

No. 84691-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE HONORABLE SUSAN K. SERKO
THE HONORABLE BRYAN E. CHUSCHOFF

Respondents

v.

MICHAEL HANBEY
SEATTLE TIMES CORPORATION

Appellants

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY

PETITIONER
BRIEF OF APPELLANT

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I.

ASSIGNMENT OF ERROR

A. Assignments of Error

1. The Trial Court(s) erred when they entered an Order Restraining the disclosure of the investigative reports authored by employees of the Pierce County Sheriff because “pre-trial” publicity could impair the defendants right to a fair trial under the Sixth Amendment.
2. The Trial Court(s) erred when they entered an Order Restraining the disclosure of investigative records authored by employees of the Pierce County Sheriff entered as Exhibits at the public trial of Latanya Clemmons because disclosure could impair the defendants right to a fair trial under the Sixth Amendment.

B. Issue Pertaining to Assignments of Error

1. Whether the Trial Court(s) properly determined that the disclosure of public records would impair the “pre-trial” rights of a criminal defendant when no findings were entered addressing the analysis in Cowles Publishing Company v. Spokane Police Department.
2. Whether the Trial Court(s) properly determined that the rule in Gannett Co. Inc. v. DePasquale precluded disclosure of public records to preserve the “pre-trial” rights of a criminal defendant to a fair trial.
3. Whether the determination made by the Court to seal Exhibits admitted in open court without conducting the analysis in Cowles Publishing Company v. Spokane Police Department properly barred disclosure.
4. Whether a Writ of Mandamus action is the proper form of action to challenge closure orders in a criminal proceeding.

II.

STATEMENT OF THE CASE

A. Procedural Steps:

The Petitioner in this cause sought public records related to the killing of four Lakewood Police Officers in Pierce County in November 2009 by Maurice Clemmons, a convicted felon. Requests under the Public Records Act, Chapter 42.56 RCW, were made to the Prosecutor, the Sheriff and the Law Enforcement Support Agency for Pierce County by the Petitioner. Certain documents were provided after a review of documents was conducted by the Public Records Officer for each agency. The balance of documents requested were either exempt due to work product exceptions or because they were incomplete.

Several persons were charged with Rendering Criminal Assistance to Mr. Maurice Clemmons before and after the deaths he caused. Those persons were charged in Pierce County Superior Court by the end of February 2010. Each defendant was assigned legal counsel due to their indigency. When the defendants' attorneys learned that there were public records requests addressed to the investigative reports compiled by the Office of the Sheriff and within the Law Enforcement Support Agency and the Prosecutor's Office, the defendants' attorneys sought an Order of

Restraint barring disclosure of those same reports and related material from public disclosure. [CP 9-10] That Motion for Order Restraining the Pierce County Sheriff from Releasing Materials was filed on 11 March 2010. It was supported by a Memorandum [CP 1-6] and a Declaration of Counsel in Support. [CP 7-8]

This cause of action arose when a Motion to Intervene on Motion to Restraint was filed in the Pierce County Superior Court by the Petitioner, Wm. Michael Hanbey, on 23 March 2010. [CP 13-15] The Petitioner's Motion was supported by a Memorandum [CP 16-29] and a Declaration of Michael Hanbey. [CP 30-31] The Declaration included a copy of the Request for Public Records related to investigative reports compiled by the Office of the Sheriff for Pierce County, dated 22 December 2009 [CP 36-37] and to the Law Enforcement Support Agency for Pierce County. [CP 39-40]

At the time of the request for Public Records, the investigations conducted by the Sheriff for Pierce County were not complete. The Public Records Officer for the Pierce County Sheriff advised that the investigations were complete in late February 2010.

The Petitioner anticipated release of the records but the Honorable Stephanie Arend scheduled a Hearing on the Motions for the 29th of March 2010. On that day, the Court, by Judge Arend, entered a Order of

Restraint of Public Records Requests for one week.¹ [CP 59-60] The Order was to remain in effect for one week until the 7th of April 2010. [CP 60]

A Motion Declaration and Memorandum to Reconsider Its Ruling related to Judge Arend's Order of Restraint² (for one week) was filed by Defendant Douglas Davis through his legal counsel, Kent Underwood on 7 April 2010. [CP 375-460] The Order by Judge Arend had permitted one week for legal counsel for Defendants to bring an "action for declaratory judgment or any other action in accord with RCW 42.56.540".³

On 7 April 2010, Judge Bryan Chushcoff conducted a hearing on a Motion to Intervene for Limited Purpose of Joining in Motion for Reconsideration and to Stay by legal counsel for Darcus Allen. [CP 83-84] That motion was supported by a Declaration of Mary Kay High in Support filed on the same day. [CP 71-82] At the conclusion of the hearing, Judge Chushcoff entered an Order Staying Judge Arend's Order on Restraint of Public Records Requests until 21 April 2010. CP 69-70.

An Order to Intervene for Limited Purpose of Joining in Motion to Reconsider was entered on 20 April 2010 enabling Defendant Darcus

¹ The Seattle Times Company filed Opposition to Defendant's Motion to Enjoin Release of Public Records on 29 March 2010. CP 41-54.

² Entered 31 March 2010, CP 59-62.

³ Line 3-5, CP 60.

Allen to be a party to the Public Records Issue. [CP 89-90] The Petitioner filed a memorandum of Points and Authorities, RE: Public Disclosure Act on 20 April 2010. [CP 91-94] A Summary of Documents held by the Pierce County Sheriff's Department Subject to Potential Disclosure was filed on 23 April 2010. [CP 95-99] On 23 April 2010, an Order Staying RE: In Camera Review for Documents Under Public Records Act, was entered by Judge Arend. [CP 100-101] A hearing was set for argument on 29 April 2010.

On 29 April 2010, after argument, Judge Arend entered a further Order Continuing Stay RE: In Camera Review for Documents under Public Records Act. [CP 102-103] On 9 May 2010, Judge Arend entered an Order on Motion to Reconsider and for In Camera Review for Documents Under Public Records Act imposing upon the judicial officer the obligation to assess the records under Chapter 42.56 RCW (the Public Records Act), and considering the "Bench-Bar Guidelines" and "Rules of Professional Conduct 3.6 and 3.8."⁴

The In Camera Order authorized Judge Susan Serko to conduct a review of the subject records and determine which records were exempt from disclosure by the 20th of May 2010.⁵ Counsel for Defendants were authorized to review the same subject records and to submit written

⁴ Paragraph 5, CP 110.

⁵ Lines 19-21, CP 102.

objections to the court by close of business, 13 May 2010.⁶ On 14 May 2010, a Memorandum RE: Objection to PCSO Documents Identified for Release was filed on behalf of Darcus Allen by Mary Kay High. [CP 114-154]

On the 18th of May 2010, the Seattle Times Opposition to Memorandum, RE: Objection to PCSO Documents Identified for Release was filed. [CP 155-201]

On the 20th of May 2010, Judge Serko filed her Findings and Order, RE: In Camera Review of PCSO Documents.⁷ [CP 205-226] On 28 May 2010, the Seattle Times Objections to Court's May 20, 2010 Findings and Order RE: In Camera Review of PCSO Documents was filed. [CP 227-239] Judge Serko conducted a hearing on the 4th of June 2010 to consider the objections of the Seattle Times and the undersigned Petitioner, treating those objections as a Motion for Reconsideration.⁸ Legal counsel for Darcus Allen filed a Reply to Request for Reconsideration prior to the hearing on 4 June 2010. [CP 244-252] Judge Serko entered an Order Denying Reconsideration on 4 June 2010. [CP 241]

⁶ Objections to release to be provided for Judge Serko. Lines 18-19, CP 102.

⁷ At the same time Judge Serko entered an Order to Seal, the CD containing documents held by the PCSO to restrict access to the CD. CP 202.

⁸ The Petitioner had provided to Judge Serko an "Objection to Ruling on Disclosure of Public Records in Non-Media Request prior to the hearing on 4 June 2010, but it was not noted as filed with the Clerk of the Court until 7 June 2010. CP 253-258.

In May and June the trial of State v. Latanya Clemmons was held in Cause No. 09-1-05523-0. During that trial, certain records that had been subject to the review by Judge Serko were offered and admitted as Exhibits in the public trial of the defendant.⁹ On 9 June 2010, a Motion to Seal Exhibits Admitted into Evidence in the State v. Latanya Clemmons trial was filed. [CP 259-283] A declaration was filed in support of the Motion, to wit: Declaration of John O'Melveny in Support of Motion to Seal Exhibits Admitted Into Evidence on the same day. [CP 284-285] Without prior notice to counsel, an Ex Parte order, Order RE: Sealing Exhibits in State v. Clemmons, was entered. [CP 286-87]

A second Declaration of John O'Melveny was filed on 25 June 2010. [CP 290-91] On that same day, without notice to legal counsel, a Motion to Shorten Time, RE: Sealing Records, was filed. [CP 288-89] Then without Motion to Extend Sealing of Records, an Order Extending Order Sealing Exhibits was entered by The Honorable Stephanie Arend. [CP 294-96] Her order confirmed the sealing of records ordered by Judge Serko on 20 May 2010 and removed the seal from records admitted as Exhibits (in the Latanya Clemmons Trial), required Exhibits marked but

⁹ Ms. Latanya Clemmons had been one of the defendants who had sought and had been awarded an Order of Restraint by Judge Arend on 31 March 2010. CP 59.

not admitted (in the Latanya Clemmons Trial) to remain sealed, all pending a hearing to be held on 14 July 2010.¹⁰

Judge Arend further Ordered that Mr. John O'Melveny prepare a list of all Exhibits (in the Latanya Clemmons Trial) that are subject to the Order of 25 June 2010 and to circulate the list among all legal counsel to be presented to Judge Chushcoff for signature on 30 June 2010.¹¹

A second motion was filed by Mr. John O'Melveny seeking to Seal Exhibits from Latanya Clemmons trial on 7 July 2010. [CP 309-344] That Motion was preceded by a Motion to Shorten Time, RE: Sealing Records filed by Mr. O'Melveny. [CP 288-289]

On the 2nd of July 2010, an Order, RE: Sealing/Unsealing Exhibits from State v. Clemmons, was entered. [CP 297-308]

The Seattle Times filed Objections to Motion to Seal Exhibits from Latanya Clemmons Trial on 9 July 2010. [CP 345-357] The Petitioner filed Michael Hanbey's Joinder with the Opposition of the Seattle Times to the Motion to Seal Exhibits on 12 July 2010. [CP 358-59]

On the 16 of July 2010, The Honorable Stephanie Arend entered a Preliminary Order Regarding Motion to Seal Trial Exhibits of Latanya Clemmons. [CP 362-64]

B. Facts Relevant to the Appeal:

¹⁰ Lines 20-25, CP 294.

¹¹ Line 24, CP 294 – Line 7, CP 295.

The Petitioner filed a series of requests for public records under the Public Records Act (PRA) in December 2009 seeking records from the Prosecutor, the Sheriff and the Law Enforcement Support Agency for Pierce County related to the actions by county employees and officials who pursued and investigated Maurice Clemmons in the killing of four Lakewood Officers in November 2009.

A series of documents were disclosed by the three agencies. The Office of the Prosecutor asserted that several of records requested were subject to the "work-product" exemption under the PRA. The Office of the Sheriff, through a deputy prosecuting attorney charged with review and disclosure of public records initial provided documents but asserted that investigative records were subject to exemption because they had not been completed and were on-going. However, the Petitioner was informed that by the end of February 2010, it was likely that the investigation would be complete and the internal review for any other exemptions or deletions of exempt material would be completed.

In mid-February 2010, the records officer for the Sheriff for Pierce County advised that the investigative records would be made available at the end of February 2010.

Before the investigative records could be disclosed, legal counsel for the defendants charged with Rendering Criminal Assistance to Mr. Maurice Clemmons began a series of motions requesting restraint from disclosure of the requested investigative records. Initially, The Honorable Stephanie Arend entered a temporary restraint on 31 March 2010 barring release of the subject records. Then, through a series of motions and orders, the subject investigative records were barred from disclosure until The Honorable Susan Serko was tasked to review all of the subject records and discern those which remained exempt from disclosure or otherwise should be barred from disclosure.

On the 20th of May 2010, Judge Serko entered her Findings and Order, RE: In Camera Review of PCSO Documents. In that Order, Judge Serko determined that none of the subject records were “exempt” under the PRA. However, she exercised her jurisdiction to determine that many of the records should not be disclosed because such disclosure would imperil the “right to a fair trial” for the defendants under the 6th Amendment because of what she perceived to be the specter of “pre-trial publicity.” [CP 211]

While Judge Serko was engaged in the review of the subject records and before she issued her ruling, one of the defendants, Latanya Clemmons, appeared for trial on the charges brought against her. In the

course of that trial which continued past the 20th of May 2010, several of the subject investigative records subject to the Petitioner's PRA requests were offered and admitted as evidence in the trial or marked but not admitted as evidence at the trial. The trial was not conducted as a closed hearing.

When Judge Serko entered her ruling, at the conclusion of the Latanya Clemmons trial, a new series of Motions was filed seeking an Order sealing those Exhibits marked at the trial of Latanya Clemmons regardless of whether they were admitted at trial or were not admitted at trial. A series of Orders sealing the Exhibits at the Latanya Clemmons trial were entered and this action was begun in mid-June 2010.

After this Petition was filed on 23 June 2010, additional motions and Orders were filed that ultimately distinguished between those Exhibits which should be disclosed, those which should be subject to redaction and then disclosed, those which should not be disclosed because they are subject to RCW 68.50.105 (the autopsy photographs) and those for which ruling should be reserved.

The Petitioner has no quarrel with the first three categories listed above but does assert that there is basis for the court to reserve any ruling on any of the remaining exhibits from the Latanya Clemmons trial.

No finding was made by any judge reviewing this matter that the Petitioner would engage in pre-trial publicity. No finding was made by any judge reviewing this matter that the Petitioner was affiliated with, worked for or was a media company with a purpose to inform the public.

III.

SUMMARY OF ARGUMENT

- A. Whether the Trial Court(s) properly determined that the disclosure of public records would impair the “pre-trial” rights of a criminal defendant when no findings were entered addressing the analysis in *Cowles Publishing Company v. Spokane Police Department*.

The ruling by The Honorable Susan Serko, in her Findings and Order determined that none of the subject records were exempt under the PRA. However, she concluded that the 6th Amendment right of each defendants to a fair trial required non-disclosure of the subject records pending completion of each of the trials of all of the seven (7) defendants. To reach this conclusion, Judge Serko applied RCW 42.56.540 and took judicial notice of the potential for “pre-trial publicity” including that which had already transpired, and relied upon the ruling in Gannett Publishing Company v. DePasquale, 433 U.S. 368 (1979) as the primary basis for her determination to bar the bulk of the subject records from disclosure.

The holding in Newman v. King County, 133 Wn.3d 565, 947 P.2d 712 (1997) was distinguished from the current case by the Judge. Newman was addressed in the later ruling in Cowles Publishing Company v. Spokane Police Department, 139 Wn2d. 472, 987 P.2d 620 (1999). That ruling held that investigative records are presumptively disclosable when a suspect has been identified and charged, under the PRA. At the time of the decision by Judge Serko, all of the defendants had been charged and one of them was in trial on those charges.

The decision by Judge Serko contradicted the principles set forth in Cowles and should be subjected to a Writ of Mandamus requiring release of all documents.

- B. Whether the Trial Court(s) properly determined that the rule in Gannett Co. Inc. v. DePasquale precluded disclosure of public records to preserve the “pre-trial” rights of a criminal defendant to a fair trial.

The United States Supreme Court Ruling in Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2989, 61 L.Ed.2d 608 (1979) has been determined to be “..[un]clear on the source of the asserted public interest in free and open access to judicial proceedings.”¹² The decision in Gannett v. DePasquale is characterized as establishing five “...workable guidelines” to balance the defendant’s and the public’s competing

¹² Federated Publications v. Kurtz, 94 Wn.2d 51, 56-57, with Footnote 2 – “We do not distinguish between the interests of the press and public in this matter.”

constitutional interests.¹³ The decision by Judge Serko was essentially a closure or sealing action which precluded disclosure of documents otherwise available under the PRA.

Under the analysis in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), a presiding court must “apply the ‘strict, well-defined standard’” when faced with a motion for closure or to seal. At 258. One of the key elements of analysis¹⁴ among the five derived from the ruling in Gannett is the requirement that the proponent of closure or sealing must show a “serious and imminent threat” to the right to a fair trial. Here, Judge Serko acknowledged that “Defendants do not provide data, statistics, print or video stories to substantiate their position that pretrial publicity will jeopardize Defendant’s right to a fair and impartial jury.”¹⁵

The Defendants failed to provide the key information in any pleading filed before Judge Serko. Consequently, the ruling by Judge Serko fails to meet the analysis standard established in Gannett. Thus her ruling sealing the subject records was in error.

Further, given the fact that by the time Judge Serko entered her ruling, a trial of one of the defendants had begun, a jury had been seated and there was no determination that the defendant, Latanya Clemmons

¹³ State v. White, 152 Wn.App. 173, 180 (Div. I, 2009).

¹⁴ At page 258-59.

¹⁵ CP 210.

was unable to receive a fair trial belies the judicial notice that the Court took about the potential impact of pretrial publicity.

- C. Whether the determination made by the Court to seal Exhibits admitted in open court without conducting the analysis in Cowles Publishing Company v. Spokane Police Department properly barred disclosure.

Judge Chushcoff entered two categorical orders sealing the Exhibits admitted in the State v. Latanya Clemmons trial. Judge Chushcoff did not conduct any analysis of the elements required to inhibit publication set forth in the Gannett v. DePasquale ruling. The Judge relied upon the determination made by Judge Serko where the Exhibits admitted at trial were the same documents precluded from disclosure by Judge Serko. However, the rule in Gannett requires an independent determination of the test and the facts considered by Judge Serko differed from those available to Judge Chushcoff.

The rule in Cowles established that when a defendant had been charged, the documents related to the investigation were subject to disclosure absent an in camera review and case by case determination that nondisclosure is essential to effective law enforcement. At page 480. Here, Judge Chushcoff failed to examine the subject documents, in camera; he failed to conduct an analysis under Gannett, and then entered a

categorical non-disclosure order after the public trial had been held and the documents were marked and admitted at trial.

It was error for Judge Chushcoff to enter a categorical order precluding disclosure of the Exhibits from the Latanya Clemmons trial.

D. Whether a Writ of Mandamus action is the proper form of action to challenge closure orders in a criminal proceeding.

Mandamus by an original action in the State Supreme Court is a proper form of action for third party challenges to closure orders in criminal proceedings. State v. Bianchi, 92 Wn.2d 91, 593 P.2d 1330 (1979).

The Petitioner contends that the Court should enter a Writ of Mandamus directing each of the respondent judicial officers to modify their Orders and release the documents that were sought through the Public Records Act.

IV.

ARGUMENT

A. SCOPE OF AUTHORITY:

The Supreme Court has nonexclusive and discretionary original jurisdiction to issue a writ of mandamus against a state officer.

Washington State Labor Council v. Reed, 149 Wn.2d 48, 65 P.3d 1203 (2003).

B. BASIS FOR WRIT OF MANDAMUS:

A party seeking a writ of mandamus is required to demonstrate that (1) the party subject to the writ is under a clear duty to act, (2) the petitioner is “beneficially interested”, and (3) the petitioner does not have a plain, speedy and adequate remedy in the ordinary course of law.

Paxton v. City of Bellingham, 129 Wn.App. 439, 119 P.3d 373 (Div. I, 2005).

C. FACTUAL BASIS FOR WRIT OF MANDAMUS:

The Petitioner has sought production of public records under the Public Records Act (PRA), Chapter 42.56 RCW. The public records act establishes a public policy in favor of disclosure:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030
[Emphasis Added]

The PRA is a strongly worded mandate for broad disclosure of public records. Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.3d 389 (1997). The PRA requires every governmental agency to disclose any public record upon request, unless the record falls within certain specific exemptions. O'Connor v. Department of Social and Health Services, 143 Wn.2d 895, 905, 25 P.3d 426 (2001).

Here, Judge Serko determined after an *in camera* review that none of the subject investigative records sought by the Petitioner were subject to an exemption under the PRA. This determination established that the Petitioner had "beneficial interest" in the documents as did the initial request for disclosure of the documents under the PRA. When the documents were determined not to be subject to a certain exemption there was a duty to disclose those documents. O'Connor, at 905. Each of the Courts who considered the Petitioner's request for disclosure had a duty to act to cause the documents to be released. However, Judge Serko and Judge Chushcoff entered orders barring the disclosure and/or sealing the documents from the public.

Their determinations, for which objection had been made, eliminated any plain, speedy or adequate remedy for the Petitioner. These determinations, when coupled with the ruling that each document, regardless of whether it is admitted as an Exhibit in open court or not,

would be subject to the restraining Orders pending trial of all of the defendants about whom the investigative reports relate. Potentially, the Orders could remain in effect for months if not for years.

The PRA provides that documents shall be disclosed within a specific period of time or the party subject to the request may be required to pay attorney fees, costs and discretionary penalties for failure to provide the documents not subject to exemption in a timely manner. RCW 42.56.550(4). The statutory award under subsection (4) is a penalty, intended to encourage broad disclosure and deter improper denial of access to public records. Cowles Publishing v. City of Spokane, 69 Wn.App. 678, 849 P.2d 1271 (1993). Hence, the delay occasioned by the ruling of Judge Serko and Judge Chushcoff would deny the Petitioner the remedy available under law. The Writ process is the only adequate remedy that will ensure early disclosure of documents that have been sought since December 2009.

D. Pre-trial Rights of Defendant to Fair Trial:

Whether the Trial Court(s) properly determined that the disclosure of public records would impair the “pre-trial” rights of a criminal defendant when no findings were entered addressing the analysis in Cowles Publishing Company v. Spokane Police Department.

Judge Susan Serko entered her Findings and Order, RE: *In Camera* Review of PSCO Documents [CP 205-226] on the 20th of May after conducting an *in camera* review of the subject investigative records held by the Pierce County Sheriff's Office (PCSO). In that ruling, Judge Serko acknowledged that none of the documents fell under any specific exemption in the PRA. However, she applied RCW 42.56.540¹⁶ to the argument raised by defendants although she found that the defendants did not provide data, statistics, print or video stories to substantiate their position that pretrial publicity would jeopardize defendants' right to a fair trial. CP 210.

Instead Judge Serko took judicial notice of the extraordinary level of local, state and national news coverage of the events following 29 November 2009 when the four Lakewood officers were killed. CP 210.

¹⁶ The examination of any specific public record may be enjoined if, upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains, the superior court for the county in which the movant resides or in which the record is maintained, finds that such examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions. An agency has the option of notifying persons named in the record or to whom a record specifically pertains, that release of a record has been requested. However, this option does not exist where the agency is required by law to provide such notice.

[1992 c 139 § 7; 1975 1st ex.s. c 294 § 19; 1973 c 1 § 33 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.330.]

The Court relied upon the ruling in Gannett v. DePasquale, *supra*, where the judge found the facts to be analogous. Although Judge Serko found the facts in Newman v. King County to be inapposite, the case did involve the interaction between the PRA mandate and the question of what was essential for effective law enforcement. In that case, the agency was resisting disclosure of investigative documents before any charging decision had been made. At 573. Thus, the ruling is applicable to the application of RCW 52.56.540 in so far as it would not clearly "...be in the public interest." Apparently, this is the interest upon which the ruling by Judge Serko is based. CP 210. The Newman case dealt with what was essential to law enforcement and provided clarification where there was an ongoing investigation. At 573. It was relied upon by the Defendants in their argument.

However, the ruling in Cowles Publishing Company v. Spokane Police Department, provided a limiting factor to Newman. Cowles determined that when someone has been charged with a crime, the "on-going" nature of the investigation has ended for purposes of the PRA. At 477-78. Since the PCSO was not claiming the exemption, there was no claim from an investigating agency¹⁷ that nondisclosure was essential for effective law enforcement (as was the claim in Newman).

¹⁷ Lines 23-24, CP 211.

The Cowles decision did address the fair trial rights of a defendant. Justice Johnson writing for himself and six other justices held: “Nor does a defendant’s constitutional right to a fair trial compel categorical nondisclosure of police investigations. At 479. His holding was predicated upon a claim from the agency that the documents sought to be withheld were essential to effective law enforcement. Here, there is no such claim.

Thus, in so far as the 6th Amendment rights of any defendant relates to the PRA, they must be determined under the privacy rights of the individual or to protect the trial process. DePasquale had been arrested for DUI and the documents requested were the investigative reports involving the basis for the charges brought against him. At 475. The court noted that a case-by-case analysis should take place when a claim is made and documents are sought to be withheld. At 479. In Cowles, the majority held that it would be rare that criminal allegations would devastate the reputation of a suspect. At 479. There were no facts before Judge Serko that made a claim of such injury. Further, the fact that while Judge Serko was engaged in her *in camera* review a jury was selected and a trial was conducted in Pierce County Superior Court of one of the defendants without a determination that pre-trial publicity had hampered the right to a fair trial of the defendant acts against the supposition made by Judge

Serko that there would be jeopardy to the fair trial rights damaging the trial process.

Judge Serko's determination that ruling in Cowles was not dispositive of the issue of disclosure was in error. A Writ should issue to require Judge Serko to dissolve her Order restricting disclosure of the documents within the scope of the Order.

E. Disclosure of Investigative Records prior to Trial is not barred by Gannett v. DePasquale.

Whether the Trial Court(s) properly determined that the rule in Gannett Co. Inc. v. DePasquale precluded disclosure of public records to preserve the "pre-trial" rights of a criminal defendant to a fair trial.

Petitioner agrees that the right to a fair trial should be afforded any defendant in a criminal action under the 6th Amendment. The question presented to the Court is whether Judge Serko and Judge Chushcoff properly analyzed the subject documents under the principles established in Gannett v. DePasquale as those principles have been applied in subsequent decision.

Gannett was a plurality decision by the United States Supreme Court.¹⁸ In the case, Mr. Justice Powell, concurring with the majority of

¹⁸ Federated Publications v. Kurtz, 94 Wn.2d 51, 57, 615 P.2d 440 (1980).

four justices, found a 1st Amendment right of public access to a pretrial suppression hearing, "...a question expressly reserved by the majority."¹⁹

Gannett established five guidelines to apply when a court is considering the question of access to the criminal trial process including records.

These guidelines were first discussed in Federated Publications v. Kurtz, 94 Wn.2d 51, 62-64, 615 P.2d 440 (1980) shortly after Gannett was decided then summarized more recently in State v. White by Judge Applewick, 152 Wn.App. 173 (Div. I, 2009):

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

Under the applicable decisions, the courts have not been faced with a series of defendants who may have trials extending over months or more than a year. Each of the instances cited in decisions referenced in this brief involve single trials or criminal prosecutions of single persons where a request for records has been analyzed in comparison to the rights of a single Defendant under the 6th Amendment. And, in each of the cases

¹⁹ Ibid, Justice Williams held for the majority.

referenced in this brief, there was a governmental agency opposing the disclosure. Here, the facts demonstrate we have multiple defendants and no agency objection to disclosure. What is also unique in this factual pattern is that the objecting party are the Defendants and not the law enforcement agency. It is true that the Petitioner objects, but the Petitioner has no 6th Amendment right as do each of the defendants.

That is significant because the guidelines in Gannett require use of the least restrictive practical alternative which would protect the rights of the defendant. Kurtz, at 63. Ironically, the Petitioner there suggested that a continuance, severance, change of venue, change of venire, voir dire, peremptory challenges, sequestration and admonitions to the jury provided practical alternatives to entering an Order withholding the access to a pretrial suppression hearing. It is ironic, because the facts in this case demonstrate that a jury could be selected and a trial held in Pierce County without a determination that there was such “pretrial publicity” that the rights of Latanya Clemmons were jeopardized. Clearly, there were practical alternatives available to the bench in Pierce County that avoided pre-trial jeopardy despite the same “...extraordinary level of local, statewide and national attention”²⁰ focused on these defendants.

²⁰ Lines 1-2, CP 211.

Judge Serko did enter findings where she asserted that she had balanced the interests involved in the matter. She noted that she found the 6th Amendment right of the Defendants to be paramount to the rights established by the PRA to public disclosure. However, she did not have before her the type of evidence contemplated in Gannett needed to assess the effect of “pre-trial publicity” on the fair trial rights of the Defendants. Judge Serko noted that she did not have data, statistics, print or video stories to substantiate” the jeopardy to the Defendants. None was provided to Judge Serko. CP 210.

Here, based upon the ruling by Judge Serko, the competing interests were those under the 6th Amendment and those under the 1st Amendment and the public’s access to trials. Our Supreme Court has held that the ruling in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 75 L.Ed.2d 973 (1980) held that the 1st and 14th Amendment protects the public’s right of access to criminal trials. Seattle Times v. Ishikawa, 97 Wn.2d 30, 35, 640 P.2d 716 (1982). In Ishikawa, the Court assessed the five guidelines from Gannett adopted in Kurtz. At 37-39. The Court in Ishikawa determined that the trial court had failed to comply with the constitutional analysis and had not “...explicitly outlined the nature of the interests protected” and that the “...legal conclusions were not substantiated by the factual findings.” At page 41.

Here, Judge Serko (and certainly Judge Chushcoff who made no findings) failed to substantiate her conclusions with factual findings. She relied, instead, upon judicial notice. The use of judicial notice was gravely diminished by the actual fact that a trial of one of the defendants had begun, a jury was selected and the trial continued without the court finding in that matter that the same “pretrial publicity” relied upon by Judge Serko in taking “judicial notice” caused jeopardy to the right to trial for Latanya Clemmons. The holding in Ishikawa appears to direct that the trial court must actively consider the practical alternatives to closure or sealing records which neither Judge Serko nor Judge Chushcoff did. At 43.

F. Exhibits Admitted at a Public Trial Should not be Barred from Disclosure:

Whether the determination made by the Court to seal Exhibits admitted in open court without conducting the analysis in Cowles Publishing Company v. Spokane Police Department properly barred disclosure.

Judge Serko and Judge Chushcoff entered Orders prohibiting the disclosure of subject documents marked as Exhibits in the Trial of Latanya Clemmons regardless of whether they were admitted or not in that proceeding. The opportunity for the Court to enter any Order sealing a

record or withholding records cannot be categorical, but must rely upon a case-by-case analysis of the document.

It is true that Judge Serko had reviewed all of the documents held by the PSCO that were subject to the PRA requests of the Petitioner. CP 205-226. But, it is not true that Judge Serko had before her the Exhibit list and documents proffered in the Latanya Clemmons file. Nor, did Judge Chushcoff have before him the same documents. A review of the Orders each had entered²¹ shows that Judge Chushcoff did no analysis of the documents marked as Exhibits, and that he made any distinction between those which had been admitted and those which had not, and that he did not conduct the analysis required under Gannett or Cowles.

The Cowles decision places a substantial burden on the court when the subject documents are long past the charging stage, which our Court has determined is a critical point for investigative records. Under Cowles, the judge must consider the relevant factors and the potential alternatives, and his or her decision will not be overturned absent abuse of discretion. Cowles, at 590. Judge Chushcoff failed to do more than adopt the decision made by Judge Serko when she reviewed the PSCO documents absent the factual basis that certain of those subject documents had been marked as Exhibits and admitted at the public trial. CP 286.

²¹ Judge Chushcoff, CP 286-87; Judge Serko, CP 202.

His failure to conduct the Cowles assessment and the Gannett evaluation vitiate his Order and require the court to issue a Writ instructing him to modify his determination and permit disclosure of the documents marked as Exhibits at the Trial of Latanya Clemmons.

V.

CONCLUSION

The Petitioner, Wm. Michael Hanbey, asserts that there was error committed by Judge Serko and Judge Chushcoff for the reasons set forth above. The determination by Judge Serko failed to address practical alternatives to her Order to Seal once she determined that none of the documents were subject to a specific exemption in the PRA, but would be subject to the provisions of RCW 42.56.540. Further, Petitioner asserts that the Court's reliance upon the "Court Protection of Records" provision of the PRA as analyzed under the rule in Gannett v. DePasquale was misplaced because a) there were no facts establishing the claim of the Defendants, b) judicial notice was misplaced in light of the then existing public trial of one of the defendants without jeopardy to her right to trial despite occurring after the same "extraordinary" public attention to the events following 29 November 2009 when four Lakewood Officers were shot and killed, and c) Gannett did not fully address the issue of the 1st Amendment, and the subsequent rulings in Ishikawa and Cowles, in favor of public access to criminal proceedings and records.

There was no analysis, findings or conclusions made for any Order entered by either Judge in regard to the potential for jeopardy for the Defendants if the Exhibits marked and either Admitted or not entered at the Latanya Clemmons trial, were made public.

A Writ of Mandamus should issue to each of the Respondent Courts to require them to dissolve their respective Order sealing or withholding any of the records subject to the PRA request of the Petitioner.

RESPECTFULLY SUBMITTED THIS 29TH DAY OF JULY 2010.


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CERTIFICATE OF SERVICE

I, Michael Hanbey, Attorney at Law, hereby certify that I caused the following original documents to be filed with the Court: Brief of Appellant Hanbey and the Certificate of Service to be service via email on the parties listed below:

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

Dated this 30th day of July, 2010.



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