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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG, Respondent,

v.

THURSTON COUNTY and the THURSTON COUNTY
PROSECUTING ATTORNEY, Petitioners.

BRIEF OF AMICI CURIAE, THE WASHINGTON DEFENDER
ASSOCIATION and THE WASHINGTON ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

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TABLE OF CONTENTS

A. INTRODUCTION1

B. ARGUMENT2

 1. IF KOENIG SEEKS INSIGHT INTO THE COURT’S DECISIONMAKING
 PROCESS, HIS REMEDY IS TO SEEK AN ORDER UNSEALING THE
 PSYCHOSEXUAL EVALUATION IN THE COURT FILE3

 2. YATES WAS CORRECTLY DECIDED; DEFENSE MITIGATION
 MATERIALS PROVIDED TO THE PROSECUTOR IN THE HOPES OF
 ACHIEVING LENIENCY ARE EXEMPT FROM PUBLIC RECORD
 REQUESTS5

 a. Under *Yates*, defense mitigation materials are properly classified as
 “investigative records” under RCW 42.56.240(1).....5

 b. *Yates* correctly held that keeping defense mitigation material confidential is
 necessary to ensure effective law enforcement and protect the defendant’s
 right to privacy7

 3. IT CANNOT BE DISPUTED THAT A PSYCHOSEXUAL EVALUATION IS
 PROTECTED HEALTH CARE INFORMATION SUBJECT TO THE
 PRIVACY PROTECTIONS CONTAINED IN RCW 70.029

C. CONCLUSION10

TABLE OF AUTHORITIES

Washington Supreme Court

Koenig v. City of Des Moines, 158 Wn.2d 173, 142 P.3d 162
(2006)..... 8

Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997)..... 6

Washington State Court of Appeals

Cowles Publishing Co. v. Pierce County Prosecuting Attorney's Office
[&Yates], 111 Wash. App. 502, 45 P.3d 620 (2002)..... 1, 2, 5-8

State v. Bankes, 114 Wash. App. 280, 57 P.3d 284 (2004)..... 4

State v. Jollo, 38 Wash. App. 469, 685 P.2d 669 (1984)..... 4

Statutes

RCW 42.17.310 7

RCW 42.56.240 5, 7

RCW 70.02 9, 10

RCW 70.02.005 10

RCW 9.94A.670..... 4

A. INTRODUCTION

If a mitigation package is available to the public, a defendant's family members may be reluctant to share their personal information and feelings about the defendant. Without this information, the defendant's only input to the prosecutor would be defense counsel's arguments...We agree with the trial judge: public disclosure of mitigation information would have a chilling effect on the flow of such information to the prosecutor.

Cowles Publishing Co. v. Pierce County Prosecuting Attorney's Office [Yates], 111 Wash. App. 502, 509-10, 45 P.3d 620 (2002) (Yates) (emphasis added).

The concerns advanced by Amici are real; disclosure of defense mitigation material, which is what Koenig seeks, will have a chilling effect on plea negotiations. Indeed, the Koenig decision potentially reaches far beyond the disclosure of psychosexual evaluations provided to the prosecution in the hopes of obtaining a recommendation for the Special Sex Offender Sentencing Alternative [SSOSA]. Should this decision stand, potentially any material provided by the defense to the prosecution for negotiation purposes will be subject to Public Records Act [PRA] requests. Materials subject to disclosure could include psychiatric evaluations, medication records, psychological evaluations, counseling records, medical records, school records, military

records, psychosexual evaluations provided in non-SSOSA sex cases, and any other records and information that the defense may provide to the prosecution in the hopes of receiving leniency from the prosecutor. These records may include information about not only the defendant but the defendant's family, friends, co-workers and others.

Koenig has acknowledged that Yates is on point, but asks this Court to overrule that decision and hold that the defense mitigation materials at issue here—a psychosexual evaluation provided to the prosecutor in the hopes of achieving a joint recommendation for SSOSA — are not exempt from public disclosure. Koenig raises three arguments: first, that the materials are not mitigation materials, Answer to Brief of Amici Curiae, 1-4; second, that nondisclosure of these materials is not essential to effective law enforcement, id. at 4-6; and third, that a SSOSA evaluation is not private information under the PRA, id. at 6-8. Koenig's arguments are without merit. This Court should uphold the Yates decision, and hold that the defense mitigation material at issue here is not subject to public disclosure.

B. ARGUMENT

1. IF KOENIG SEEKS INSIGHT INTO THE COURT'S DECISIONMAKING PROCESS, HIS REMEDY IS TO SEEK AN ORDER UNSEALING THE PSYCHOSEXUAL EVALUATION IN THE COURT FILE.

First, Koenig asserts in his Reply to Amicus that psychosexual evaluations obtained in pursuit of SSOSA are exclusively court-ordered creatures. See Answer to Brief of Amici Curiae, p. 2. Koenig is incorrect. As stated in the Declaration of Amy Muth on behalf of the Washington Association of Criminal Defense Lawyers, “[i]t is the practice of the King County Prosecuting Attorney’s Office to require psychosexual evaluations prior to extending a plea offer for a sex offense charge so that they can make an appropriate sentencing recommendation.” CP 109-115. It is commonplace for attorneys to advise their clients to seek psychosexual evaluations prior to entering into plea negotiations, so as to determine whether SSOSA is even a viable option for their clients, as was well-documented in the record here. See id.; Supplemental Brief of Thurston County at 2-3.

Koenig miscomprehends the workings of the criminal plea negotiations process. In potential SSOSA cases, and indeed, in many sex offense prosecutions in which the defense is seeking a more favorable resolution for the client, the defense seeks to have

the client evaluated prior to sentencing.¹ If the evaluation is produced to the prosecution, it is submitted for ER 410 purposes as a proposed settlement offer. The evaluation cannot be used in the state's case-in-chief should negotiations fail. See ER 410; State v. Jollo, 38 Wash. App. 469, 685 P.2d 669 (1984).

Here, the trial court never ordered Mr. Lerud submit to a psychosexual evaluation. See CP 70; Supplemental Brief of Thurston County at 3. The evaluation at issue constitutes defense mitigation material.

Nonetheless, Koenig asserts that he can gain insight into the court's ruling by obtaining information from the prosecutor's file, not the court's file. Even if the court had ordered the defendant to undergo a psychosexual evaluation, that evaluation was ordered sealed in the court file. The proper remedy would be for Koenig to seek a court order to unseal the evaluation instead of doing what amounts to an end-run around that court order by filing a PRA request with the prosecutor's office.

¹ Koenig cites to State v. Bankes, 114 Wash. App. 280, 57 P.3d 284 (2004) and RCW 9.94A.670(3) to support his position that SSOSA evaluations are court-ordered. But nothing in either case law or statute suggests that these evaluations must be court-ordered for the court to decide whether to impose SSOSA. Instead, RCW 9.94A.670(3) provides that "If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment." The court is not required to order such an evaluation, and nothing in the statute prohibits the parties from furnishing an evaluation to the court, absent an order to do so, to request SSOSA.

2. YATES WAS CORRECTLY DECIDED: DEFENSE MITIGATION MATERIALS PROVIDED TO THE PROSECUTOR IN THE HOPES OF ACHIEVING LENIENCY ARE EXEMPT FROM PUBLIC RECORD REQUESTS.

Koenig correctly concedes that Yates is on point and, hence, if this Court orders disclosure of Mr. Lerud's psychosexual evaluation, this Court will be overturning Yates. Therefore, he asks this Court to overrule Yates in part and hold that these materials should be subject to a PRA request. This Court should decline that invitation.

- a. Under *Yates*, defense mitigation materials are properly classified as "investigative records" under RCW 42.56.240(1).

In Yates, the Spokesman Review sought a copy of the defense mitigation package provided to the Pierce County Prosecuting Attorney's Office [PCPAO] in the Robert Yates case, asking the prosecutor not to seek the death penalty. PCPAO refused to disclose the package, and the newspaper sought review in the trial court. The trial court, after conducting an in camera review of the materials, agreed with PCPAO that the materials were not subject to public disclosure. The newspaper sought

review in Division II and Robert Yates was permitted to intervene in the lawsuit.

The prosecutor and Yates relied upon the investigative record exemption to argue for withholding the materials. Division II agreed that the records fell within this exemption. The court noted that the records should be considered “investigative records,” despite the fact that the office was not “ferreting-out” criminal activity, because “one part of a prosecutor’s investigation focuses on the question of an appropriate penalty.” Yates, 111 Wash. App. at 508.

The court then considered the argument that the exemption did not apply because the mitigation materials were not “compiled by” law enforcement. Id. The court cited to this Court’s decision in Newman v. King County, 133 Wn.2d 565, 947 P.2d 712 (1997), which held that “any documents placed in [an] investigation file satisfy the requirement that the information is compiled by law enforcement.” Newman, 133 Wn.2d at 573, cited in Yates, 111 Wash. App. at 508.

The court thus concluded that the defense mitigation material, despite being prepared by someone other than law enforcement, nonetheless constituted law enforcement

investigative records, and the exemption contained in what is now RCW 42.56.240(1) applies.²

Here, as in Yates, Mr. Lerud's psychosexual evaluation was placed in the prosecutor's file, and further, it was submitted for the purposes of considering whether to recommend SSOSA. Accordingly, it falls within the definition of "investigative records" under RCW 42.56.240(1).

- b. Yates correctly held that keeping defense mitigation material confidential is necessary to ensure effective law enforcement and protect the defendant's right to privacy.

After finding that defense mitigation materials were investigative records, Division II then considered whether keeping the records confidential was (1) essential to effective law enforcement, or (2) necessary to protect privacy rights. The court concluded that both prongs applied in the case of defense mitigation materials.

First, as stated above, the court concluded that disclosing these materials would have a "chilling effect" on negotiations. Yates, 111 Wash. App. at 509-10. Second, the court acknowledged the privacy concerns present outweighed the public's interest in the materials. In particular, the court held that

² The decision cites to the previous version of the statute, codified at RCW 42.17.310(1).

“while a prosecutor’s death penalty decision is a matter of legitimate public concern, personal information about the defendant’s family is not. And the family’s privacy interests outweigh any public interest in the basis for the prosecutor’s decision.” Id. at 510.

Rehabilitating offenders, reducing recidivism, and avoiding putting vulnerable victims through the trauma of a trial are goals essential to effective law enforcement. More broadly, ensuring the resolution of any kind of criminal case through plea negotiations is essential to effective law enforcement. Yates correctly assesses the level of disruption that will occur if defense mitigation material is suddenly subject to PRA requests.

This Court has previously held that “where ‘the public interest in efficient government could be harmed significantly more than the public would be served by disclosure,’ the public concern is not legitimate and disclosure is not warranted.” Koenig v. City of Des Moines, 158 Wn.2d 173, 185, 142 P.3d 162 (2006) (emphasis added). That is the case here. These materials should not be disclosed.

3. IT CANNOT BE DISPUTED THAT A
PSYCHOSEXUAL EVALUATION IS PROTECTED
HEALTH CARE INFORMATION SUBJECT TO THE

PRIVACY PROTECTIONS CONTAINED IN RCW
70.02.

Without any citation to authority in support of his position, Koenig asserts that because of an individual's status as a charged sex offender,³ that person relinquishes protections accorded to all Washingtonians under the Health Care Information Act. His argument that "no statute or case law suggests that the protections for patients under that statute would extend to the sentencing of convicted sex offenders," Answer at 7, is unsupported by law. The protections of the HCIA apply to all patients—regardless of their criminal history. See RCW Chapter 70.02.

Koenig again misapprehends the difference between the court relying on certain information to render a sentencing decision and information that is produced to the prosecutor's office in the hopes of achieving leniency. This case is not about court-ordered SSOSA evaluations; it is about materials that defense attorneys furnish to prosecutors' offices on a regular basis to resolve their cases. And again, the court ordered that this evaluation be sealed in the court file. Therefore, Koenig had to seek the evaluation that

³ Koenig characterizes these individuals as "convicted" sex offenders, but in most cases, the evaluations are furnished prior to any plea of guilty being entered. Nonetheless, the analysis of this issue remains the same regardless of whether the individual has entered a plea and is awaiting sentencing or is in the negotiations stage.

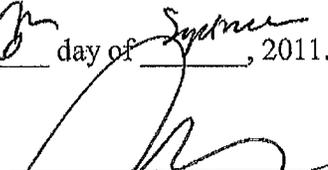
was furnished to the prosecutor as part of *negotiations*—a critical distinction.

There can be no question that a psychosexual evaluation consists of protected health care information as defined in RCW 70.02.005(7) for the reasons cited in the County's and Amici's previous briefing.⁴

C. CONCLUSION

For the foregoing reasons, Amici Curiae urges this Court to hold that the trial court properly withheld Mr. Lerud's psychosexual evaluation from Mr. Koenig's PRA request.

DATED this 07 day of September, 2011.



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⁴ Koenig conflates the issue by arguing that an analysis under RCW 70.02.050 is necessary to determine if exemptions apply. However, those exemptions apply when a party makes a request to the *health care provider*, not to a third party. In this case, those exemptions would only apply to a person who sought the evaluation directly from the sex offender treatment provider who completed the evaluation, not from the prosecutor's office. Amici and the County "failed to analyze" this provision of the law because it does not apply.