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Case No. 84940-4

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SUPREME COURT OF THE STATE OF WASHINGTON

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DAVID KOENIG  
*Respondent / Cross-Petitioner,*

v.

THURSTON COUNTY  
*Petitioner / Cross-Respondent.*

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ANSWER TO BRIEF OF AMICI CURIAE

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Pursuant to RAP 13.4(h), respondent / cross-petitioner David Koenig submits the following answer to the Brief of Amici Curiae, the Washington Defender Association and the Washington Association of Criminal Defense Lawyers (hereafter Amicus Brief).<sup>1</sup>

## I. ARGUMENT

Amici assert that the decision of the Court of Appeals in *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010) is “critically important” to the criminal justice system, that the case is a matter of substantial public interest, and that this Court should accept review. *Amicus Brief* at 3. Koenig does not argue otherwise, but seeks review of the Court of Appeals’ erroneous determination that a victim impact statement (VIS) is exempt from disclosure under the Public Records Act, Chapter 42.56 RCW (“PRA”). However, the legal analysis in the *Amicus Brief* is both erroneous and seeks to raise issues that are not presented in this case.

**A. The issue raised by the County’s *Petition for Review* is whether SSOSA evaluations under RCW 9.94A.670(3) are exempt from public disclosure.**

This case involves the Special Sex Offender Sentencing Alternative (hereafter “SSOSA”) authorized by RCW 9.94A.670. Where a defendant convicted of a felony sex offense is eligible for SSOSA, the

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<sup>1</sup> The *Brief of Amici Curiae* is actually an amici curiae memorandum in support of review. See RAP 13.4(h).

sentencing court may order the examination of the defendant to determine whether the defendant is amenable to treatment. RCW 9.94A.670(3). The resulting SSOSA evaluation is used by the sentencing court to determine whether the offender and the community will benefit from the use of the SSOSA alternative. RCW 9.94A.670(4). The Court of Appeals correctly held that the SSOSA evaluation is *not* exempt from public disclosure under RCW 42.56.240(1). *Koenig*, 155 Wn. App. at 412-17.

Amici largely ignore both the issue presented and the applicable statutes, and argue that the Court of Appeals' decision would apply to "any material provided by the defense ... for negotiation purposes." *Amicus Brief* at 1. But a SSOSA evaluation is *not* provided by the defense for negotiation purposes. Rather, a SSOSA evaluation is ordered by and prepared for the court itself. *State v. Bankes*, 114 Wn. App. 280, 287, 57 P.3d 284 (2002). The question of whether materials provided by the defense "in hopes of receiving leniency from the prosecutor" are exempt from disclosure, *Amicus Brief* at 1, is not presented in this case.

Amici also suggest that the Court of Appeals' decision in this case potentially abrogates *Cowles Pub'g Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 45 P.3d 620 (2002). *Amicus Brief* at 2. That may be true, at least in part. But that erroneous case *should* be abrogated or overruled. In *Cowles Pub'g*, the Court of Appeals held that a "mitigation package" submitted by a defendant in an effort to persuade the

prosecutor not to seek the death penalty was entirely exempt from public disclosure under former RCW 42.17.310(1)(d) (now codified as RCW 42.56.240(1)). 111 Wn. App. at 510-11. *Cowles Pub 'g* is distinguishable. The records at issue in *Cowles Pub 'g* were compiled by the prosecuting attorney as part of its statutory investigation of whether to seek the death penalty. 111 Wn. App. at 508. In contrast, a SSOSA evaluation is ordered by and prepared for the court itself. *Bankes*, 114 Wn. App. at 280.

However, as Koenig explained in his *Answer and Cross Petition for Review* at 17, the *Cowles Pub 'g* decision violated the well-established rule that responsive records must be redacted to remove exempt information rather than withheld in their entirety. 111 Wn. App. at 511; see RCW 42.56.210(1); *Progressive Animal Welfare Soc. v. University of Washington*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994). Although the *Koenig* court did not cite its earlier decision in *Cowles Pub 'g* on the redaction issue, the court once again violated the PRA redaction requirement by holding that the VIS is entirely exempt without even considering what nonexempt information the VIS might contain. *Koenig*, 155 Wn. App. at 411-12. This is the fourth published case in which Division II has summarily dismissed the redaction requirement for various

reasons.<sup>2</sup> Consequently Koenig agrees with amici that this Court should grant review in order to address the validity of *Cowles Pub'g*.

**B. Nondisclosure of the SSOSA evaluation is not essential to effective law enforcement.**

Under RCW 42.56.240(1), a SSOSA evaluation may be exempt from disclosure if nondisclosure is *essential* to effective law enforcement. Amici argue that the SSOSA system is essential to effective law enforcement because it is effective at reducing crime, and that disclosure of SSOSA evaluations will “chill” the use of SSOSA. *Amicus Brief* at 6.

As a threshold matter, the efficacy of SSOSA is a matter of public debate. It is not surprising that defense attorneys who frequently employ SSOSA assert that the SSOSA system is effective. CP 114. Critics suggest that sex offender therapy is not effective, and does not reduce recidivism. CP 216-221. The WSIPP study cited by Amici does *not* support the exaggerated claim that SSOSA is “incredibly effective” at treating sex offenders and protecting the community. *Amicus Brief* at 4.

On the contrary, the WSIPP study states:

This report is not an outcome evaluation of SSOSA, since there is no comparable group of sex offenders who were not granted a SSOSA. That is, it is not possible to

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<sup>2</sup> See *Cowles Pub'g Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 510-11, 45 P.3d 620 (2002); *Lindeman v. Kelso Sch. Dist. No. 458*, 127 Wn. App. 526, 541, 111 P.3d 1235 (2005), rev'd, 162 Wn.2d 196 (2007) (holding that a school district was not required to redact the videotape because such redaction would leave “no meaningful information remaining on the tape”); *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 152, 827 P.2d 1094, review denied, 119 Wn.2d 1020 (1992) (holding that that redaction of the names of the alleged victim and informant “would accomplish nothing”).

determine whether the lower recidivism rates for those granted a SSOSA arise from the SSOSA selection process or from treatment.

Washington State Institute for Public Policy, “Sex Offender Sentencing in Washington State: Recidivism Rates,” (January 2006) at 4 (*Amicus Brief*, Appendix B at 4).<sup>3</sup> Regardless of the outcome of the public policy debate over SSOSA, which is not for this Court to adjudicate, the public has a legitimate interest in scrutinizing SSOSA cases. The most important public document in such cases is the SSOSA evaluation on which the court relies.

The Court of Appeals correctly rejected the argument that nondisclosure of SSOSA evaluations is essential because disclosure would have a “chilling effect” on participation in SSOSA. *Koenig*, 155 Wn. App. at 413-15. As the Court of Appeals noted, defendants have a strong incentive to enter the SSOSA program because they face significantly less jail time under SSOSA. 155 Wn. App. at 15.

Nevertheless, amici assert that some defendants will decline to pursue a SSOSA sentence and opt to resolve their cases through trial. *Amicus Brief* at 6. Like the County, the amici conflate their mere preference for nondisclosure with the stringent PRA requirement that nondisclosure be “essential to effective law enforcement.” RCW

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<sup>3</sup> In the trial court, Professor Patrick Brown explained that it is a logical fallacy to conclude that abolition of the SSOSA program would result in higher recidivism rates for those offenders who otherwise would have qualified for a SSOSA disposition. CP 214.

42.56.240(1). Even if some defendants would decline SSOSA based on privacy concerns, the nondisclosure of SSOSA evaluations is not *essential* to effective law enforcement. Defendants who decline SSOSA will be tried, and if guilty, sent to jail. To suggest that SSOSA must be made available to those defendants would decline SSOSA based on privacy concerns implies that the ordinary criminal justice system is wholly ineffective. The Court of Appeals correctly held that nondisclosure of SSOSA evaluations is not essential to effective law enforcement. *Koenig*, 155 Wn. App. at 413.

**C. A SSOSA evaluation is not private for purposes of RCW 42.56.240(1).**

Under RCW 42.56.240(1), an investigative record may be exempt from disclosure (subject to redaction) if the record is private under the PRA's two-prong privacy test. A person's right to privacy is violated "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050.

Even if the disclosure of a SSOSA evaluation would be highly offensive to a reasonable person, it is not private for purposes of the PRA because a SSOSA evaluation is of legitimate interest to the public. A SSOSA evaluation is used by the superior court to determine whether the defendant and the community would benefit from a SSOSA sentence. *Bankes*, 114 Wn. App. at 287. The Court of Appeals correctly held that a

SSOSA evaluation is not private because a SSOSA evaluation is of legitimate interest to the public. *Koenig*, 155 Wn. App. at 417. That holding is entirely consistent with this Court's determination that the public has a legitimate interest in the criminal justice system, including the unpleasant details. *See Koenig v. Des Moines*, 158 Wn.2d 173, 186-87, 142 P.3d 162 (2006).

The argument of amici on the issue of privacy is based on an erroneous assumption that a court-ordered SSOSA evaluation is "health care information" for purposes of the Uniform Health Care Information Act, Chapter 70.02 RCW. *Amicus Brief* at 7-10. No statute or case law suggests that the protections for patients under that statute would extend to the sentencing of convicted sex offenders.<sup>4</sup> Amici rely on careless extrapolation from the observation that "[s]ex offender treatment providers are considered health care professionals under RCW 18.155.020." *Amicus Brief* at 8 n.1. This case is about court-ordered SSOSA evaluations under RCW 9.94A.670(3); the question of whether records of sex offender therapy are "health care information" is not presented.

Like the County, the amici ignore the applicable provisions of RCW 9.94A.670(3), take bits of Chapter 70.02 out of context, and completely fail to analyze the detailed provisions of RCW 70.02.050,

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<sup>4</sup> There are no references to RCW 9.94A.670 in Chapter 70.02 RCW. Nor are there references to Chapter 70.02 RCW in RCW 9.94A.670. Nor are there references to Chapter 70.02 RCW in Chapter 18.155 RCW which regulates sex offender treatment providers.

which has numerous exceptions. The Court of Appeals correctly refused to consider the County's undeveloped argument on this issue. *Koenig*, 155 Wn. App. at 418. The *Amicus Brief* adds nothing of substance to that argument.

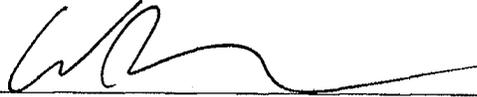
## II. CONCLUSION

Amici seek to elevate the privacy concerns of convicted sex offenders above the rights of the public under the PRA as well as the constitutional requirement that "Justice in all cases shall be administered openly." Wash. Const. art. I, § 10. The PRA emphatically states that "The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. The SSOSA system is one of those instruments, and the SSOSA evaluations on which that system depends must be available to the people so that they may determine whether the system actually works.

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RESPECTFULLY SUBMITTED this 5th day of November, 2010.



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I, the undersigned, certify that on the 5th day of November, 2010, I caused a true and correct copy of this *Answer to Brief of Amici Curiae* to be served, by the method(s) indicated below, to the following person(s):

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Dear Clerk-

Enclosed please find respondent Koenig's Answer to Brief of Amici Curiae.

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