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STATE OF WASHINGTON
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CAPITAL CASE

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No. 86084-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

Vs.

JOSEPH T. McENROE, Petitioner

PETITIONER'S REPLY BRIEF

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ORIGINAL

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SUMMARY OF REPLY

Issue

What, if any, options are available to a capital defendant who has been denied sealing of sensitive documents filed in support of a primary motion or response? This is a question of first impression because no rule or opinion of this Court explains what should happen in case a motion to seal is denied.¹ This Court has articulated the issue simply:

Whether a party who requests the sealing of documents submitted to a court in support of a motion may withdraw the documents from consideration if the court denies the request to seal.

The Court, in formulating the issue, correctly recognized that withdrawn documents are not merely physically withdrawn, they are withdrawn “from consideration” meaning withdrawn documents are not part of any decision making of a court.

It should be noted here again that the issue is not whether the trial court should apply the standards of Seattle Times Co. v. Ishikawa, 97 Wn2d 30 (1982) in deciding whether to seal proffered documents. Mr. McEnroe agrees the Ishikawa standards apply. The issue is whether Mr. McEnroe should be permitted to withdraw sensitive documents if the trial

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Undersigned counsel represents to the Court that individual trial courts answer this question differently. Even within the King County Superior Court some judges automatically return documents to moving parties and others, including Mr. McEnroe’s trial court, believe KCLGR 15 requires open filing of documents upon denial of a motion to seal.

court, after applying Ishikawa standards, refuses to seal the documents.

Contrary to the State's formulation of the issue, the Court is not being asked to "announce a procedure whereby a party may withdraw materials ... if the trial court denies the party's motion to seal those materials," Response, p. 1. The Court is being asked to interpret its existing rules and recognize that capital defendants, at a minimum, are properly accorded the option of withdrawing materials from consideration of the court if a motion to seal is denied.

Facts

It must be kept in mind that Mr. McEnroe is here because he was proactive in seeking to avoid application of LGR 15. Had he initially filed a motion to seal documents in support of pleadings regarding the order of trial pursuant to LGR 15 and the trial court denied sealing, under LGR 15 those sensitive documents would have already been open to the prosecution to use against Mr. McEnroe in any way it wishes at the guilt phase or potential penalty phase of his trial. His previously confidential information, including mental health history, and mitigation strategies would be the fodder for media reports and available to all potential jurors in King County to discuss with their neighbors and cogitate long before the first juror is summoned. Mitigation witnesses, typically the source of private and intimate background information covering a defendant's formative years, would be subject to hounding by the media and may very

well lose interest in testifying at trial. The damage would be done and the Court could not undo it even if it decided the trial court was wrong to openly file the documents.

Unless this Court decides that its rules permit a capital defendant to withdraw documents if a motion to seal is denied, the only way Mr. McEnroe can assure that his mitigation evidence is not published is to not provide the trial court with any information he cannot afford to have published should sealing be denied.² The Sophie's choice is either to forego or ineffectively pursue important mitigating evidence by failing to put his request in the context of his theory of mitigation or to taint potential jurors, and advantage the prosecution's effort to have him executed, through premature publication of his mitigation case.³ Mr.

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In addition to being irrelevant, the State's assertion that "McEnroe obviously does not intend to withdraw his motion to be tried after Anderson," Response, p. 12, is wrong because Mr. McEnroe has not filed a motion to be tried after Anderson and, also, because he will certainly be forced to abandon his argument that he be tried second if that is the only way to assure his mitigation evidence and strategy is not prematurely published.

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The Commissioner's ruling precisely noted:

Were counsel assured at the outset that the defense could withdraw the documents if the request to seal them is denied, as permitted by explicit court rule in other jurisdictions, this dilemma would be solved, and the choice made less burdensome, if not completely clear.

Commissioner's Ruling, p. 9.

McEnroe must assume the trial court will not seal his sensitive documents because he doesn't know what the trial court will decide.

Mr. McEnroe is representative of all capital defendants in Washington because almost all penalty phase trials involve extremely sensitive evidence and there are often issues related to the penalty phase that must be litigated before trial. Capital defendants will adjust their motions practice depending on the Court's decision here.

REPLY ARGUMENT

State's Position and Reply

Although the State has agreed to the sealing of materials submitted by Petitioner Joseph McEnroe in support of his opposition to the State's oral motion that he be tried before codefendant, Michele Anderson,⁴ the State argues in its Brief of Respondent (Response) that King County Local General Rule 15 (LGR 15), requiring open filing of unredacted original documents if a motion to seal is denied, should be applied. The State favors capital defendants being put to LGR 15's version of Russian Roulette: Lucky spin and sealing is granted; losing spin results in inevitable public exposure of sensitive, otherwise confidential material, that may well prejudice future jurors and grant a windfall to the prosecution seeking his execution.

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"State's Answer to Motion for Discretionary Review," p. 6-7.

The State opposes a capital defendant⁵ being able to withdraw sensitive materials, even to withdraw any primary motion to which they related, in order to protect his right to a fair trial and sentencing proceeding. The State makes no mention of cases which prohibit requiring a criminal defendant to choose between two constitutional rights, in this case the Eighth Amendment right to pursue mitigating evidence and his Sixth Amendment right to an impartial jury and a fair sentencing hearing. The State argues a capital defendant is like “any other litigant” and must “run the risk of public disclosure if he cannot satisfy the Ishikawa standards.” Response, p. 16. The State is not concerned with a higher degree of due process normally accorded defendants whose lives are at stake in death penalty cases⁶ but seems to argue that, if anything, capital defendants should be afforded less protection of confidential mitigation strategy and information because when the death penalty is sought, “... the interests of the public and press are especially keen.”

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The State actually does not distinguish between capital defendants and all other litigants so its arguments include capital defendants.

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“... the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

Woodson v. North Carolina, 428 U.S. 280 (1976)

Response, p. 4.

The State's constitutional argument does not make sense and is not supported by Washington or United States Supreme Court case law on open courts. Under the State's logic, it comports with Article 1, section 10, for documents sealed from other parties, the media and public, after an Ishikawa analysis, to be fully considered by the court in making substantive decisions. Such documents are definitely relied on in a court's decision making process, may even be the crux of a ruling, and still be totally shielded from public access with no constitutional violation. However, if a motion to seal is denied, according to the State, it would offend Article 1, section 10, to allow a party to withdraw a document before it is ever part of a substantive decision and so it can never be used for any purpose by the court. This Court has previously determined that "[if] information does not become part of the court's decision making process, article 1, section 10, does not speak to its disclosure. Dreiling v. Jain, 151 Wn2d 900, 910, (2004). "We have already held that article 1, section 10, is not relevant to documents that do not become part of the court's decision making process." Rufer v. Abbott Labs, 154 Wn2d 530 (2005). The State's logic: Documents not to be used for any decision must be public, documents that are definitely the basis for a judicial decision may be completely sealed. That is not a sound constitutional conclusion.

The State's proposition that the only way this Court can recognize a right of parties to withdraw documents upon denial of sealing is through "the Court's rule making process," Response, p. 13, is completely without authority and contrary to past practice of the Court. This Court prescribed very important procedures for capital penalty proceedings in the seminal case of State v. Bartholomew, 101 Wash.2d 631, 647, 683 P.2d 1079 (1984), without employing any rule making procedures.

The State argues that "the merit of the motion to seal depends critically upon the nature of the underlying substantive motion" and apparently a trial court cannot decide a motion to seal supporting documents without considering the primary motion. Response, p. 10. However, not only does the State fail to cite a single case in support of this argument, it does not even offer an example of when or why a motion to seal would require a court to address the merits of the primary motion.

The State's only acknowledgment of federal court rules which explicitly permit withdrawal of materials if a motion to seal is denied is to say "there is no equivalent to Article 1, section 10 in the federal constitution, so federal courts have not confronted a constitutional question in drafting the federal rules." Response, p. 13. But this Court has recently noted,

The public's right to an open trial is mirrored federally by the First Amendment.

State v. Lormor, 172, Wn2d 85 (2011), citing, Press Enter. Co. v. Superior Court, 464 U.S. 501 (1984). There is a strong presumption of openness in criminal proceedings in the federal courts. Globe Newspapers v. Superior Court for Norfolk County, 457 U.S. 596 (1982). Allowing parties to withdraw documents when sealing is disallowed has not been found to offend the presumption of openness in the federal courts or other jurisdictions where withdrawal has been practiced for years.

Furthermore, the State does not respond to the fact that almost all federal district courts allow withdrawal of documents on failure of a motion to seal or even automatically return the documents to moving parties and yet there is no record of judges being tainted or other calamities the State claims are likely should withdrawal be acknowledged as an option. The long practice of the federal courts and many other states of allowing withdrawal of sensitive documents on denial of a motion to seal has apparently not encouraged unscrupulous counsel and corruption among the judiciary as posited by the State.

The State's concern that a trial judge's impartiality might be impaired by ruling on a motion to seal if the motion is denied, or that parties will manufacture motions to seal merely to get unsavory information into a judge's mind "hoping that the judge will be influenced by them nonetheless," Response, p. 15, are also refuted by this Court's decision in Tacoma News, Inc. v. Cayce, 172 Wn2d 58 (2011). There the

Court approved sealing of a preservation deposition that was taken before the trial judge but never introduced into evidence at trial. An unscrupulous party could schedule depositions of witnesses he never intends to call at trial merely so the trial judge would hear inadmissible allegations of wrong doing of the opposing party. This Court held that if the deposition is not used to support a motion or introduced at trial it is not subject to Article 1, section 10, regardless of what the trial judge may have heard or ruled on during the court room deposition. A judge ruling on a preliminary motion to seal sensitive supporting documents is no more likely to be improperly influenced than a judge hearing live deposition testimony. The situations are very similar.

The State Ignores Constitutional Prohibitions on Forcing Criminal Defendants to Choose Between Constitutional Rights

The State is cavalier in asserting a capital defendant is like all other litigants and, therefore, “McEnroe must make the same difficult tactical choice that any other litigant must make ... and run the risk of public disclosure if he cannot satisfy the Ishikawa standards.” Response, p. 16. Criminal defendants, especially capital defendants, are not like civil litigants. They have constitutional protections that do not apply in the civil cases. The State completely ignores the United States Supreme

Court's decision in Simmons v. United States, 390 U.S. 377 (1968),⁷ and this Court's decision in State v. Michielli, 132 Wn2d 229 (1997), which prohibit forcing criminal defendants to choose between constitutional rights.

It is likely the King County Superior Court's rules committee did not intend the rule to apply to criminal cases so as not to cause conflict with criminal defendants rights. As Mr. McEnroe pointed out below in his Motion to Waive LGR 15, criminal cases are not mentioned in the text of LGR 15 and were not mentioned when the local rule was put out for comment.⁸ The trial court's "Order on Defendant's Motion to Waive LGR 15" acknowledges that LGR 15, as written, may only apply to "civil and domestic relations court records," Trial Court Order, p. 5, but proceeded to order LGR 15 will apply to all motions to seal brought in Mr. McEnroe's case.

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... we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Simmons v. United States, 390 US 377 (1968).

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See commentary of Honorable Paris Kallis, ret. King County Superior Court, in the April, 2009, WSBA Bulletin. App. A.

CONCLUSION

The Court should find the trial court erred in ordering that LGR 15 will apply to all defense motions. The Court should hold that when a motion to seal documents in a capital case is denied, the defendant should be allowed the option to withdraw the documents from any consideration of the Court and keep the documents shielded from public disclosure.

Dated: October 24, 2011.

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