

No. 87350-0

WASHINGTON SUPREME COURT

LOUIS CHAO CHEN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

PETITIONER'S REPLY TO STATE'S ANSWER TO
MOTION FOR DISCRETIONARY AND DIRECT REVIEW

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TABLE OF CONTENTS

1. IN ARGUING THAT DIRECT REVIEW IS NOT WARRANTED THE STATE IGNORES THE FACT THAT APPLICATION OF THE *ISHAKAWA* STANDARDS TO THE PUBLIC FILING OF COMPETENCY REPORTS PROVIDES JUDGES WITH LITTLE PRACTICAL GUIDANCE, UNDERMINES THE CLEAR LEGISLATIVE DICTATES AND RESULTS IN ENTIRELY INCONSISTENT TRIAL COURT RULINGS.....1

2. IN ARGUING AGAINST THE GRANTING OF INTERLOCUTORY DISCRETIONARY REVIEW THE STATE FAILS TO ADDRESS THE FACT THAT THE FILING OF COMPETENCY REPORTS INVOLVES A CONTROLLING QUESTION OF LAW WHERE THERE EXISTS AN OVERWHELMING GROUND FOR DIFFERENCE OF OPINION.....3

3. INTERLOCUTORY DISCRETIONARY REVIEW IS NECESSARY. THE SUPERIOR COURT CLEARLY ERRED IN REFUSING TO SEAL THE COMPETENCY REPORT BECAUSE ITS RULING CONFLICTS WITH THE PLAIN LANGUAGE OF RCW 10.77.210.5

4. CONCLUSION8

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TABLE OF AUTHORITIES

State Cases

Seattle Times v. Ishikawa, 97 Wn.2d 30,
640 P.2d 716 (1982) 1, 2, 4

State v. Delauro, 163 Wn.App 290, 258 P.3d 696 (2011) 7

State Statutes

RCW 10.77.210 *passim*

1. IN ARGUING THAT DIRECT REVIEW IS NOT WARRANTED THE STATE IGNORES THE FACT THAT APPLICATION OF THE *ISHAKAWA* STANDARDS TO THE PUBLIC FILING OF COMPETENCY REPORTS PROVIDES JUDGES WITH LITTLE PRACTICAL GUIDANCE, UNDERMINES THE CLEAR LEGISLATIVE DICTATES AND RESULTS IN ENTIRELY INCONSISTENT TRIAL COURT RULINGS.

The State is wrong when it states that direct review should not be granted because the standards for sealing competency reports, as applied in this case, do not present an issue of sufficient public import to warrant review. The State ignores the unmistakable reality that application of the case-by-case *Ishikawa* “standards,” as they relate to the public filing of competency reports, are unworkable because 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.

Contrary to the State’s position, the public filing of competency reports presents an issue of great public importance. The issue of competency to stand trial and what should happen with the reports is often

recurring.¹ Judges confronting the issue are left in a lurch, with no real guidance as to how to handle the sensitive mental health information contained in these 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 them. The handling of competency reports is an issue of vital importance to defendants and those within the criminal justice system charged with fairly trying to determine how the plain language of RCW 10.77.210, which limits disclosure, can be reconciled with the standards set forth in *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Attesting to the current state of confusion, appellant presented declarations of experienced public defenders. *See, Appellant's Motion for Discretionary Review, Appendices E and F.* These lawyers state that: 1) until recently, the 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

¹ The Defender Association Felony Unit Supervisor Daron Morris states that "WSH reports that they conducted a total of over 1500 competency evaluations of criminal defendants in 2011 (for all counties that WSH serves)." App. E. And, Associated Counsel for the Accused Felony Unit Supervisor Louis Frantz estimates that 5% to 10% of their felony clients require competency evaluations. App. F.

problems and confusion for defendants and the attorneys advising them regarding whether there is any confidentiality to the competency evaluation process. The current state of affairs is untenable, as it undermines due process by compromising the validity and accuracy of competency determinations.

In clear recognition of the current state of confusion of the law on this issue and the need for appellate guidance, Superior Court Judge Kessler certified the issue for interlocutory appeal. *See, Appellant's Motion for Discretionary Review, App. G.* Judge Kessler certified the issue despite having denied appellant's motion to seal the competency report in its entirety. Judge Kessler recognized both the import of the issue and need for appellate clarification. Under these circumstances there is a compelling basis for direct review.

2. IN ARGUING AGAINST THE GRANTING OF INTERLOCUTORY DISCRETIONARY REVIEW THE STATE FAILS TO ADDRESS THE FACT THAT THE FILING OF COMPETENCY REPORTS INVOLVES A CONTROLLING QUESTION OF LAW WHERE THERE EXISTS AN OVERWHELMING GROUND FOR DIFFERENCE OF OPINION.

In its answer the State ignores the undisputed fact that there exists a state of confusion in the trial courts as to how to handle competency reports. Given the inconsistent and conflicting trial court rulings over the public filing of competency reports, the issue clearly presents a controlling

question of law as to which there is a substantial ground for difference of opinion that compels immediate review. In certifying the issue, Judge Kessler specifically found:

THIS COURT HEREBY CERTIFIES that the Court's Order on Motion to Seal Forensic Psychological Evaluation involves a controlling question of law as to which there is substantial ground for a difference of opinion ...

Without in any way analyzing the undisputed difficulties facing courts that have to apply the *Ishikawa* factors in light of the conflicting RCW 10.77.210 statute and host of other privacy concerns, the State simply tells this Court to ignore Judge Kessler's RAP 2.3(b)(4) certification as it "is not binding on the appellate courts." *State's Answer*, at 14. Rather than acknowledging and attempting to address the existing confusion and the vastly varying rulings issued by the Superior Courts that try to apply the *Ishikawa* factors, the State chooses to disagree with Judge Kessler's certification without analysis. Instead, relying on the uncontested principle that court records are presumptively open, the State just glosses over the very real problem facing trial judges that have to reconcile application of the *Ishikawa* factors in light of RCW 10.77.210, and ignores the compelling reasons underlying Judge Kessler's certification order.

Inherent in Judge Kessler's certification is the recognition that competency evaluations arise pre-trial and present the type of procedural issue that is too seldom reviewed by appellate courts. How competency reports should be handled is precisely the type of issue most fitting for interlocutory review. The State's suggestion that appellant may in the future raise a mental defense, *State's Answer* at 7-8, is entirely irrelevant to the questions before this court of whether review should be granted and whether it should be direct review before this Court.

3. INTERLOCUTORY DISCRETIONARY REVIEW IS NECESSARY. THE SUPERIOR COURT CLEARLY ERRED IN REFUSING TO SEAL THE COMPETENCY REPORT BECAUSE ITS RULING CONFLICTS WITH THE PLAIN LANGUAGE OF RCW 10.77.210.

The State asserts that the superior court did not err because RCW 10.77.210, a statute that specifically limits distribution of competency reports, limits distribution only until the reports are considered by the court, then the reports become presumptively open. *State's Answer*, at 14. The State is wrong.

RCW 10.77.210 strictly limits access to the information in competency reports:

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). In enacting RCW 10.77.210, the legislature, taking into account the apparent 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.

In its interpretation, the State rewrites this statute. The State would have this Court, in effect, add language to the legislation that says that dissemination is restricted only until the report is provided to the superior court, then it becomes a presumptively open document. Had the legislature intended to limit restrictions on competency 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.

In support of its position the State relies on *State v. Delauro*, 163 Wn.App 290, 258 P.3d 696 (2011). To be sure, the court in *Delauro* stated:

The evaluating facility may make available any report made pursuant to chapter 10.77 RCW only to specific persons identified in RCW 10.77.210. A report considered by the court in determining competency will therefore be available for public review only if the court maintains it in the court file.

However, the *Delauro* court failed to analyze how RCW 10.77.210 would continue to have any practical effect since all competency reports are necessarily appropriately maintained in court files. The *Delauro* court also entirely failed to address how the legislature's intent of protecting individuals' privacy by limiting report dissemination can possibly be consistently enforced. In fact, on remand, the superior court properly concluded that Mr. Delauro's report must be sealed. *See* App. F (Franz Dec. App A.) In so ruling, the court emphasized that RCW 10.77.210 provides a statutory basis limiting disclosure. *See id.* (Conclusion 2). Unlike the court here, the superior court also found that redaction would not be feasible or effective. *See id.* (Conclusion 4).

There is no notable factual distinction between Mr. Delauro and Dr. Chen's cases that would justify the superior court's conflicting handling of the issue. Rather, the differing results are reflections of the differing legal interpretations courts arrive at when they address the same issue.

The superior court erred by ignoring the plain language of RCW 10.77.210. Pursuant to RAP 2.3(b)(1) and (2) interlocutory discretionary review is necessary.

4. CONCLUSION

For the foregoing reasons, and the interests of justice, discretionary review should be granted and the issue should be heard directly before this Court.

DATED this 19th day of June, 2012.

Respectfully submitted,


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PROOF OF SERVICE

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

On the 19th day of June, 2012, I sent by U.S. Mail, postage prepaid, one true copy of Petitioner's Reply to State's Answer to Motion for Discretionary and Direct Review to attorney for Respondent:

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And mailed to Appellant Louis Chen.

DATED at Seattle, Washington this 19th day of June, 2012.



Paula Smeltzer,
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