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STATE OF WASHINGTON

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No. 87350-0

IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

King County No. 11-1-07404-4 SEA

STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHAO CHEN,

Appellant.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

*PETITIONER'S*  
APPELLANT'S OPENING BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by refusing to seal the defendant's competency evaluation report, thereby ignoring the plain language of RCW 10.77.210, that specifically limits dissemination of such reports.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is RCW 10.77.210 violated when a trial court refuses to seal a competency evaluation report?
2. Does RCW 10.77.210 create a presumption that disclosure of competency evaluation reports are strictly limited and that such reports should not be available for public scrutiny?

## **III. STATEMENT OF THE CASE**

### **A. Procedural Background**

On August 16, 2011, the King County Prosecuting Attorney filed an Information charging the appellant, Dr. Louis Chen, with two counts of Aggravated First Degree Murder based upon an incident that occurred sometime between August 8, 2011 and August 11, 2011. *See* CP 1-2.<sup>1</sup> Dr. Chen has entered a plea of not guilty to all charges.

In light of the charged offenses, Dr. Chen initially faced the possibility of a sentence of death. The defense provided the prosecution with a "Mitigation Package" in the hopes of convincing the prosecution

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<sup>1</sup> The King County Superior Court has prepared two sets of clerk's papers relating to this appeal. The term "CP" refers to the unsealed portion of these clerk's papers. The term "SEALED CP" refers to the sealed portion of the clerk's papers. To protect Dr. Chen's privacy, Appellant's counsel will not quote from any of the sealed pleadings.

not to file a Notice of Special Sentencing Proceeding pursuant to RCW 10.95.040. CP 156.<sup>2</sup> After evaluating the case, including the information contained within the Mitigation Package, the King County Prosecuting Attorney concluded that the death penalty would not be appropriate given the circumstances of this case. *See* CP 156-57.

In reviewing the Mitigation Package, the prosecutors learned that Dr. Chen was suffering from psychosis. *See* CP 157. 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. *See id.* 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. *See* 18-19, 157; 10/28/11 RP 5.<sup>3</sup>

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<sup>2</sup> The information contained within this mitigation package is generally protected from disclosure pursuant to ER 410. *See, e.g., State v. Jollo*, 26 Wn.App. 1010, 685 P.2d 669 (1984).

<sup>3</sup> Transcriptionists have produced verified reports for the proceedings on October 28, 2011, November 17, 2011, December 8, 2011, December 15, 2011, January 26, 2012, March 29, 2012, April 5, 2012, April 20, 2012, and May 16, 2012. These reports are included in two separate packets. The first packet includes the reports from the hearings on December 15, 2011, January 26, 2012, April 5, 2012, April 20, 2012, and May 16,

On October 25, 2011, the State filed a “Motion to Address Defendant’s Competency and to Toll the Time of Trial.” CP 13-16. The parties appeared for hearing on the State’s motion on October 28, 2011. *See* CP 157; 10/28/11 RP 4-10. 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”). *See* CP 8-12, 157; 10/28/11 RP 6.

On November 17, 2011, the parties returned to court and reported that Dr. Chen had yet to be transported to WSH. *See* CP 157-58; 11/17/11 RP 18. The defense then 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. *See* 11/17/11 RP 11-12. 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

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2012; the second packet includes transcripts from October 28, 2011, November 17, 2011, December 8, 2011, and March 29, 2012. To avoid confusion, the report for each proceeding will be referenced by date and associated page number. For example, the hearing held on April 5, 2012 is identified as “4/5/12 RP” followed by the appropriate page number.

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. *See* CP 20; 11/17/11 RP 14-17.

Following that hearing, the State filed a motion seeking an order requiring the defense to provide medical, psychological, and psychiatric records to the evaluators at WSH. *See* CP 30-34.<sup>4</sup> The defense filed a response to the State's request, and objected to any order that would allow WSH to obtain a complete copy of Dr. Chen's medical and mental health records. *See* CP 39-41.<sup>5</sup> The defense also argued that any competency evaluation report must be sealed. *See* CP 44-55. Dr. Chen argued then, and has consistently argued, that these records are privileged and must be protected under the Washington State Constitution, HIPPA (42 U.S.C. § 1320) and Washington's Medical Records Privacy Act (RCW 70.02 *et seq*). *See id.*

The parties returned to court once again on December 15, 2011. *See* 12/15/11 RP 1-16. The defense objected to the competency evaluation and again emphasized that Dr. Chen was being compelled to participate in this process. *See* 12/15/11 RP 4. After considering these matters, the Court granted the State's motion for disclosure of the medical records but

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<sup>4</sup> The State subsequently modified that motion. *See* CP 35.

<sup>5</sup> The State's motion was specifically 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.

also entered a Protective Order regarding the disclosure of the WSH report. *See* CP 90-92, 158-59; 12/11/11 RP 5-7 .

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, the doctors also obtained a copy of Dr. Chen's private medical records from the King County Jail.<sup>6</sup> 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. *See* CP 159.

After reviewing the WSH competency evaluation report, defense counsel renewed the motion to seal. *See* CP 98-106, 159-60. Defense counsel also argued, in the alternative, that the Court should redact certain sections of the report before it was distributed pursuant to RCW 10.77.065.<sup>7</sup> The defense provided the trial court a redacted and unredacted copy of the report for *in camera* review. *See* CP 159-60.

On January 26, 2012, the court confirmed that Dr. Chen was competent to proceed to trial. *See* CP 107-08; 1/26/12 RP 17-30. The

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<sup>6</sup> Dr. Chen never authorized release of those records.

<sup>7</sup> Consistent with the superior court's Protective Order, the defense also provided the State with a redacted version of the WSH report. Dr. Chen's counsel has also delivered an unredacted copy of the report to the State's appellate counsel, but this document has not been provided to the trial prosecutors. *See* CP 208-10.

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court put over the issue regarding sealing and/or redaction to a hearing on March 29, 2012. *See* 1/26/12 RP 30.

The parties returned to court on March 29, 2012. *See* 3/29/12 RP 37-42. At the commencement of that hearing, the trial court notified the parties that it had signed an Order denying the motion to seal. *See* 3/29/12 RP 40. The court also advised the parties that it had agreed to some, but not all, of the redactions proposed by the defense. *See* 1/26/12 RP 39.

Meanwhile, on March 30, 2012, a Seattle television station, Q13Fox, sent the King County Prosecuting Attorney a public disclosure request seeking “access to the physiological evaluation for Louis Chen.” CP 160, 179 Although this request was somewhat confused – as there is no indication that the prosecutors possess any “physiological evaluation” – the parties presumed that Q13Fox was actually seeking disclosure of the prosecution’s copy of the WSH evaluation report.

The parties next appeared before the superior court on April 5, 2012. *See* 4/5/12 RP 32-91. The defense 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 prosecutors agreed that a stay was appropriate in light of these circumstances. *See* 4/5/12 RP 33-34. The

parties also notified the court that this issue was likely to be further complicated by the Public Records Act (“PRA”) request from Q13Fox. *See* 4/5/12 RP 36-39. The court stayed disclosure of that WSH report pending a hearing on the PRA request. *See* CP 128-29; 4/5/12 RP 41.

The defense then formally moved to enjoin the prosecution from disclosing this evaluation to Q13Fox or any other person. *See* CP 137-64, 185-211. The parties appeared for a hearing on April 20, 2012. After hearing argument, the superior 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* 4/20/RP 65-67. 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. *See* 4/20/12 RP 66.

On May 16, 2012, the superior court certified this issue for appellate review. *See* 5/16/12 RP 87-88. In so ruling, the court concluded 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.

*See* 5/16/12 RP 66.

**B. Procedural History**

On May 4, 2012, Dr. Chen filed a Notice of Discretionary Review of the trial court's order denying the motion to seal the WSH competency evaluation report. Thereafter, on or about May 18, 2012, Dr. Chen filed his Motion for Discretionary Review and Statement of Grounds for Direct Review.

These motions were subsequently considered by a commissioner of this Court. On June 25, 2012, the commissioner entered a Ruling Granting Direct Discretionary Review. As the commissioner explained:

Under the circumstances I agree with the superior court that discretionary review is warranted under RAP 2.3(b)(4). Trial judges are making inconsistent rulings on motions to seal and thus need guidance on how RCW 10.77.210, GR 15, and the *Ishikawa* factors work together in deciding such motions. Our rules may disfavor interlocutory review, but RAP 2.3(b)(4) presents a useful exception to that general rule. The issue is most likely to arise in the context of pretrial rulings, thus making it capable of evading review on appeal.

Commissioner's Ruling at 4 (footnote omitted).

## IV. ARGUMENT

### A. Legal Background

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. *See, e.g., Drope v. Mississippi*, 420 U.S. 162, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *State v. Heddrick*, 166 Wn.2d 898, 903-05, 215 P.3d 201 (2009). When there is reason to doubt a defendant’s competency the court must order an examination and report. *See* RCW 10.77.060(1)(a). The governing statute strictly limits access to the information in such a report:

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.

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.

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. Prior to sealing a document or closing a court room, in order to satisfy constitutional requirements, the trial court must harmonize GR 15 with the standards established in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). See, e.g., *State v. Waldon*, 148 Wn.App. 952, 957-958, 202 P.3d 325 (2009)

Apparently, there is only one reported decision regarding these matters: *State v. DeLauro*, 163 Wn.App 290, 258 P.3d 696 (2011). There, a panel of Division One concluded that a written competency report must ordinarily be filed within the court's file and may be subject to public review. The Court did not reach the ultimate question regarding disclosure and sealing. On the contrary, the *DeLauro* Court explained:

Our decision does not necessarily mean the report will be open to public review. We are not deciding that the defendant's privacy concerns are insubstantial. DeLauro may still move under GR 15 to seal or redact the document if he can satisfy the five factor balancing test set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

*Id.* at 700.

The *DeLauro* Court failed to address how the legislature's intent of protecting individuals' privacy by limiting report dissemination can possibly be consistently enforced. On remand, the superior court properly concluded that Mr. DeLauro's report must be sealed. *See* 5/20/12 RP 85, 87. *See also* Motion for Discretionary Review App. F (Order of Hon. Brian Gain). In so ruling, the trial court emphasized that RCW 10.77.210 provides a statutory basis limiting disclosure. *See id.* (Conclusion 2). Moreover, unlike the trial court in this case, the *DeLauro* court also found that redaction would not be feasible or effective. *See id.* (Conclusion 4).

**B. The Legislature Has Concluded That Competency Evaluation Reports Should Not Be Available For Public Review.**

The Washington legislature has concluded that disclosure of competency evaluation reports must be strictly limited. *See* RCW 10.77.210. In enacting this statute, the legislature, taking into account the obvious privacy concerns, 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.

This conclusion is sensible for several reasons. First, in light of due process requirements, criminal defendants are often compelled to participate in such an evaluation process. Second, the information contained within the evaluation report is health care information that must be jealously protected. *See generally* RCW 70.02. *et seq.*

The superior 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* 4/20/12 RP 68-69. It is noteworthy that the court barred disclosure of the report despite its earlier ruling on defendant's motion to seal. As the superior court explained: "I think that the language of 10.77 is rather specific. It limits disclosure. It's meaningless to disclose it a little bit and then disclose it -- or to disclose all of it in one context and not another." 4/20/12 RP 69.<sup>8</sup>

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. As conceded by the trial court, its denial of the defendant's motion to seal rendered the limitations of RCW 10.77.210 meaningless.

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<sup>8</sup> Just before announcing this ruling, the court candidly explained: "there's some inconsistency that's about to happen here." 4/20/12 RP 69.

This Court reviews questions of statutory interpretation *de novo*. *See, e.g., State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303, 1308 (1996). Where on its face, the Court must give effect to that meaning as expressing the legislature's intent. *See Jacobs*, 154 Wn.2d at 600. The court determines the plain meaning of a statutory provision from the ordinary meaning of its language; as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *See Jacobs*, 154 Wn.2d at 600. Whenever possible, the Court must give effect to all language in the statute and to render no portion meaningless or superfluous. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). It is important to avoid a reading that produces absurd or illogical results. *See J.P.*, 149 Wn.2d at 450.

The State has argued that dissemination is restricted only until the report is provided to the superior court, then it becomes a presumptively open document. *See* CP 112-14, 135. Had the legislature intended to limit restrictions on competency evaluation reports disclosure only until the reports are provided to the court, it surely would have stated so in the statutory language. Rather, the plain language of RCW 10.77.210 puts no such prohibition on the limited dissemination of the reports. The State's interpretation of RCW 10.77.210 would render the statute meaningless

because all competency reports are provided to the courts, and would therefore be public documents contrary to the clear statutory language. Open public filings would obviously frustrate the legislative goal of protecting sensitive, private and privileged information contained in these reports from open dissemination.

C. **This Court Should Establish A Bright Line Rule That In Most Cases A Competency Evaluation Report Should Not Be Subject To Public Review And, Thus, Should Be Sealed**

Article I, section 10 of the Washington Constitution provides “Justice in all cases shall be administered openly, and without unnecessary delay.” As a general matter, Article I, section 10 ensures public access to court records as well as court proceedings. *See Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). The public's right of access is not absolute. It may be limited “to protect other significant and fundamental rights.” *Id.* At 909. But “any limitation must be carefully considered and specifically justified.” *Id.* at 904.

In *Federated Publ'ns Inc. v. Kurtz*, 94 Wn.2d 51, 62-63, 615 P.2d 440 (1980), this Court announced guidelines for trial courts to follow in balancing competing constitutional interests in suppression hearing closure questions. Two years later, in *Ishikawa*, the Court expanded *Kurtz* by setting forth five factors that a trial court must consider in deciding

whether a motion to restrict access to court proceedings or records meets constitutional requirements.

1. “The proponent of closure and/or sealing must make some showing of the need therefore. In demonstrating that need, the movant should state the interest or rights which give rise to that need as specifically as possible without endangering those interests ... if closure and/or sealing is sought to further any right or interest besides the defendant’s right to a fair trial, a serious and imminent threat to some other important interest must be shown.”...
2. “Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction].” ...
3. “The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened.”
4. “The court must weigh the competing interests of the defendant and the public,” and consider the alternative methods suggested.
5. “The order must be no broader in its application or duration than necessary to serve its purpose...”

*Ishikawa*, 97 Wn.2d at 37-39.

In denying Dr. Chen’s motion to seal, the superior court attempted to apply the *Ishikawa* standards to weigh the competing interests of the defendant and the public. *See* CP 131-36. Ultimately, the court concluded that sealing the entire report was not necessary to protect the defendant’s

interests, and instead redacted certain sections of the report. *See* CP 135. In discussing RCW 10.77.210, the court acknowledged that the statute does not state that the report may be made available to the victim or the public. *See* CP 135. Yet, without explanation, the court refused to apply the statute and instead concluded that Dr. Chen's motion to seal the report in its entirety should be denied.

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.

When evaluating these issues, the superior court very properly noted:

- 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).
  - (2) It is the public policy of this state that a patient's interest in the proper use and disclosure of 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.

CP 132-33.

The superior court rejected the State's argument that RCW 10.77.210 merely limits to whom Western State can distribute the report. As the court explained, the State's claim that this statute "does not limit the prosecutor, defense lawyer and court in their distribution of the report would make the statute meaningless." CP 135. Nevertheless, notwithstanding these findings, the court concluded "the defendant's motion to seal the report in its entirety is denied." *Id.*

The court did redact a few portions of the report, but it did not do so based upon Dr. Chen's constitutional rights or privacy interests. Rather, the court only redacted the parts which were, in its view, not relevant to the court's determination of the competency issue. *See* CP 135.

Yet the superior court was less than certain that this analysis was the correct one. When certifying the issue, the court candidly explained:

But I don't need to read Judge Gaines' opinion [in the *DeLauro* case] because, because I know what other judges do. Some judges seal an entire Western State Hospital report as a matter of course. Some judges deny any redaction or sealing. And these are King County judges. These are facts I know about. And I take a middle ground closer to the unsealing side, since I redact very little, but I do do some redactions.

There isn't any other way that this could be resolved by an appellate decision short of an appeals court on direct appeal deciding they want to resolve it under the, uh, except for the mootness doctrine, which could be done but it's not too often invoked. Of course, neither is discretionary review.

I'm going to interpret the words "may materially advance the ultimate termination of the litigation" to apply, to apply in this case to the issue and not to the case as a whole. And I suppose one of my motivations for certifying this is, I'd like somebody to tell me what to do. And what I always get is the prosecutor says "We object to any sealing and redacting," and I have the defense saying "You should seal the whole thing." And I get very little guidance. So I think it's better off that we know. So, recognizing it doesn't bind the Supreme Court to anything I'm going to certify this as an issue that needs to be resolved.

4/5/11 RP 87-88.

The trial court's ruling in this case helps to demonstrate that application of the case-by-case *Ishikawa* "standards," as they relate to the public filing of competency reports, are unworkable. Application of those "standards" results in wildly inconsistent superior court rulings, provides scant practical guidance for judges, and undermines the clear legislative and public policy dictates of RCW 10.77.210 limiting disclosure of such reports. In this case, the trial court's decision on the motion to seal is not supported by his own findings and conclusions. Moreover, the trial court's decision cannot be squared with his conclusion that, in light of RCW 10.77.210, this same evaluation report must not be released in response to a public disclosure request.

Trial judges confronting this issue are left in a lurch, with no real guidance as to how to handle the sensitive mental health information contained in these court-ordered reports. The lack of clear and understandable guidelines results in confusion both for judges having to determine the issue, criminal defendants having to undergo competency evaluations, and attorneys advising these defendants. The handling of competency examination reports is an issue of vital importance to defendants and those within the criminal justice system.

Superior court judges are called upon to review thousands of competency evaluation reports every year. See <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/6492-S%20SBR%20HA2%2012.pdf> (discussing SSB 6492 and noting that Western State Hospital and Eastern State Hospital received 3,305 court referrals for initial competency evaluations for adult defendants in 2011).<sup>9</sup> The requirements for a detailed case-by-case consideration of the *Ishikawa* factors in each instance makes little sense. Here, because of the uncertainties created by an *ad hoc* application of these *Ishikawa* factors, the trial court was called

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<sup>9</sup> See also <http://www.komonews.com/news/local/126043458.html> (KOMO News reported that justice is being delayed in hundreds of cases due to staffing shortages at WSH).

upon to review hundreds of pages of briefing and to preside over at least seven hearings that addressed the sealing issue.

Washington's legislature has already balanced these competing interests in enacting RCW 10.77.210 and concluding that these reports should generally not be subject to public review. In light of these factors, this Court should adopt a bright line rule or a presumption that competency evaluation reports should be sealed and not subject to review by the public. In most instances as in this case, there is no need for case-by-case analysis of each competency evaluation report to decide the sealing question.<sup>10</sup> Nor is there a need for a line-by-line (or word-by-word) analysis of each competency evaluation report. Here, as in most cases, Dr. Chen's competency evaluation report should have been sealed in its entirety.

## V. CONCLUSION

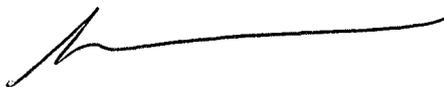
For all of these reasons, and in the interests of justice, this Court should reverse the Superior Court's ruling.

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<sup>10</sup> Appellant acknowledges that the trial courts may face somewhat different concerns where the case involves contested proceedings regarding the defendant's competency. Here, however, all parties and evaluators agreed that Dr. Chen was competent and there was no need for a contested hearing on this matter. Thus, Dr. Chen's privacy rights far outweighed the public's right for access to the personal information contained within the competency evaluation report.

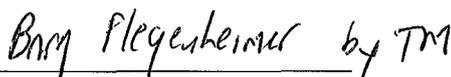
DATED this 15<sup>h</sup> day of November, 2012.

Respectfully submitted,



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**PROOF OF SERVICE**

Todd Maybrowm swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 15<sup>th</sup> day of November, 2012, I deposited for mailing, postage prepaid, first class, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Ann Summers  
King County Prosecutor's Office  
Appellate Division  
516 Third Ave., W554  
Seattle, WA 98104

And to Appellant:

Dr. Louis Chen  
King County Jail  
500 Fifth Avenue  
Seattle, WA 98104

DATED at Seattle, Washington this 15<sup>th</sup> day of November, 2012.



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