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SUPREME COURT
STATE OF WASHINGTON
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CAPITAL CASE

No. 86084-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSEPH T. McENROE, Petitioner

MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

A. IDENTITY OF PETITIONER

Joseph T. McEnroe asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

Petitioner McEnroe seeks review of the “Order on Defendant’s Motion to Waive LGR 15.”¹

The decision interprets this Court’s GR 15 to require a party seeking to have pleadings or supporting documents sealed to first file the unredacted documents in open court files, available to opposing parties, the media and the public, and then to later file a motion to seal, leaving the sensitive, possibly privileged, materials exposed to public view until such time as the trial court can hear and decide the motion to seal the documents.

The trial court’s decision further holds that King County Local Rule LGR 15² will apply to all future proceedings in the pending capital case of State v. McEnroe, King County Superior Court No. 07-1-08716-4 SEA, and the case of the co-defendant, State v. Anderson, King County Superior Court No. 07-1-08717-2 SEA. LGR 15 requires parties bringing motions to seal sensitive documents to file unredacted copies of the

¹The trial court’s order is attached as Appendix A.

²A copy of LGR 15 is attached as Appendix B.

documents along with the motion to seal. Should the motion to seal be denied, LGR 15 provides for immediate open filing of such documents and service on other parties contemporaneous to or even prior to notice of the denial of sealing being given to the moving party.

The trial court's decision modified LGR 15 in that it provided that if a motion to seal documents is denied, the documents will not be openly filed for thirty days to allow the moving party to seek review. However, if review is denied, the documents will be openly filed without further recourse to the proponent of sealing. Specifically, the moving party will not be allowed to withdraw either the primary motion to which the sensitive documents for which sealing was sought pertain or the documents themselves.

C. ISSUES PRESENTED FOR REVIEW

In this capital murder prosecution the trials of the two co-defendants, Joseph McEnroe and Michele Anderson, have been severed. A trial date of October 10, 2011, has been set but it has not been determined which defendant will be tried first. The State has orally moved to have Defendant McEnroe tried first.³ Defendant McEnroe

³Mr. McEnroe's motion to waive LGR 15 was originally brought as a preliminary matter to his anticipated motion to have his trial after the trial of his co-defendant, Michele Anderson; the Motion to Waive LGR 15 was entitled "Motion to Waive LGR 15 for the Purpose of Filing Defendant's Motion to Seal 'Defendant's Motion to Have His Trial After Michele Anderson's Trial is Complete.'" However, at the most recent status

believes his case should be tried second and has advised the trial court he seeks to submit materials explaining his need to be tried after his co-defendant, and if necessary his need for a continuance of the current trial date, under seal to protect his right to a fair trial. This is because the materials would necessarily contain defense strategy and confidential information regarding his mitigation case if the trial proceeds to a capital sentencing phase. The trial court decided that LGR 15 will apply to Mr. McEnroe's motion to seal⁴ meaning, a) Mr. McEnroe must attach an unredacted copy of any document he wishes to be sealed to the motion to seal; b) if the motion to seal is denied, the document for which sealing was sought will be openly filed, available to the media, and served on all parties unless an appellate court grants review and issues a stay; and c) Mr. McEnroe will not be able to avoid disclosure of the documents by withdrawing them or withdrawing the motion to which they were attached.

The following issues are raised:

- 1) In a capital case, what are the proper procedures for a defendant submitting, and a trial court considering, motions to seal or redact pleadings and/or supporting documents the defendant believes necessary

conference, held June 2, 2011, the trial court directed that the issue of which defendant is tried first will be considered as an oral motion by the State to conduct the trial of Joseph McEnroe first. Defendant McEnroe is directed to respond to the State's motion no later than June 27, 2011.

⁴And LGR 15 will also apply to all subsequent motions which may be brought by McEnroe or Anderson.

to a trial court being fully informed and able to fairly hear and decide a motion brought by a defendant?

2) Was the trial court in error in interpreting this Court's GR 15 to allow for sealing of documents only AFTER said documents have been openly filed and available for perusal by other parties and the public in general?

3) Does the trial court's decision to apply LGR 15 to Mr. McEnroe's anticipated motion to have his trial after the trial of his co-defendant (and to any future motions to seal brought in his case) violate the federal and state constitutions by requiring the defendant to choose between seeking to obtain information important to his mitigation case in support of a life sentence and avoiding the premature disclosure of confidential information regarding his mitigation strategy and highly personal information regarding himself and other potential mitigation witnesses which would not otherwise be discoverable until after the guilt phase of his trial if he is convicted of aggravated murder?

D. STATEMENT OF THE CASE

Joseph McEnroe and Michele Anderson are charged with six counts of aggravated murder and the State has filed a Notice of Intention to Seek the Death Penalty. McEnroe and Anderson are charged with killing six members of Anderson's family on Christmas Eve, 2007. The case has been subject to intensive media scrutiny and publicity.

On April 28, 2011, the trial court severed the trials of the co-defendants.

Joseph McEnroe advised the trial court he intended to file a motion to allow his trial to take place following completion of the trial of his co-

defendant, Michele Anderson. Should he be required to proceed to trial first, Mr. McEnroe will file a motion to continue the trial date from October 10, 2011, as presently scheduled, to January 30, 2012.

Mr. McEnroe further advised the trial court that in order to evaluate Mr. McEnroe's motion regarding the order of trials, the trial court will need to understand the defense theory of his mitigation case, including possible mental health mitigation. However, premature disclosure of the defense strategies regarding mitigation, should there be a penalty phase of trial, would be highly prejudicial to the defense at guilt as well as penalty, likely to taint potential jurors, and invasive of the privacy rights of Mr. McEnroe as well as other anticipated mitigation witnesses.

The trial court specifically directed Mr. McEnroe's attention to LGR 15(c)(3)(A), requiring that motions to seal be accompanied by unredacted copies of the materials sought to be sealed. LGR 15 (c)(3)(B) further provides that "If the hearing judge denies the motion to seal, the judge will file the original unredacted documents unsealed with an order denying the motion..." The trial court already had exercised this provision with regard to the co-defendant's counsels' earlier motion to withdraw.

In order to protect his right to a fair trial and penalty proceeding, Mr. McEnroe filed a "Motion to Waive LGR 15 for the Purpose of Filing

Defendant's Motion to Seal."⁵ The trial court denied the motion to waive LGR 15, "Order on Defendant's Motion to Waive LGR 15," (Appendix A, hereto; hereafter referred to as "Order").

The trial court held that LGR 15 is not in conflict with GR 15. The trial court held GR 15 "assumes that the court record being sealed has already been [openly] filed." Order, p. 3. The trial court held that the local rule, LGR 15, provides greater protections than GR 15 to parties seeking to have documents sealed because GR 15

affords no procedure for review prior to filing the document in the [open] record ... in order to avoid placing sensitive documents in the public record pending a ruling on a motion to seal LGR 15 permits the moving party to provide "the original unredacted copy of the documents the party seeks to file under seal to the hearing judge in an envelope for in camera review." LGR 15(C)(3).*[sic]*

Order, p. 4. The trial court's order denied the motion to waive application of LGR 15, denied the defendant's request that should the court refuse to seal the documents the defendant be permitted to withdraw the documents and the primary motion, and ruled,

[although] "an argument could be made that LGR 15 as written only applies to civil and domestic relations court records ... this court adopts the provisions of LGR 15 as the protocol for motions to seal in both *State v. McEnroe* and *State v. Anderson* with the proviso that in the event of an unfavorable ruling the court will afford counsel a minimum of 30 days to seek review before unredacted materials are filed in the public record.

⁵Mr. McEnroe's "Motion to Waive LGR 15" is attached as Appendix C.

Order, p. 5.

The trial court has set a due date of June 27, 2011, for Mr. McEnroe to file his response to the State's motion for Mr. McEnroe's trial to proceed before his co-defendant's trial.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1) RAP 2.3 (b)(1), Further Proceedings Useless:

The trial court's decision that it will apply LGR 15 to Mr. McEnroe's motion to be tried after his co-defendant renders further proceedings useless because Mr. McEnroe cannot take the risk that the sensitive and otherwise privileged or confidential information regarding his mitigation strategy and potential evidence would be disclosed and published prior to his trial on guilt or sentencing. Because he cannot risk disclosure of these materials in the event his motion to seal the documents is denied by the trial court, Mr. McEnroe will not submit the materials and information with his motion to be tried after his co-defendant. The trial court will not have the benefit of the opinions of Mr. McEnroe's psychological experts, which are critical to understanding why Mr. McEnroe seeks to have his case be tried after the trial of his co-defendant. The trial court will not fully understand why Mr. McEnroe needs information very likely to be disclosed in the trial of his co-defendant, and

not otherwise available to Mr. McEnroe, to support his mitigation case. The trial court will not be able to put Mr. McEnroe's request to be tried second in the context of Mr. McEnroe's theory of mitigation. Because Mr. McEnroe cannot provide the information the trial court needs to properly consider his motion to be tried after his co-defendant, further proceedings on this issue are certainly impaired if not useless.

In addition, if Mr. McEnroe took the other route and were to include the unredacted sensitive documents with his motion to seal, as required by LGR 15 and the trial court's decision, and the materials were openly filed by the court, his ability to seat an impartial jury would be seriously diminished because his mitigation case, including psychological opinions, would be available to the media which has closely monitored developments in this case. The state would also have access to Mr. McEnroe's mitigation evidence far in advance of what is contemplated by SPRC 4 and 5. The prosecution's access to such information would give the state an unfair advantage at both guilt and penalty phases of trial. Pre-trial exposure of sensitive, often deeply personal information may result in defense witnesses being discouraged from cooperating with Mr. McEnroe's defense. All of this would deny Mr. McEnroe the procedures he is entitled to under Washington law and deny him the heightened due process mandated in a capital case.

Thus, whether Mr. McEnroe declines to risk exposure of his confidential information by not submitting the supporting documents with his response to the state's motion that he be tried first, or whether he submits the materials and the trial court denies his motion to seal, he will not receive a fair trial and sentencing proceeding. If Mr. McEnroe is convicted of aggravated murder and sentenced to death, the decision of the trial court to apply LGR 15 to this motion and any subsequent motions will be carefully scrutinized by post-conviction courts as a basis to vacate both the conviction and the sentence, rendering the trial and sentencing proceeding useless.

2) RAP 2.3 (b)(2) the Superior Court Has Committed Probable Error and the Decision Substantially Alters the Status Quo or Substantially Limits the Freedom of the Defendant to Act:

Mr. McEnroe wants to have a ruling on his motion to seal sensitive documents in support of his response to the state's motion that his trial happen before that of his codefendant before he files that motion. He wants to be allowed to withdraw the documents in the event the motion to seal is denied. The trial court's decision substantially limits Mr. McEnroe's freedom to act because, as stated above, he cannot submit the sensitive supporting documents at all because under LGR 15 the risk of publication is too great. Mr. McEnroe is put to the Sophie's choice of failing to properly support his bid to have his trial after his co-defendant,

and thereby gain access to evidence in the co-defendant's control which is confidential to her until she presents it at her trial, or fully supporting his argument to be tried second but risk damaging premature disclosure of his own confidential and otherwise privileged mitigation evidence which would diminish his ability to defend himself at both phases of his trial.

Mr. McEnroe submits the trial court committed probable error as follows:

The trial court framed its final holdings in the context of what it described as "the quagmire surrounding GR 15." This suggests a need for explication of GR 15.

The trial court held that this Court's GR 15 provides a mechanism to seal court records only AFTER they have been openly filed. For however many days or weeks it takes for the superior court to conduct a hearing and decide a motion to seal, according to the trial court's decision, sensitive documents would reside in open court files, inviting the perusal of other parties, media and the general public. Common sense alone refutes this holding of the trial court. No competent attorney would openly file documents containing confidential, embarrassing, and/or

privileged material with intention of obtaining a sealing order at some point in the future, after the cows have left the barn.⁶

This Court's definition of "sealing" refutes the trial court's holding. CR 15 (4) defines "seal:" "To seal means to protect from examination by the public and unauthorized court personnel." Sealing could not serve its purpose of protecting sensitive documents from "examination by the public and unauthorized court personnel" if those documents were allowed to languish in the public court file for any amount of time. Indeed, King County's "Electronic Court Records" ("ECR") database, plus the statewide Judicial Information Systems ("JIS") and SCOMIS, allow diligent reporters, opposing parties and curious members of the public access to such documents in open court files almost immediately on filing from the comfort of their own desks and living rooms.

Other rules of this Court show that GR 15 does not require open filing of sensitive document prior to a decision on sealing. GR 31(a) provides,

Access to court records is not absolute and shall be
consistent with reasonable expectations of personal privacy

⁶There are occasions, such as after a criminal conviction is expunged, when a party may seek to seal a court file which was previously open, and GR 15(c)(4) and (5) address that situation.

as provided by article 1, section 7 of the Washington State Constitution

Personal privacy would be eradicated if sensitive documents had to be openly filed prior to a decision on sealing, as the trial court interpreted GR 15. Furthermore, GR 31 recognizes that public access to court records may be “restricted by federal law, state law, court rule, court order, or case law.” *Id.*, emphasis added. Restrictions, regardless of the source, would mean little if the trial court was correct in its holding regarding GR 15.

The trial court’s decision that it will not allow the defendant to withdraw sensitive documents should the motion to seal be denied was probable error. The trial court held that the defendant’s “request appears anathema to an open and accountable system of justice.” Order, p. 5. However, allowing parties to withdraw documents from consideration by the court rather than have them published does not offend “an open and accountable system of justice.” Withdrawn documents would not be considered by the court and would have no influence on any issue before the court. The federal courts provide for the lodging and withdrawal of documents should a motion to seal be denied.

Western District of Washington Local Rule 5(g) (5):

A motion or stipulation to seal may either be filed prior to or contemporaneously with a filing that relies on the documents to be filed under seal. If the court subsequently denies the motion to seal, the sealed document will be unsealed unless the court orders

otherwise, or unless the party that is relying on the sealed document, after notifying the opposing party within three days of the court's order, files a notice to withdraw the documents. If a party withdraws a document on this basis, the parties shall not refer to the withdrawn document in any pleadings, motions and other filings, and the court will not consider it. For this reason, parties are encouraged to seek a ruling on motions to seal well in advance of filing underlying motions relying on those documents.

Emphasis added.⁷ The federal courts surely must be recognized as administering “an open and accountable system of justice.” Other states also have rules permitted the “lodging” of documents with a court in order to allow the court to decide whether those documents should be sealed, and provision to return those documents, unfiled, to the sealing proponent in the event that the court denies the motion to seal. See, e.g., California Rules of Court, Rule 2.551(b)(4)-(6); and New Mexico Rules of Criminal Procedure for the District Courts, Rule 5-123(B)(2), 5-123(E).

It may be that Washington courts have not considered withdrawn documents as part of the “court record” under GR 31(c)(4) because such documents would not be “maintained by a court in connection with a judicial proceeding” and would not necessarily be “entered into the

⁷Undersigned counsel Ross has been practicing law in Washington since 1976 and believes that for much if not all of that time Washington superior courts have similarly permitted the “lodging” of documents and withdrawal if sealing is denied in a manner similar to what the federal district courts expressly allow. She is not sure whether the practice was pursuant to a court rule or simply common sense.

record.” This Court would do a good service to lower courts and litigants to illuminate the interplay of the rules.

The trial court committed probable error in holding that LGR 15 applies to criminal cases despite its absence of reference to criminal cases. The court’s decision acknowledges that LGR arguably was intended only to apply to civil and domestic cases. Order, p. 5. Mr. McEnroe noted in his Motion to Waive LGR 15 that when the pertinent amendment to the rule was put up for public comment in 2009, the summary given by former King County Judge Paris Kallas in the April 2009 Washington State Bar News made no mention of criminal cases.

LGR 15 - Sealing Rule. Many cases and court rules address motions to seal and redact court documents. Nonetheless a gap exists.

Specifically, neither GR 15, GR 22, nor King County Local Rules address the situation where a party seeks to seal or redact documents filed contemporaneously with a court document. This arises most often in the summary judgment setting. Currently, most parties address the gap by way of a discovery protective order. Enacting a local rule establishes a uniform and consistent practice.

It is highly likely the amendment to LGR 15⁸ was intended to discourage the scourge of acrimonious pleadings in domestic cases as well as in civil summary judgment motions. Almost certainly the amendment’s

⁸The amendment to LGR 15 took effect in September 2010.

application to criminal cases, especially to capital cases, was not considered by the King County local rules committee.

This Court has held that when it comes to sealing records, criminal defendants seeking to preserve their right to a fair trial are held to a lesser burden than civil litigants seeking to protect other interests.

The quantum of need which would justify restrictions on access differs depending on whether a defendant's Sixth Amendment right to a fair trial would be threatened. When closure and/or sealing is sought to protect that interest, only a "likelihood of jeopardy" must be shown. *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62 (1980). See *Gannett Co. v. DePasquale*, 443 U.S. 368, 400, 99 S.Ct. 2898, 2916, 61 L.Ed.2d 608 (1979) (Powell, J., concurring). However, since important constitutional interests would be threatened by restricting public access (*Cohen v. Everett City Coun.*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575-578, 100 S.Ct. 2814, 2826-2828, 65 L.Ed.2d 973, 988-90 (1980)), a higher threshold will be required before court proceedings will be closed to protect other interests. If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown.

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37 (1982). In holding that LGR 15 applies equally to criminal and civil cases, the trial court failed to recognize the constitutional rights to be safeguarded in a criminal trial, particularly in a capital trial.

The trial court committed further and perhaps more grievous probable error by completely ignoring Mr. McEnroe's arguments that the application of LGR 15 to his motion to proceed to trial after his co-defendant would violated his rights to present all relevant mitigating evidence under the Eighth Amendment and his right to effective assistance of counsel under the Sixth Amendment. The trial court also did not address the unconstitutionality of forcing Mr. McEnroe to choose between two constitutional rights. *State v. Michielli*, 132 Wn.2d 229 (1997), *Simmons v. United States*, 390 U.S. 377 (1968). The Court made no mention of need, cited by Mr. McEnroe, to assure the highest degree of due process and reliability in capital cases. *Woodson v. North Carolina*, 428 U.S. 280 (1976). And the trial court further committed probable error by ignoring the special procedural protections afforded to capital defendants under SPRC 4 and 5 which protect premature disclosure of mitigating evidence in capital cases.⁹ Mr. McEnroe brought all of these

⁹The sensitive nature of mitigation evidence is recognized in the special court rules for capital penalty proceedings which specifically allow the trial court

... discretion, in accordance with CrR 4.7(h)(4), to defer disclosure of all or part of the defendant's penalty phase evidence until the guilt phase has been completed.

SPRC 4. Mental health evidence intended for the penalty trial is especially protected allowing a defendant to delay until 24 hours after a guilty verdict before announcing whether or not he will present mental health experts as part of his mitigation case and prohibiting the prosecution from hearing from its own expert or receiving any report from its own expert until after the defendant elects to present his own mental health experts, again 24 hours after a guilty verdict. Until that time, the mental health evidence is sealed

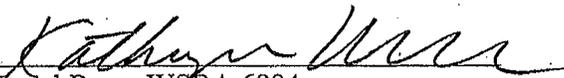
arguments to the trial court's attention in his motion but the trial court did not acknowledge them.

F. CONCLUSION

The Court should accept review for the reasons stated in part E. The Court should find that King County Local Rule 15 does not apply to Mr. McEnroe's Motion to Seal documents filed in opposition to the state's motion that he be tried before his co-defendant or to any future motions brought by him in his case. The Court should find LGR 15 is unconstitutional as applied to capital cases. The Court should clarify that Washington rules permit parties, at least defendants in capital cases, to withdraw sensitive documents should the trial court refuse to order them filed under seal.

Dated: June 13, 2011.

Respectfully submitted:


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and if the defendant chooses not to present expert testimony in mitigation, the state's experts' reports remain permanently sealed. SPRC 5.

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and Michele Anderson,

Defendants.

Cause Nos. 07-1-08716-4 SEA and
07-1-08717-2 SEA

**ORDER ON DEFENDANT'S MOTION TO
WAIVE LGR 15**

The court has received Defendant McEnroe's Motion to Waive LGR 15 for the Purpose of Filing Defendant's Motion to Seal Defendant's Motion to Have His Trial after Michele Anderson's Trial is Complete. Co-defendant Anderson has filed a Statement in Joinder to the motion.

The underlying concern expressed in both motions is that under LGR 15 should the court deny the defendants' respective motions to seal, the court will immediately file unredacted copies of the documents they wished to submit under seal, thereby "allowing no time for the moving party to seek review or otherwise protect the information the party believed to be confidential." Defendants complain that criminal defendants, particularly in death penalty cases, should not be forced to choose between either (a) risking release to the public of sensitive information submitted in support of a motion, or (b) not including the sensitive information in the motion so as to avoid the risk of release.

Defendants contend that GR 15, as adopted by the Washington Supreme Court, "contains no such drastic consequence [as LGR 15] for parties unsuccessful in their efforts to seal sensitive

1 documents." They maintain, therefore, that LGR 15 violates GR 7 which requires that local rules be
2 consistent with the rules adopted by the Supreme Court.

3 To the extent that the Defendants appear to believe that GR 15 provides them greater
4 protections than LGR 15, they are mistaken. GR 15 states in pertinent part:

5 **(c) Sealing or Redacting Court Records.**

6 (1) In a civil case, the court or any party may request a hearing to seal or redact the court
7 records. In a criminal case or juvenile proceedings, the court, any party, or any interested person may
8 request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be
9 given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must
10 also be given to the victim, if ascertainable, and the person or agency having probationary, custodial,
11 community placement, or community supervision over the affected adult or juvenile. No such notice is
12 required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

13 (2) After the hearing, the court may order the court files and records in the proceeding, or any
14 part thereof, to be sealed or redacted if the court makes and enters written findings that the specific
15 sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the
16 public interest in access to the court record. Agreement of the parties alone does not constitute a
17 sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that
18 may be weighed against the public interest include findings that:

19 (A) The sealing or redaction is permitted by statute; or

20 (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective
21 order entered under CR 26(c); or

22 (C) A conviction has been vacated; or

23 (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court
record; or

(F) Another identified compelling circumstance exists that requires the sealing or
redaction.

(3) A court record shall not be sealed under this section when redaction will adequately
resolve the issues before the court pursuant to subsection (2) above.

(4) Sealing of Entire Court File. When the clerk receives a court order to seal the entire court
file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter
shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless
protected by statute, is available for viewing by the public on court indices. The information on the court
indices is limited to the case number, names of the parties, the notation "case sealed," the case type
and cause of action in civil cases and the cause of action or charge in criminal cases, except where the

1 conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written
2 findings supporting the order to seal shall also remain accessible to the public, unless protected by
statute.

3 (5) Sealing of Specified Court Records. When the clerk receives a court order to seal
specified court records the clerk shall:

4 (A) On the docket, preserve the docket code, document title, document or subdocument
5 number and date of the original court records;

6 (B) Remove the specified court records, seal them, and return them to the file under
7 seal or store separately. The clerk shall substitute a filler sheet for the removed sealed
8 court record. If the court record ordered sealed exists in a microfilm, microfiche or other
9 storage medium form other than paper, the clerk shall restrict access to the alternate
10 storage medium so as to prevent unauthorized viewing of the sealed court record; and

11 (C) File the order to seal and the written findings supporting the order to seal. Both shall
12 be accessible to the public.

13 (D) Before a court file is made available for examination, the clerk shall prevent access
14 to the sealed court records.

15 (6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a
16 court order, the original court record shall be replaced in the public court file by the redacted copy. The
17 redacted copy shall be provided by the moving party. The original unredacted court record shall be
18 sealed following the procedures set forth in (c)(5).

19 "Court record" is defined in GR 31(c)(4) as including but not limited to: "(1) Any document,
20 information, exhibit, or other thing that is maintained by a court in connection with a judicial
21 proceeding."

22 As written, GR 15 contemplates that a party seeking to seal a document will file the motion and
23 document as they would any other motion and supporting documentation. Following the court's
decision, the clerk's office is directed to take action in conformity with the decision pursuant to
subsections (4), (5) and (6).

In short, the "uniform procedure" set forth in GR 15 assumes that the court record being sealed
has already been filed. After receiving a court order to seal, the clerk will "[r]emove the specified court
records, seal them, and return them to the file under seal or store them separately." GR 15(c)(5).
Accordingly, the reason why GR 15 does not contain the "drastic consequence" of subsequent filing of
the unredacted document is because the rule assumes that the documents have already been filed.

1 The Local Rules Committee of the King County Superior Court, chaired by Judge Paris Kallas
2 (ret.), recognized this infirmity in GR 15 and attempted to craft a rule that would provide a procedure by
3 which a party could obtain an order to seal before being required to file in the court record the
4 document for which the sealing order was sought. LGR 15 allows a party to provide the original
5 unredacted document directly to the judge who is considering the motion to seal. If the motion is
6 successful, the document is subsequently filed under seal by the court at that time, thereby avoiding the
7 prospect of the document being available to the public as a court record while the motion is pending
8 before the judge. If the motion is denied, the unredacted document is then filed by the court.

9 From this court's perspective, the procedure set forth in LGR 15 affords the Defendants herein
10 greater protection than GR 15, which affords no procedure for review prior to filing the document in the
11 record. Furthermore, to the extent that Defendants assert that this court should waive the provisions of
12 LGR 15 because it is inconsistent with the rules adopted by the Supreme Court, this argument has
13 unintended consequences.

14 As aforementioned, in order to avoid placing sensitive documents in the public record pending a
15 ruling on a motion to seal, LGR 15 permits the moving party to provide "the original unredacted copy of
16 the document(s) the party seeks to file under seal to the hearing judge in an envelope for in camera
17 review". LGR 15(C)(3). After the hearing, the judge then either files the original unredacted document
18 or the document under seal depending on the ruling. This procedure arguably runs afoul of CR 5(e),
19 entitled "Filing with the Court Defined." That rule provides that "[t]he filing of pleadings and other
20 papers, as required by these rules shall be made by filing them with the clerk of the court, except that
21 the judge may permit the papers to be filed with him or her, in which event the judge shall note thereon
22 the filing date and forthwith transmit them to the office of the clerk." CR (5)(e). Nothing in the rule
23 allows a judge to receive materials for filing, particularly originals, and retain them until a decision is
made sometime in the future, yet this is precisely what LGR 15 instructs a judge to do. GR 15, as
written and interpreted by this court, is not in conflict with CR 5(e) because it presupposes that the
document already is part of the court record prior to hearing the motion to seal.

1 It is against this backdrop, with feet firmly planted in the quagmire surrounding GR 15, that this
2 Court hereby enters the following rulings in response to Defendants' motions:

- 3 1. The motion to waive LGR 15 is denied. To the extent that Defendants believe that GR
4 15 provides them a safer harbor, they are unfortunately mistaken for the reasons set
5 forth above.
- 6 2. The motion to permit the Defendants to withdraw their motions and supporting
7 documentation in the event of an unfavorable ruling on their motions to seal is denied.
8 Defendants have failed to provide any authority or legal argument in support of such
9 relief, and the request appears anathema to an open and accountable system of justice.
- 10 3. Defendants' request that this court afford them an opportunity to seek review of an
11 adverse ruling on their motions to seal is granted. This court believes that the
12 Defendants' request is reasonable and, in the event of an unfavorable ruling, this court
13 will file the unredacted materials under seal for a period of no less than 30 days to permit
14 counsel an opportunity to seek review.
- 15 4. Lastly, having painstakingly reviewed LGR 15, it appears that an argument could be
16 made that LGR 15 as written only applies to civil and domestic relations court records.
17 In order to avoid further potential confusion, and to provide guidance to the parties in the
18 future, this court adopts the provisions of LGR 15 as the protocol for motions to seal in
19 both State v. McEnroe and State v. Anderson with the proviso that in the event of an
20 unfavorable ruling the court will afford counsel a minimum of 30 days to seek review
21 before unredacted materials are filed in the public record.

22 Done this 24th day of May, 2011.

23 

Judge JEFFREY M. RAMSDELL

APPENDIX B

XIII. GENERAL RULES

LGR 15. DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(c) Sealing or Redacting Court Records.

(1) Motions to Destroy, Redact or Seal. Motions to destroy, redact or seal all or part of a civil or domestic relations court record shall be presented, in accordance with GR 15 and GR 22, to the assigned judge or if there is no assigned judge, to the Seattle Chief Civil Judge for civil cases with a Seattle designation and to the Chief Judge in Kent for civil cases with a Kent designation, the Chief Unified Family Court Judge for family law cases with children, with the following exceptions.

(A) Guardianship, Trusts and Probate: (Title 11) Motions may be presented to any regularly sitting (but not a pro tem) Ex Parte and Probate Commissioner.

(B) Vulnerable Adult Protection Order: (RCW 74.04) Motions may be presented to any regularly sitting (but not a pro tem) Ex Parte and Probate Commissioner.

(C) Minor/Incapacitated Settlement: The motion shall be presented to the judicial officer who approved the minor settlement unless the judicial officer who approved the minor settlement is a pro tem commissioner, in which case the motion shall be brought before the assigned judge or any regularly sitting Ex Parte and Probate Commissioner.

(D) Name Changes Based on Domestic Violence: If no assigned judge, motion may be presented by the requesting party to any regularly sitting (but not a pro tem) Ex Parte and Probate Commissioner.

*Local Rules of the
Superior Court for King County
Effective September 1, 2010*

Page 78

LGR 15

(E) Financial Source Documents, Personal Health Care Records and Confidential Reports in Title 26 Cases: In a proceeding brought pursuant to RCW 26, "financial source document", "personal health care record" and "confidential report" as defined under and submitted in accordance with GR 22 will be automatically sealed by the clerk without court order, if accompanied by the proper cover sheet. See, also, LFLR 5(c) and LFLR 11 with respect to family law court records in general.

(2) Orders to Destroy, Redact or Seal. Any order containing a directive to destroy, redact or seal all or part of a court record must be clearly captioned as such and may not

be combined with any other order; the clerk's office is directed to return any order that is not so

captioned to the judicial officer signing it for further clarification. See also LCR 26(c), LCR 79

(d)(6), LFLR 5(c) and LFLR 11. The clerk is directed to not accept for filing and to return to the

signing judicial officer any order that is in violation of this order.

(3) Motions to Seal/Redact Filed Contemporaneously with Confidential Document(s).

(A) Contemporaneously with filing the motion to seal, the moving party shall provide the following as working copies:

(i) the original unredacted copy of the document(s) the party seeks to file under seal to the hearing judge in an envelope for in camera review. The words "SEALED PER COURT ORDER DATED [insert date]" shall be written on the unredacted

document(s). The following information shall be written on the envelope: The case caption and

cause number; a list of the document(s) under review; and the words "SEALED PER COURT

ORDER DATED [insert date]."

(ii) a proposed redacted copy of the subject document(s).

(iii) a proposed order granting the motion to seal, with specific proposed findings setting forth the basis for sealing the document(s).

(B) If the hearing judge denies the motion to seal, the judge will file the original unredacted document(s) unsealed with an order denying the motion. The words "SEALED PER COURT ORDER FILED [insert date]" will be crossed out on the unredacted

document(s).

(C) The unredacted document(s) shall not be filed electronically. If submitted through the Clerk's Working Copies Application, the unredacted document(s) will be

placed, by the Clerk's Office, in an envelope as described above.

(D) If the hearing judge grants the motion to seal, in whole or in part, the judge will file the sealed document(s) contemporaneously with a separate order granting the

motion. If the judge grants the motion by allowing redaction, the judge shall write the words

"SEALED PER COURT ORDER DATED [insert date]" in the caption of the unredacted document before filing.

(e) *Motions to Unseal or Examine.* See LCR 77(i)(11) with respect to motions to unseal or examine a sealed court record.

[Adopted effective September 1, 2008; amended effective January 1, 2009; January 1, 2009;

September 1, 2009; September 1, 2010]

APPENDIX C

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	No. 07-C-08716-4 SEA
)	
Plaintiff,)	MOTION TO WAIVE LGR 15 FOR
)	THE PURPOSE OF FILING
v.)	DEFENDANT'S MOTION TO SEAL
)	DEFENDANT'S MOTION TO HAVE
JOSEPH T. McENROE,)	HIS TRIAL AFTER MICHELE
)	ANDERSON'S TRIAL IS COMPLETE
<u>Defendant</u>)	

OVERVIEW

The Court has advised all parties that it will apply LGR 15 to an anticipated Motion to Seal documents in support of motions regarding the order of trials and, if necessary, for continuance of the trial date. LGR 15 requires parties to file unredacted originals of the documents for which sealing is sought. Should the trial court deny the motion to seal, the documents are openly filed along with the order denying the motion to seal allowing no time for the moving party to seek review or otherwise protect the information the party believed to be confidential.

MOTION TO WAIVE LGR 15 FOR THE PURPOSE OF FILING DEFENDANT'S MOTION TO SEAL DEFENDANT'S "MOTION TO HAVE HIS TRIAL AFTER MICHELE ANDERSON'S TRIAL IS COMPLETE" - Page 1 of 11

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1
2 **MOTION**

3 Defendant Joseph McEnroe Moves for the following relief:

- 4 1.) To consider and rule on the Defendant's "Motion to Seal" certain documents and
5 information prior to considering Mr. McEnroe's substantive motions regarding the order and
6 timing of trials;
7
8 2.) To allow Defendant, in the event the Court denies the Motion to Seal, an
9 opportunity to seek review of the adverse ruling prior to openly filing the documents for which
10 sealing is sought;
11
12 3.) To allow Defendant, in the event the Court denies the Motion to Seal an
13 opportunity to withdraw the substantive motions as well as the supporting documents;
14
15 4.) To declare LGR 15 unconstitutional, particularly in the context of a capital case.
16

17 **FACTUAL BACKGROUND**

18 On April 28, 2010, the Court severed the trials of co-defendants Joseph McEnroe and
19 Michele Anderson.

20 Defendant Joseph McEnroe intends to file a motion to allow his trial to proceed following
21 completion of the trial of his co-defendant, Michele Anderson. Should that motion be denied,
22 Mr. McEnroe will file a motion to continue the trial date from October 10, 2010, as presently
23 scheduled, to January 30, 2012.
24

25 In order to evaluate Mr. McEnroe's motion regarding the order of trials, the Court will
26 need to understand the defense theory of his mitigation case including possible mental health
27

28 **MOTION TO WAIVE LGR 15 FOR THE
29 PURPOSE OF FILING DEFENDANT'S MOTION
TO SEAL DEFENDANT'S "MOTION TO HAVE
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" - Page 2 of 11**

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1 mitigation. However, premature disclosure of the defense strategies regarding mitigation,
2 should there be a penalty phase of trial, would be highly prejudicial to the defense at guilt as well
3 as penalty, likely to taint potential jurors, and invasive of the privacy rights of Mr. McEnroe as
4 well as other anticipated mitigation witnesses.

5 The sensitive nature of mitigation evidence is recognized in the special court rules for
6 capital penalty proceedings which specifically allow the trial court "... discretion, in accordance
7 with CrR 4.7(h)(4), to defer disclosure of all or part of the defendant's penalty phase evidence
8 until the guilt phase has been completed." SPRC 4. Mental health evidence intended for the
9 penalty trial is especially protected allowing a defendant to delay until 24 hours after a guilty
10 verdict before announcing whether or not he will present mental health experts as part of his
11 mitigation case and prohibiting the prosecution from hearing from its own expert or receiving
12 any report from its own expert until after the defendant elects to present his own mental health
13 experts, again 24 hours after a guilty verdict. Until that time, the mental health evidence is
14 sealed and if the defendant chooses not to present expert testimony in mitigation, the state's
15 experts' reports remain permanently sealed. SPRC 5.

16
17
18
19 Mr. McEnroe has advised the Court he will seek to submit supporting materials for the
20 order of trial and, if necessary, for the continuance, under seal to protect his right to a fair trial.
21 To be useful to the Court, the supporting materials would necessarily contain defense strategy
22 regarding Mr. McEnroe's mitigation case.

23
24 The Court has specifically directed the parties' attention to LGR 15, requiring that
25 motions to seal be accompanied by unredacted copies of the materials sought to be sealed. LGR
26 15 (B) further provides that "If the hearing judge denies the motion to seal, the judge will file the

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28 **MOTION TO WAIVE LGR 15 FOR THE**
29 **PURPOSE OF FILING DEFENDANT'S MOTION**
TO SEAL DEFENDANT'S "MOTION TO HAVE
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TRIAL IS COMPLETE" – Page 3 of 11

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1 original unredacted documents unsealed with an order denying the motion....” The Court here
2 has already exercised this provision with regard to the co-defendant’s counsels’ motion to
3 withdraw.

4 **SUMMARY OF ARGUMENT**

5 LGR 15 (c)(1)(A) requires any party seeking to have any court records sealed to file “the
6 original unredacted copy of the documents the party seeks to file under seal to the hearing
7 judge....” LGR (c)(1)(B) provides that if the motion to seal is denied, “the judge will file the
8 original unredacted documents unsealed with an order denying the motion.” Under the local
9 rule, the moving party learns his motion to seal is denied at the same time opposing parties and
10 the public learn of the ruling and after the subject documents have been openly filed. This
11 process leaves the moving party with no recourse; he cannot avoid disclosure of the sensitive
12 materials to other parties and the public by withdrawing his underlying motion because the
13 materials are already published when he learns of the trial court’s order. Nor can the moving
14 party seek meaningful review of the trial court’s decision by an appellate court because even if
15 the trial court’s decision is erroneous, the damage of publishing sensitive, confidential,
16 information has been done.

17 Under LGR 15 the only way a party can assure even the most sensitive, otherwise
18 privileged, information is not released to opponents and the public is not to bring motions in any
19 way related to that material. This subjects criminal defendants to a Hobson’s choice – withhold
20 supporting materials that support and fully advise the trial court regarding motions the defendant
21 deems necessary to his defense or risk the trial court releasing information that may seriously
22 prejudice his ability to present his defense or select an impartial jury. Of Hobson’s choices of

23 **MOTION TO WAIVE LGR 15 FOR THE**
24 **PURPOSE OF FILING DEFENDANT’S MOTION**
25 **TO SEAL DEFENDANT’S “MOTION TO HAVE**
26 **HIS TRIAL AFTER MICHELE ANDERSON’S**
27 **TRIAL IS COMPLETE” – Page 4 of 11**

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1 this constitutional sort, the U.S. Supreme Court has said "... we find it intolerable that one
2 constitutional right should have to be surrendered in order to assert another." *Simmons v. United*
3 *States*, 390 U.S. 377 (1968).

4 ARGUMENT

5 LGR 15 was amended effective September 1, 2010, to add section (c)(3)(B) which
6 mandates the Sophie's choice of failure to request necessary relief out of fear of immediate
7 publication of damaging confidential information or risking potentially devastating publication
8 without recourse. GR 15, the statewide rule adopted by the Supreme Court regarding sealing
9 court documents, contains no such drastic consequence for parties unsuccessful in their efforts to
10 seal sensitive documents. LGR 15(c)(3)(B) violates GR 7 which requires local rules to be
11 consistent with rules adopted by the Supreme Court.
12
13

14 It appears that the King County Superior Court did not anticipate the chilling effect of
15 LGR 15(c)(3)(B), particularly as it might be applied in capital cases. In April 2009, when the
16 local rule change was put up for comment, former Judge Paris Kallas wrote in the WSBA
17

18 Bulletin:

19 LGR 15 - Sealing Rule. Many cases and court rules address motions to seal and
20 redact court documents. Nonetheless a gap exists.

21 Specifically, neither GR 15, nor GR 22, nor the King County Local Rules address
22 the situation where a party seeks to seal or redact documents filed
23 contemporaneously with a court document. This arises most often in the
24 summary judgment setting. Currently, most parties address the gap by way of a
25 discovery protective order. Enacting a local rule establishes a uniform and
26 consistent practice.

27 **MOTION TO WAIVE LGR 15 FOR THE**
28 **PURPOSE OF FILING DEFENDANT'S MOTION**
29 **TO SEAL DEFENDANT'S "MOTION TO HAVE**
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" – Page 5 of 11

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1 *Id.*, *emphasis added*. LGR 15(c)(3)(B) was intended to fill a gap left by other rules in the
2 situation in which a party filed supporting documents the party desired to be sealed with the
3 motion for sealing. The local court apparently did not want always to have to deal with separate
4 motions for protective orders, particularly in civil motions for summary judgment, which are
5 frequent and burdensome for the court. However, what was, according to Judge Kallas, an
6 amendment intended to deal with the situation when parties voluntarily attached documents they
7 wished to be sealed to the motion to seal became enacted as a rule requiring parties to attach
8 unredacted originals to motions to seal at great risk should the motion to seal be denied.
9

10 Criminal cases, and conflict with constitutional protections of criminal defendants, appear
11 not even envisioned when the local rule was put up for comment. The Sixth and Eighth
12 Amendments to the U.S. Constitution were seemingly not considered when the local rule was
13 drafted. GR 15, on the other hand, specifically contemplates that motions to seal or redact may
14 be brought in criminal cases. GR 15 (c)(1). Nothing in GR 15 requires filing of unredacted
15 original copies of documents for which sealing is sought and there is no language suggesting a
16 court should surprise, and effectively punish, moving parties by publishing the sensitive
17 documents simultaneously with an order denying the motion to seal.
18

19 The provision of LGR 15(c)(3)(B) which requires the trial judge to openly file documents
20 requested to be sealed if and immediately when the motion to seal is denied does not allow the
21 moving party to seek review. It is possible the trial court's decision is in error:
22

23
24 The legal standard for sealing or unsealing court records is a question of law
25 which we review de novo. *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861
26 (2004). We review a trial court's decision to seal or unseal records for abuse of
27 discretion, but if that decision is based on an improper legal rule, we remand to
the trial court to apply the correct rule. *Id.* at 907, 93 P.3d 861.

28 **MOTION TO WAIVE LGR 15 FOR THE**
29 **PURPOSE OF FILING DEFENDANT'S MOTION**
TO SEAL DEFENDANT'S "MOTION TO HAVE
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" – Page 6 of 11

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1
2 *Rufer v. Abbott Laboratories*, 154 Wn.2d 530 (2005). The legal standard means nothing if
3 parties cannot seek review of whether it has been properly applied before the documents in
4 question are published.

5 The defense of capital cases is different than all other cases counsel or the courts
6 encounter. SPRC rules reflect and recognize that fact. As stated above, mitigation evidence is
7 acknowledged to be especially sensitive and protected from disclosure until late in the trial, often
8 after the guilty verdict is in. SPRC 4, 5. Capital defense counsel are required to thoroughly
9 investigate and seek to obtain all evidence which may argue against a sentence of death for their
10 client. Failure to do so has been found to be constitutionally deficient representation:
11
12

13 Counsel's decision not to expand their investigation beyond the PSI and the DSS
14 records fell short of the professional standards that prevailed in Maryland in 1989.
15 As Schlaich acknowledged, standard practice in Maryland in capital cases at the
16 time of Wiggins' trial included the preparation of a social history report. App.
17 488. Despite the fact that the Public Defender's office made funds available for
18 the retention of a forensic social worker, counsel chose not to commission such a
19 report. *Id.*, at 487. Counsel's conduct similarly fell short of the standards for
20 capital defense work articulated by the American Bar Association (ABA)—
21 standards to which we long have referred as "guides to determining what is
22 reasonable." *Strickland, supra*, at 688; *Williams v. Taylor, supra*, at 396. The
23 ABA Guidelines provide that investigations into mitigating evidence "should
24 comprise efforts to discover *all reasonably available* mitigating evidence and
25 evidence to rebut any aggravating evidence that may be introduced by the
26 prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in
27 Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these
28 well-defined norms, however, counsel abandoned their investigation of
29 petitioner's background after having acquired only rudimentary knowledge of his
30 history from a narrow set of sources. Cf. *id.*, 11.8.6, p. 133 (noting that among the
31 topics counsel should consider presenting are medical history, educational history,
32 employment and training history, *family and social history*, prior adult and
33 juvenile correctional experience, and religious and cultural influences) (emphasis
34 added); 1 ABA Standards for Criminal Justice 4—4.1, commentary, p. 4—55
35 ("The lawyer also has a substantial and important role to perform in raising

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38 **MOTION TO WAIVE LGR 15 FOR THE**
39 **PURPOSE OF FILING DEFENDANT'S MOTION**
40 **TO SEAL DEFENDANT'S "MOTION TO HAVE**
41 **HIS TRIAL AFTER MICHELE ANDERSON'S**
42 **TRIAL IS COMPLETE" – Page 7 of 11**

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1 mitigating factors both to the prosecutor initially and to the court at sentencing...
2 Investigation is essential to fulfillment of these functions”).

3 *Wiggins v. Smith*, 539 U.S. 510 (2003).

4 Defendant McEnroe's motion to be tried after his co-defendant is based on a need for
5 access to evidence pertinent to his mitigation case. However, the Court will not understand
6 either what evidence is hoped to be obtained or what relevance it might have to Mr. McEnroe's
7 mitigation unless the Court is provided with information about Mr. McEnroe's mitigation
8 strategy and how the sought information would fit into the context of other mitigation evidence
9 including expert opinions. However, such information is confidential, sensitive, and protected as
10 work product generally and by SPRC discovery rules for capital cases. Premature publication of
11 Mr. McEnroe's mitigation strategies, as could happen should the Court deny his motion for
12 sealing, is likely to taint potential jurors, allowing for pre-trial cogitation on possible mitigation
13 evidence, and uninformed pressure from media and social commentary (such as comments under
14 on-line news articles). Also, the prosecution would have access to defense evidence prior to
15 final decisions made by the defense and prior to the time required for disclosure under SPRC
16 rules.
17

18
19 LGR 15(C)(3)(B) puts Mr. McEnroe's counsel to the choice of meeting their Sixth and
20 Eighth Amendment obligations to seek all relevant mitigation evidence and vigorously prepare
21 for a potential penalty phase trial by filing and arguing the motion regarding order of trial with
22 the confidential information attached to the motion to seal, OR, to avoid the risk of damaging
23 publication of confidential and privileged mitigation evidence by either not bringing the motion
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28 **MOTION TO WAIVE LGR 15 FOR THE**
29 **PURPOSE OF FILING DEFENDANT'S MOTION**
TO SEAL DEFENDANT'S "MOTION TO HAVE
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" – Page 8 of 11

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1 to be tried second or failing to properly support the motion. Either choice impinges on Mr.
2 McEnroe's constitutional rights.

3 A defendant should not be put to an unnecessary choice between constitutional rights.
4 *State v. Michielli*, 132 Wn.2d 229 (1997), *Simmons v. United States*, 390 U.S. 377 (1968).

5 It is especially important to make sure that procedures are fair and designed to protect the
6 accuracy of any decision in a capital case:
7

8 This conclusion rests squarely on the predicate that the penalty of death is
9 qualitatively different from a sentence of imprisonment, however long. Death, in
10 its finality, differs more from life imprisonment than a 100-year prison term
11 differs from one of only a year or two. Because of that qualitative difference,
12 there is a corresponding difference in the need for reliability in the determination
13 that death is the appropriate punishment in a specific case.

14 Woodson v. North Carolina, 428 U.S. 280 (1976). LGR 15(c)(3)(B), by discouraging counsel
15 from fully supporting requests for relief counsel believes are necessary to secure their client's
16 right to present mitigating evidence in a capital, does not promote reliability in capital sentencing
17 decisions. Regardless of whether LGR 15's requirements of simultaneous filing of motions to
18 seal with unredacted original documents, risk of disclosure of the documents should the court
19 deny the sealing motion, and lack of opportunity to seek review of the sealing decision by a
20 higher court, are acceptable in the civil cases the rule seemingly was intended to address, there is
21 no justification for the chilling effect of the rule in a capital case. Death is different.
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28 **MOTION TO WAIVE LGR 15 FOR THE**
29 **PURPOSE OF FILING DEFENDANT'S MOTION**
TO SEAL DEFENDANT'S "MOTION TO HAVE
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" – Page 9 of 11

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CONCLUSION

The Court should not apply LGR 15(c)(1)(B) to Defendant McEnroe's anticipated "Motion to Seal", "Motion to Proceed to Trial After Co-Defendant", and, if necessary, "Motion for Continuance of Trial Date."

1.) The Court should consider and rule on the defendant's "Motion to Seal" certain documents and information prior to considering Mr. McEnroe's substantive motions regarding the order and timing of trials;

2.) Should the Court deny the "Motion to Seal", the Court should allow the defendant an opportunity to seek review of the adverse ruling prior to openly filing the documents for which sealing is sought;¹

3.) Should the Court deny the "Motion to Seal", the Court should allow the defendant an opportunity to withdraw the substantive motions as well as the supporting documents without open filing and publication or disclosure to other parties;

¹In the context of a civil case the Court of Appeals has held that if the Court does not consider documents and does not base any decision on such documents are not subject to public disclosure:

Each sealed document in this case is like a witness subpoenaed to a trial who sits in the front row of the courtroom but is never called to testify. What the witness knows may be a matter of great public interest and curiosity. But our state constitution does not force that witness to speak.

Bennett v. Smith Bunday Berman Britton, 156 Wash. App. 293 (2010).

MOTION TO WAIVE LGR 15 FOR THE PURPOSE OF FILING DEFENDANT'S MOTION TO SEAL DEFENDANT'S "MOTION TO HAVE HIS TRIAL AFTER MICHELE ANDERSON'S TRIAL IS COMPLETE" – Page 10 of 11

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1 4.) The Court should declare LGR 15(c)(3)(B) unconstitutional, particularly in the
2 context of a capital case.

3
4 Respectfully submitted:

5
6 
7 Kathryn Lund Ross, WSBA No. 6894
8 Leo Hamaji, WSBA No. 18710
9 William Prestia WSBA No. 29912
10 Attorneys for Joseph McEnroe

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28 **MOTION TO WAIVE LGR 15 FOR THE**
29 **PURPOSE OF FILING DEFENDANT'S MOTION**
TO SEAL DEFENDANT'S "MOTION TO HAVE
HIS TRIAL AFTER MICHELE ANDERSON'S
TRIAL IS COMPLETE" - Page 11 of 11

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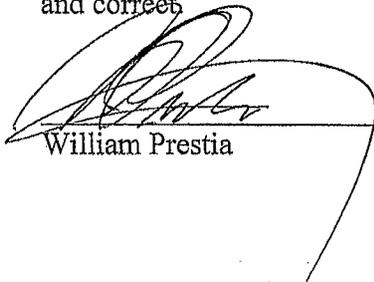
Certificate of Service by Hand Delivery / Inter-Office Mail

On June 15, 2011, I delivered to the attorneys for Respondent the State of Washington, King County Prosecuting Attorney's Office (James Konat and Andrea Vitalich) and co-defendant Michele Anderson (Colleen O'Connor and David Sorenson, Society of Counsel Representing Accused Persons), hard copies of the following documents in this case, Washington Supreme Court cause number 86084-0:

1. Statement of Grounds for Direct Review
2. Declaration in Support of Accelerated Review or Stay Pending Decision on Discretionary Review
3. Motion for Discretionary Review

The copies for Respondent's counsel were delivered to their office, King County Courthouse, 516 Third Ave., 5th Floor, Seattle, WA 98104. The copies for co-defendant's counsel were deposited in their inter-office mail box located at the King County Prosecutor's Office.

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



William Prestia

6/15/2011 - Seattle, WA
Date and Place

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 15, 2011, 3:17 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

ORIGINAL

OFFICE RECEPTIONIST, CLERK

To: Bill Prestia
Subject: RE: State v. Joseph McEnroe, Supreme Court No. 86084-0

Rec. 6-15-11

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From: Bill Prestia [<mailto:bill.prestia@defender.org>]
Sent: Wednesday, June 15, 2011 3:15 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: State v. Joseph McEnroe, Supreme Court No. 86084-0

Kindly file the attached document in State v. Joseph McEnroe, No. 86084-0:

Certificate of Service for Statement of Grounds for Discretionary Review, Declaration in Support of Accelerated Review or Stay Pending Decision on Discretionary Review, and Motion for Discretionary Review.

Thank you,
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Attorney for Joseph McEnroe

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