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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHEN,

Appellant.

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

 ORIGINAL

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A. ISSUE PRESENTED FOR REVIEW.

Court records are presumptively open to public scrutiny pursuant to article I, section 10 of the state constitution. Competency evaluations filed with the court to make a determination whether a criminal defendant is competent to stand trial are court records. Court records may only be filed under seal or redacted based on an individualized determination of the factors set forth by this Court in Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Did the trial court properly exercise its discretion in applying the Ishikawa factors and determining that the competency evaluation in this aggravated murder case should be filed and open to public scrutiny, with some limited redactions?

B. STATEMENT OF THE CASE.

On August 16, 2011, Louis Chen was charged with two counts of aggravated murder in the first degree, alleged to have occurred between August 8 and August 11, 2011. CP 1-2. The victims were two-year-old Cooper Chen, the defendant's son, and Eric Cooper, the defendant's partner. CP 1-6.

The Certification for Determination of Probable Cause filed in this case reflects that on August 11, 2011, the day that the murders

were discovered, Chen was scheduled to start work at Virginia Mason Hospital as an endocrinologist. CP 3. On that day, two women knocked on the door of Chen's apartment. CP 3. He answered the door naked and covered in dried blood. CP 3. When police arrived, Chen was slumped by the front door. CP 4. Eric Cooper and Cooper Chen were dead and had multiple stab wounds. CP 4. Eric Cooper had more than 100 stab wounds. CP 5. One of the officers asked Chen, "Who did this?" CP 4. Chen responded, "I did." CP 4. Five knives were found at the crime scene, all with apparent blood stains on them. CP 4-5.

Six weeks after the charges were filed, the defense presented mitigation materials¹ to the State that included a letter from a defense-retained psychiatrist that opined that Chen was not competent to stand trial. CP 14. In a second letter, provided by the defense three weeks later, the psychiatrist opined that Chen remained incompetent to stand trial, but that his mental state was improving. CP 14.

At the State's request, the superior court ordered that Chen's competency be evaluated by Western State Hospital. CP 8-12.

The defense agreed that a competency evaluation was appropriate,

¹ The King County Prosecuting Attorney has elected not to seek the death penalty in this case.

noting that they had been “focusing very closely on our client’s mental health status.” RP 10/28/11 4-6. After that order was entered, the defense provided to the court a third letter from the defense-retained psychiatrist in which he opined that Chen was no longer incompetent to stand trial. CP 17-19. The superior court denied a defense motion to vacate the order for a competency evaluation. CP 20.

Before the competency evaluation was completed, the superior court entered an order directing Western State Hospital to deliver its completed evaluation to Chen’s defense counsel only, in order to give defense counsel an opportunity to request redactions or sealing. CP 90-91.

The superior court found Chen competent to stand trial. CP 107-08. Chen requested that the court seal the entire competency evaluation, or, in the alternative, redact “references to Dr. Chen’s private medical records and other privileged and sensitive information.” CP 98-102. A television station that was present objected to the defense request to seal the competency evaluation. RP 3/29/12 41. The court denied the request to seal the entire evaluation, but entered a written order, specifically addressing the factors set forth in Seattle Times v. Ishikawa, 97

Wn.2d at 37-39, and concluding that portions of the competency evaluation that contain privileged health care information² should be redacted. CP 131-36. The court found the redactions necessary to protect Chen's right of privacy and right to a fair trial. CP 132. The filing of the redacted version of the evaluation has been stayed pending this appeal. CP 128-29.

The superior court also entered an order, requested by the defense, enjoining the prosecuting attorney from releasing the competency evaluation to anyone requesting a copy under the Public Records Act, concluding that the evaluation is exempt from public disclosure. CP 137-64, 203-04. A television station had filed a public disclosure request seeking the competency evaluation. CP 79, 181.

On January 7, 2013, Chen filed a notice pursuant to CrR 4.2 notifying the State that he will be raising a defense of insanity or diminished capacity at trial. Supp CP ___ (sub 87). The trial date is currently set for November, 2013. Supp CP ___ (sub 89).

² The superior court ordered Harborview Medical Center to provide Chen's medical records from August 11, 2011, to Western State Hospital to assist in the competency evaluation. CP 82. At the time of his arrest, Chen was transported to Harborview for medical care and remained there for several days before being transported to the King County Jail. CP 37. The medical records were provided only to Western State Hospital staff, who are prohibited by the superior court's order from disclosing the records to anyone else. CP 90. The court allowed Western State to reference information contained in the medical records in the competency evaluation only to the extent necessary. CP 90.

C. ARGUMENT.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN APPLYING THE ISHIKAWA FACTORS AND CONCLUDING THAT THE COMPETENCY EVALUATION IT HAD RELIED UPON SHOULD BE FILED WITH LIMITED REDACTIONS.

Chen argues that the trial court erred in not filing the entire competency evaluation in this case under seal. Chen does not argue that the trial court applied the Ishikawa factors improperly. Rather, Chen argues that RCW 10.77.210 requires that *all* competency evaluations be filed under seal. In so arguing, Chen ignores the clear dictate of the state constitution: that justice must be administered openly. If RCW 10.77.210 did require all competency evaluations relied upon by the courts to be filed under seal, it would be unconstitutional. However, this Court can and should construe the statute so as to be constitutional. It does not require all competency evaluations to be filed under seal. A competency evaluation submitted as a court record may be sealed or redacted to protect important interests only after the court conducts an individualized determination of the five factors set forth in Ishikawa. Because that procedure was followed in this case, and the court did not abuse its discretion, the trial court's order should be affirmed.

The state constitution mandates that “justice shall in all cases be administered openly.” Art. I, § 10. “Our founders did not countenance secret justice. ‘Operations of the courts and the judicial conduct of judges are matters of utmost public concern.’” Dreiling v. Jane, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978)). Both the public and the press have the right to be informed as to the conduct of the judicial branch, as public scrutiny is a fundamental check on the conduct of judges and the power of the courts in a free and democratic society. Bennett v. Smith Bundy Berman Britton, PS, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 105871 (slip opinion, filed 1/10/2013) (Chambers, J., lead opinion). Proceedings that are cloaked in secrecy foster public mistrust, and raise the potential for the misuse of power. Dreiling, 151 Wn.2d at 908.

All documents that are filed with the court and considered by the court in making a decision are presumptively open to public view pursuant to article I, section 10. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005). This applies to all decisions made by the court, not just dispositive motions. Id. As this Court has previously stated, to accomplish the goal of article I,

section 10, “the public must—absent any overriding interest—be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making *any* ruling, whether ‘dispositive’ or not.” Id. at 549 (emphasis in original).

There can be no question that a competency evaluation relied upon by the trial court in finding that a criminal defendant is competent to stand trial is a court record that is presumptively open pursuant to article I, section 10. State v. DeLauro, 163 Wn. App. 290, 258 P.3d 696 (2011). Nor can there be any question that the presumed openness of such court records advances the purpose of the constitutional guarantee of the open administration of justice. The press and the public certainly have an interest in being able to scrutinize a decision by a criminal court as to whether a defendant is of sufficiently sound mind to stand trial, particularly where, as here, the defendant is charged with the most serious crime defined in our criminal code: aggravated murder.

The public’s right to access court records is not absolute. Ishikawa, 97 Wn.2d at 36. This right to access may be limited to protect other important interests. Id. However, the presumption of openness provided by the state constitution must be overcome by an individualized determination of the need to protect other

important interests. A court record that has been filed with the court and considered by the court in making a decision may only be shielded from public view after the court has conducted an individualized determination of the five factors set forth by this Court in Ishikawa, Rufer, 154 Wn.2d at 535. These five factors are:

- 1) The proponent of sealing must make some showing of the need therefor. If the need is something other than a criminal defendant's right to a fair trial, the proponent must show a serious and imminent threat to that other interest.
- 2) Anyone present when the sealing motion is made must be given an opportunity to object.
- 3) The court, the proponent and the objectors should carefully analyze whether the requested method for curtailing public access would be the least restrictive means available to protect the identified interest.
- 4) The court must weigh the interests identified by the proponent of sealing against the interests of the public.

- 5) The order must be no broader in its application or duration than necessary to serve the interests identified. If the order involves sealing, it must apply for a specific time period "with a burden on the proponent to come before the court at a time specified to justify continued sealing."

Ishikawa, 97 Wn.2d at 37-40.

Entire documents should not be shielded from public scrutiny if the redaction of sensitive items will satisfy compelling interests that have been demonstrated. Dreiling, 151 Wn.2d at 916. Where the trial court employs the proper standard in determining a motion to seal or redact court records, the court's order is reviewed only for an abuse of discretion. Rufer, 154 Wn.2d at 550.

In the present case, the trial court properly considered the five factors set forth in Ishikawa, as evidenced by its written order in which those factors are explicitly addressed. CP 197-202. The court found that redaction of portions of the competency evaluation containing reference to privileged medical records was necessary

to protect two important interests: Chen's right to privacy³ and to a fair trial. CP 198-99. The court gave other parties the opportunity to object and be heard. CP 199-200. The trial court reasonably determined that the least restrictive means to protect Chen's privacy interests was to redact portions of the competency evaluation that referred to information from privileged medical records. CP 200.

The State does, however, question the trial court's focus on the "voluntariness" of the competency evaluation in its Ishikawa analysis. The defense-retained psychiatrist was the first to raise the question of Chen's competency by offering a written opinion that Chen was not competent. CP 18. Whenever there is reason to doubt a defendant's competency, the court is statutorily required to order an evaluation. RCW 10.77.060(1)(a). This requirement protects the defendant's fundamental due process right not to be tried while incompetent to stand trial. State v. Heddrick, 166 Wn.2d

³ Once a defendant puts his mental state in issue, he waives medical privileges such as the physician-patient and psychologist-patient privileges as to evidence relevant to his mental state. In re Personal Restraint of Rice, 118 Wn.2d 876, 894, 828 P.2d 1086 (1992). Now that Chen has notified the State that he will raise insanity or diminished capacity, his right to privacy in his medical records is significantly diminished. See also State v. Hamlet, 133 Wn.2d 314, 320, 933 P.2d 1026 (1997). In light of this development, the trial court may be required in the near future to revisit its weighing of the defendant's privacy interests against the public interest, as the trial court indicated it would in its order. CP 132-35. Nonetheless, the issue on appeal is whether the trial court abused its discretion in its April 9, 2012 order, and later developments are not material to this inquiry.

898, 903-04, 215 P.3d 201 (2009). Incompetency cannot be waived. Id. at 905. Thus, the “voluntariness” of the defendant’s participation in a constitutionally and statutorily required competency evaluation should be immaterial to the court’s analysis of the Ishikawa factors. Nonetheless, the trial court did not abuse its discretion in applying the Ishikawa factors in this case, and concluding that the competency evaluation should be filed, with portions referring to information from the privileged medical records redacted.

Chen focuses his argument on RCW 10.77.210. He claims that RCW 10.77.210 requires that competency evaluations submitted to the court must be filed under seal. If this were so, the statute would plainly violate article I, section 10. In In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011), this Court held that the superior court rule providing that involuntary commitment proceedings “shall not be open to the public” violated article I, section 10. This Court cited Ishikawa in reiterating that “the open administration of justice is a vital constitutional safeguard and, although not without exception, such an exception is appropriate only under the most unusual circumstances.” In re D.F.F., 172 Wn.2d at 41. Because the court rule automatically closed

involuntary commitment proceedings without requiring the court to make the constitutionally mandated determination under Ishikawa, it violated article I, section 10. Id. Likewise, if RCW 10.77.210 were to be construed as requiring courts to seal all competency evaluations submitted as court records, effectively “closing” them from the public, it would also violate article I, section 10.

Similarly, in Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993), this Court held that a statute requiring courts to keep information identifying child victims of sexual assault from the public during the course of trial or in court records violated article I, section 10. As in D.F.F., this Court held that the state constitution requires a case-by-case analysis using the Ishikawa factors before information in court records can be kept from the public. Id. at 210-11. Statutes and court rules may not presume closure without running afoul of the state constitution. To the extent that privacy interests are compelling, those can be protected through case-by-case application of the Ishikawa factors, as was done in this case.

RCW 10.77.210 can and should be interpreted in a manner that renders it constitutional. Where possible, the court must interpret a statute in a manner that preserves its constitutionality.

State v. Rice, 174 Wn.2d 884, 899, 279 P.3d 849 (2012); City of

Seattle v. Webster, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

Notably, RCW 10.77.210 governs many records and reports that may never become court records. To the extent that it limits disclosure of those, it is not unconstitutional. As to those records that are provided to the court, the statute reads, "all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records." RCW 10.77.210(1), thus, on its face, directs the persons who create and maintain these reports and records to provide them only to the designated entities. The statute does not address what happens to the records or reports once they become court records. The statute does not direct courts to file such records and reports under seal. This Court can interpret the statute so as to comport with the constitutional requirements of article I, section 10, by holding that once such records and reports are submitted to the court as court records, they can be kept from public view by sealing

or redaction only after an individualized determination based on the Ishikawa factors, as was done in the present case.⁴

Finally, whether, and to what extent, the competency evaluation is subject to disclosure under the Public Records Act (PRA) is not a question that is presented in this case. However, it should be noted that RCW 42.56.360(2) of the PRA incorporates 70.02 RCW and allows "health care information" to be redacted from public records before the records are disclosed.⁵ See Prison Legal News, Inc. v. Department of Corrections, 154 Wn.2d 628, 644-46, 115 P.3d 316 (2005).

In sum, the competency evaluation was the basis for the trial court's decision that Chen is competent to stand trial for aggravated murder. The competency evaluation is therefore a court record that must be presumptively open to public scrutiny pursuant to article I, section 10 of the Washington Constitution. The trial court reasonably applied the Ishikawa factors in this case, and determined that the competency evaluation should be filed, with

⁴ It should be noted that the "bright line" rule advocated by Chen is not, in fact, a bright line rule. Chen urges that this Court apply a "presumption" that competency evaluations should be sealed. Such a presumption turns the constitutional presumption of open courts on its head, and should be rejected.

⁵ The State argued below that the redacted competency evaluation provided to the prosecution was subject to public disclosure. CP 165-75. The court granted the defense motion to enjoin the State from releasing the redacted evaluation, but this order has not been appealed. CP 203-04.

some redactions to protect privacy interests of the defendant that existed at the time of that order. The trial court applied the proper standard and did not abuse its discretion.

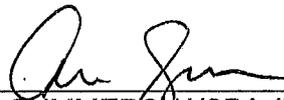
D. CONCLUSION.

The trial court's order should be affirmed.

DATED this 17th day of January, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Todd Maybrown, the attorney for the appellant, at 600 University Street, Suite 3020, Seattle, WA 98101, containing a copy of the Brief of Respondent, in, STATE V. CHEN, Cause No. 87350-0, in the Supreme Court, for the State of Washington.

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Ann Summers
Senior Deputy Prosecuting Attorney
WSBA #21509
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-296-9449
E-mail: Ann.Summers@kingcounty.gov

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