPEN COURT this MAY 16 2012 day of May, 2012

5  
6   
7 THE HONORABLE RONALD KESSLER, Judge

8 Presented by:

9  
10 \_\_\_\_\_  
TODD MAYBROWN  
WSBA No. 18557  
Attorney for Defendant

11  
12 \_\_\_\_\_  
BARRY L. FLEGENHEIMER  
WSBA No. 11024  
Attorney for Defendant

13  
14 \_\_\_\_\_  
RAYMOND C. McFARLAND  
WSBA No. 12257  
Attorney for Defendant

15  
16  
17  
18 Approved as to form only;  
DANIEL T. SATTERBERG  
19 KING COUNTY PROSECUTING ATTORNEY

20  
21 By:   
DONALD J. RAZ  
WSBA No. 17287  
22 Senior Deputy Prosecuting Attorney

23  
COURT'S CERTIFICATION OF ISSUE PURSUANT TO  
RAP 2.3(b)(4) - 2

LAW OFFICE OF  
RAYMOND C. MCFARLAND  
119 FIRST AVENUE SOUTH, SUITE 500  
SEATTLE, WA 98104  
TEL (206) 467-6690 FAX (206) 682-3002  
RAY@MCFARLANDLEGAL.COM  
Appendix G - 2