

No. 87350-0

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WASHINGTON SUPREME COURT

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STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHAO CHEN,

Petitioner.

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PETITIONER'S REPLY BRIEF

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**ORIGINAL**

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1. IN ARGUING FOR THE APPLICATION OF THE *ISHAKAWA* STANDARDS ON A CASE-BY-CASE BASIS AS THEY RELATE TO THE PUBLIC FILING OF COMPETENCY REPORTS, THE STATE IGNORES THE FACT THAT IN THIS CONTEXT THE *ISHAKAWA* STANDARDS PROVIDE JUDGES WITH LITTLE PRACTICAL GUIDANCE, UNDERMINE CLEAR LEGISLATIVE DICTATES AND RESULT IN ENTIRELY INCONSISTENT TRIAL COURT RULINGS.

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, is unworkable because application of those standards results in ad hoc and wildly inconsistent trial court rulings, provides scant practical guidance for judges; and undermines the clear and sound legislative and public policy dictates of RCW 10.77.210, which limits disclosure of such reports.

The issue of competency to stand trial and what should happen with competency reports is oft recurring. 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 for judges having to determine the issue, criminal defendants having to undergo competency evaluations, and attorneys advising defendants. The standards for disclosure 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). The current state of affairs is untenable, as it undermines due process by compromising the validity and accuracy of competency determinations.

The State ignores the undisputed fact, as clearly recognized by the trial court, that there exists a state of confusion in the trial courts as to the standards to apply in determining under what circumstances and to what extent competency reports should be disclosed or sealed. 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 asks this Court to blindly ignore the practical problem. Instead, the State focuses its entire argument on the uncontested principle that courts are presumptively open. In so doing, the State 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.

2. THE STATE'S ATTEMPT TO RECONCILE RCW 10.77.210 RENDERS THE STATUTE MEANINGLESS AND IS UNNECESSARY FOR THE STATUTE'S LIMITATION ON DISSEMINATION TO BE CONSIDERED CONSTITUTIONAL.

The State asserts that the superior court did not err in denying petitioner's motion to seal because RCW 10.77.210, a statute that specifically limits distribution of competency reports, should be read to only limit distribution and open access until the reports are provided to the court, at which time the reports become presumptively open. *Brief of Respondent*, at 13. The State's analysis is misguided.

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 required 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, and then it becomes a presumptively open document. *Id.* Had the legislature intended to limit restrictions on disclosure only until the competency 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 places 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 therefore would be public documents contrary to the clear statutory language. Open public filings, as advocated by the State, would obviously frustrate the legislative goal of protecting sensitive, private and privileged information contained in these reports from open dissemination.

The State's legislative interpretation is unnecessary for RCW 10.77.210 to pass constitutional muster. Rather, interpreting the statute as establishing a rule that presumptively seals competency reports recognizes that in enacting RCW 10.77.210, the legislature has balanced the competing interests required by the Constitution.

The State's argument that limits on the dissemination of competency reports is akin to closing the courtroom and is therefore

unconstitutional is flawed, *Brief of Respondent*, at 11-12, because the competency hearing itself is open and courts openly make findings and conclusions supporting their decisions. In advancing the argument that presumptively sealing competency reports pursuant to the statute is tantamount to closing the courtroom the State cites this Court's decision in *In re Detention of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011). In *In re Detention of D.F.F.*, this Court, citing *Ishikawa*, held that the superior court rule providing that involuntary commitment proceedings "shall not be open to the public" violated article I, section 10. *Id.*, at 41.

However, presumptively limiting competency report dissemination by sealing in accordance with RCW 10.77.210 does not create the constitutional issue identified by the Court in *In re Detention of D.F.F.* because the competency hearing itself remains open to public. At competency hearings, the trial court openly makes competency determinations and makes findings for the basis for its determinations. Having the trial court articulate its reasons for its competency determination in open court satisfies the public's right to know without the need for the public filing of the reports and in no way equates to automatically closing the courtroom, a procedure constitutionally disapproved in *In re Detention of D.F.F.*

This Court most recently rejected a similar argument as advanced here by the State of equating sealing a document with court closure. In *State v. Beskurt*, No. 85737-7 (January 31, 2013), the issue presented was whether the sealing of juror questionnaires amounts to a trial closure, implicating the public's right under article I, section 10. In rejecting the argument that sealing of such questionnaires amounts to an unconstitutional trial closure this Court stated:

Public access to court records is governed by General Rule (GR) 31. The rule seeks to balance our state's constitutional rights to judicial openness under article I, section 10 with individual privacy under article I, section 7. GR 31(a). To the extent juror questionnaires are within scope of the rule, "[i]ndividual juror information, other than name, is presumed to be private." GR 31(j). Anyone seeking to access this information petitions the trial court for access and must make a show of good cause. GR 31(j). The privacy presumption of individual juror information exists until GR 31(j) procedures are triggered and requirements are met, none of which occurred here. Because we find no article I, section 10 issue to review, remand is unnecessary.

*Id.*, at \_\_\_.

In *Beskurt*, this Court clearly rejected the argument that sealing juror questionnaires amounts to closing a court in violation of article I section 10. The State's argument here regarding competency reports is similarly unpersuasive. Moreover, in *Beskurt* this Court found no constitutional problem with GR 31(j) which presumptively seals juror questionnaires and requires an interested person from the public to show

good cause for access. Consistent with the dictates of RCW 10.77.210, Petitioner is requesting that this Court adopt a similar remedy that has competency reports be presumptively sealed unless someone seeking access makes a showing of good cause.

The practice of presumptively sealing privileged and sensitive information is similarly routinely employed in domestic relations and guardianship proceedings. Pursuant to GR 22, health care records and a broad array of confidential reports relied upon in family law and guardianship determinations are routinely sealed. Such confidential reports include parenting evaluations, domestic violence assessment reports, risk assessment reports, CPS reports, sexual abuse evaluations and guardian ad litem reports. GR 22(e)(1). In addition to health care and financial documents, the content of these confidential reports that are sealed includes:

- (i) Detail descriptions of material or information gathered or reviewed;
- (ii) Detailed descriptions of all statements reviewed or taken;
- (iii) Detailed descriptions of tests conducted or reviewed; and
- (iv) Any analysis to support the conclusions and recommendations.

GR 22 (e)(2)(B). These reports and records, critical to family court determinations made daily across the state in domestic relation cases, are unquestionably presumed sealed. Individualized determinations regarding the sealing of these reports are not made unless, pursuant to GR 22(i)(2), a

person files a motion upon the showing of good cause. Then, and only then, does a case-by-case determination take place. GR 22 (i)(A) and (C).

Here, giving meaning to the legislative dictates of RCW 10.77.210, that specifically limits competency reports' dissemination, by creating a presumption that such reports be sealed is no different than the established and accepted procedures routinely employed in family law cases. In contrast, adopting the State's argument requiring case-by-case *Ishikawa* determinations prior to the sealing of all court filed documents, would logically undermine the basis for protecting the very real privacy interests of individuals in family court proceedings.

4. CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Opening Brief, the Court should reverse the Superior Court's ruling.

DATED this 19<sup>th</sup> day of February, 2013.

Respectfully submitted,



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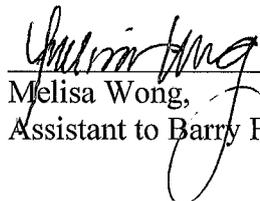
Melisa Wong swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 19<sup>th</sup> day of February, 2013, 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:

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

And mailed to Appellant Louis Chen.

DATED at Seattle, Washington this 19<sup>th</sup> day of February, 2013.

  
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Melisa Wong,  
Assistant to Barry Flegenheimer