

2012 MAY 18 AM 10: 09

NO. 87350-0

IN THE SUPREME COURT OF WASHINGTON

(King County Superior Court No. 11-1-07404-4 SEA)

STATE OF WASHINGTON,

Respondent,

v.

LOUIS CHEN,

Appellant.

CLERK

BY RONALD R. CARPENTER

12 MAY 21 AM 8: 22

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

STATEMENT OF GROUNDS FOR
DIRECT REVIEW

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Louis Chao Chen seeks direct review of the King County Superior Court's Order on Motion to Seal Forensic Psychological Report ("Order"), dated April 9, 2012, a copy of which is attached hereto as Appendix A.

I. NATURE OF THE CASE AND DECISION

During August 2011, the King County Prosecuting Attorney charged the defendant, Dr. Louis Chen, with two counts of Aggravated First Degree Murder. *See State v. Chen*, King County Superior Court Cause No. 11-1-07404-4 SEA. Dr. Chen has entered a plea of not guilty to all charges. The King County Prosecuting Attorney subsequently concluded that this would not be an appropriate case for the death penalty.

In presenting evidence in support of mitigation, defense counsel advised the prosecution that Dr. Chen was suffering from psychosis. By November 2011, defense counsel informed the Superior Court that Dr. Chen's condition was improving and that he would likely be competent in a short period of time. Nevertheless, at the State's urging, the Court then signed an Order directing that Dr. Chen be evaluated at the Western State Hospital ("WSH").

On November 17, 2011, the parties returned to the Court and reported that Dr. Chen had yet to be transported to WSH. The defense then presented an updated report from a psychiatrist confirming that Dr. Chen had continued to make significant improvements and that he was

now competent to proceed. Thus, the defense argued that there was no longer any need to proceed with a competency evaluation. The State objected and refused to waive the statutory requirement of an evaluation by at least two experts. *See* RCW 10.77.060. The trial court then concluded that any WSH evaluation should be completed in the King County Jail.

The parties returned to court once again on December 19, 2011. The defense again objected to the competency evaluation and emphasized that Dr. Chen was being compelled to participate in this process. Moreover, the defense objected to the State's motion for an order directing Harborview Medical Center to provide a complete copy of Dr. Chen's medical and mental health records to WSH for use in the competency evaluation. Counsel argued then, and has consistently argued, that these records are privileged and must be protected under the constitution, HIPPA (42 U.S.C. § 1320) and Washington's Medical Records Privacy Act (RCW 70.02 *et seq*). Thus, the defense also made a motion to seal the WSH competency evaluation report in its entirety. After considering these matters, the Court granted the state's motion but also entered a Protective Order which limited disclosure of the WSH examination.

Two representatives of WSH met with Dr. Chen at the King County Jail on December 29, 2011. Thereafter, on January 11, 2012,

WSH faxed a copy of its report to defense counsel. In that report, the representatives of WSH confirmed that Dr. Chen was currently competent to proceed to trial. After reviewing the WSH competency evaluation report, defense counsel renewed the motion to seal.¹

On January 26, 2012, the Court confirmed that Dr. Chen was competent to proceed to trial. The Court put over the issue regarding sealing and/or redaction to a hearing on March 29, 2012. At the time of that hearing, the Court notified the parties that it had signed an Order denying the motion to seal. *See* Appendix A. The Court also advised the parties that it had agreed to some, but not all, of the redactions proposed by the defense.

Meanwhile, on March 30, 2012, Q13Fox sent the King County Prosecuting Attorney a public disclosure request seeking disclosure of the prosecution's copy of the WSH evaluation report. The defense then moved to enjoin the prosecution from disclosing this evaluation to Q13 Fox or any other person. On April 20, 2012, the Court granted the motion to enjoin, finding that the evaluation report is exempt from public disclosure under RCW 10.77.210 as incorporated in the Public Records Act through RCW 42.56.070(1) and that public disclosure of the

¹ Consistent with the Court's Protective Order, the defense also provided the State with a redacted version of the WSH report. To counsel's knowledge, this is the only version of the WSH report in the possession of the King County Prosecuting Attorney.

evaluation report is not warranted because Dr. Chen did not voluntarily submit to the competency examination and was ordered to participate in the competency evaluation process. At the time of the hearing, the court acknowledged that the earlier ruling refusing to seal the WSH report was seemingly inconsistent with the ruling enjoining the prosecutor from releasing the report. Recognizing the need for appellate clarification of these issues, the Court encouraged the prosecuting attorney to join both matters for review.

On May 16, 2012, pursuant to RAP 2.3(b)(4), the Superior Court certified this matter for appellate review. *See* Appendix B. In so ruling, the court noted that judges in the King County Superior Court are currently issuing inconsistent rulings on motions to seal WSH competency evaluation reports; some judges seal the entire report as a matter of course, other judges refuse to seal or redact the report at all as a matter of course, and still other judges (like the court in this case) redact to varying degrees. The court also noted that prosecutors routinely argue that the entire report should be filed while the defense routinely argues that the entire report should be sealed, and that appellate guidance would be of great assistance to the trial courts.

The appellant, Louis Chao Chen, now seeks direct review by this Court of the King County Superior Court's Order on Motion to Seal

Forensic Psychological Report. This Court should accept direct review, and provide clear guidelines for the superior courts faced with frequently recurring issues surrounding the proper handling of competency evaluation reports.

II. ISSUES PRESENTED FOR REVIEW

A. Should discretionary review be granted where the court certified that its Order on Motion to Seal Forensic Psychological Evaluation involves a controlling question of law to which there is substantial grounds for a difference of opinion and in so ruling recognized that courts rule inconsistently on the issue and need appellate guidance?

B. By denying Dr. Chen's motion to seal the Western State Hospital competency report, thereby ignoring the plain language of RCW 10.77.065 and 10.77.210 that specifically limits dissemination of the reports, did the court commit obvious error that renders further proceedings useless where the harm done by public filing of this private information cannot be remedied by appeal from the final judgment?

C. Should discretionary review be granted where the court committed probable error and altered the status quo by denying Dr. Chen's motion to seal the Western State Hospital competency report, contrary to the plain language of RCW 10.77.065 and 10.77.210 that specifically limit dissemination of such reports, thereby causing damage to Dr. Chen's privacy interests that cannot be remedied by appeal from the final judgment?

D. Should discretionary review be granted where the court committed probable error that altered the status quo by ordering a competency exam, over the defense objection, and then making public the results of the compelled competency evaluation, thereby causing an

irrevocable loss of statutorily and constitutionally protected privacy?

E. Should discretionary review be granted where the court's order denying the sealing of the compelled competency report, while granting the defense motion to enjoin the PDA request, involves a controlling question of law as to which there is substantial ground for differences of opinion, as evidenced by inconsistent handling of such issues by trial courts, and where the issue is inextricably related to a PDA issue currently before this Court in *Koenig v. Thurston County*, No. 84940-4?

III. GROUNDS FOR DIRECT REVIEW: This Case Involves a Fundamental and Urgent Issue of Broad Public Import Requiring Prompt and Ultimate Determination Under RAP 4.2(a)(4).

A party may seek Direct Review in this Court in: “A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(4). This case involves an issue of broad public import that is at least as fundamental and urgent and demanding prompt and ultimate determination as other issues directly reviewed under this Rule. *See, e.g., Alverado v. WPPSS*, 111 Wn.2d 424, 759 P.2d 427 (1988) (mandatory urinalysis); *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 765 P.2d 264 (1988) (subdivision application); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) (automobile wrongful death); *In re Marriage of Hadley*, 88 Wn.2d 649, 565 P.2d 790 (1977) (property division).

The Court has dealt with related issues in *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), which addressed the unsealing of previously sealed court documents. *See also Seattle Times v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010). Moreover, this Court is currently considering somewhat similar issues in *Koenig v. Thurston County*, 155 Wn.App. 398, 229 P.3d 910 (2010), *review granted*, 170 Wn.2d 1020, 245 P.3d 774 (2011), and *State v. McEnroe*, No 86084-0 (direct review accepted).

The *Koenig* case is of particular interest. There, the majority ruled that a SSOSA evaluation was not exempt from disclosure under Washington's Public Records Act ("PRA"). The majority rejected arguments that the evaluation was exempt as either essential to law enforcement or under the right to privacy set forth in the PRA.² However, a strong and persuasive dissent was written by Judge Armstrong, finding that SSOSA evaluations were exempt from disclosure under both the law enforcement and right to privacy exemptions. *See Koenig*, 155 Wn.App. at 424-35 (Anderson, J, dissenting in part). Judge Armstrong determined that "it is the final SSOSA recommendation, and what the State and trial court do with that recommendation, that is of public interest, not the

² The *Koenig* Court never addressed the issue whether the evaluation was a health care record. *See* 155 Wn.App. at 418. Other trial courts, notably some courts within King County, have concluded that a SSOSA evaluation is a health care record and not subject to disclosure under the PRA.

underlying details of the evaluation.” *Koenig*, 155 Wn.App. at 432. Judge Armstrong also concluded that the public interest in efficient government would be harmed significantly more than the public would be served by disclosure of SSOSA evaluations.

This reasoning is particularly apt in regards to a competency evaluation. Dr. Chen’s privacy rights are paramount here since the WSH competency evaluation report certainly contains highly personal information pertaining to himself, his family and others, the disclosure of which would be offensive to a reasonable person. This information is not of legitimate concern to the public – particularly so where, as here, the defendant is compelled to participate in the evaluation process and the parties have agreed that Dr. Chen is competent to proceed to trial.

The superior court procedures for handling competency evaluation reports are of great public interest and of vital concern to defendants. In fact, the superior court has recently certified that appellate review is appropriate in this case – and that the trial courts are in need of clear and definitive guidance from a reviewing court.

Appellant has presented declarations from two experienced criminal defense attorneys practicing in King County, Washington – Daron Morris (the Felony Supervisor and Deputy Director for The Defender Association) and Louis Franz (Supervisor of the felony unit at

Associated Counsel for the Accused) – both of whom point to the state of confusion that currently exists surrounding the handling of such reports. *See* Appendices C and D. This uncertainty causes considerable problems for both criminal defendants undergoing competency evaluations and the attorneys representing and advising them.

Such confusion is particularly dangerous today, when the trial courts are called upon to consider so many evaluation reports. According to attorney Morris, “WSH reports that they conducted a total of over 1500 competency evaluations of criminal defendants (for all counties that WSH serves).” App. C (Morris Dec. ¶ 3). Attorney Franz estimates that 5-10 % of all felony clients require a competency evaluation from WSH. *See* App. D. (Franz Dec. at 1).

Although these proceedings often play a critical role in criminal cases, this Court has rarely weighed in to offer guidance regarding the proper application of the procedures for conducting such examinations. *See, e.g., State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009) (defendant, through appointed counsel, waived completion of statutory competency procedures); *State v. Marshall*, 144 Wn.2d 266, 27 P.3d 192 (2001) (where a defendant moves to withdraw a guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw or convene a formal competency

hearing); *In re Fleming*, 142 Wn.2d, 853, 863, 16 P.3d 610 (2001) (defense attorney ineffective for failing to raise competency issue prior to entry of guilty plea); *State v. Wicklund*, 96 Wn.2d 798, 805 P.3d 610 (1982) (procedures of the competency statute are mandatory and not merely directory). To Appellant's knowledge, the Court has yet to provide any guidance regarding the parameters of the disclosure limitations in RCW 10.77.065 and 10.77.210.

Generally, competency evaluations arise in a pre-trial posture and it is challenging to obtain appellate review of the procedural issues surrounding the evaluation process and the handling of evaluation reports. The sheer number of such evaluations suggests that prompt and ultimate determination of these issues is necessary at this time. Without guidance from this Court, superior court judges are left with little direction on how to "balance" the defendant's privacy interests vis-à-vis the constitutional right to open courts.

The current practice among superior court judges in King County is wildly inconsistent. Some judges routinely seal the WSH reports or still do not place them in the court file, while other judges will consider redacting the reports, and some judges refuse to redact or seal and file the WSH reports in the court file. It appears that judges have widely differing views of what is required, given the nature of WSH reports and the

constitutional issues regarding open courts. *See* App. C (Morris Dec. ¶ 5). Attorney Franz echoes these same concerns and notes that there is no uniform approach regarding the proper method for handling these issues. *See* App. D (Franz Dec. at 2).

Such inconsistency is inherent in the Superior Court's conflicting rulings in this case. Initially, the court ruled that Appellant's motion to seal the competency examination must be denied. Later, relying on RCW 10.77.210, the court concluded that the public had no right to obtain a copy of a redacted version of the report. Not surprisingly, the Superior Court has concluded that prompt appellate guidance is necessary. *See* App. B.

Appellant recognizes that Division One has confronted a somewhat similar issue in *State v. DeLauro*, 163 Wn.App. 290, 258 P.3d 696 (2011). There, the Court concluded that a competency evaluation report is subject to the strictures of article 1, section 10. The *DeLauro* Court went on to provide the following cryptic analysis for future courts:

A forensic report on competency is not ordinarily available to the public. The evaluating facility may make available any report made pursuant to chapter 10.77 RCW only to specific persons identified in RCW 10.77.210. A report considered by the court in determining competency will therefore be available for public review only if the court maintains it in the court file. Applying the rationale of *Dreiling* and *Rufer*, we conclude the trial court erred by denying the State's motion to file the competency report.

Our decision does not necessarily mean the report will be open to public review. We are not deciding that the defendant's privacy concerns are insubstantial. DeLauro may still move under GR 15 to seal or redact the document if he can satisfy the five factor balancing test set forth in *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 37–39, 640 P.2d 716 (1982).

163 Wn.App. at 293-94.

On remand, the superior court properly concluded that Mr. DeLauro's examination must be sealed. *See* App. D (Franz Dec. App. A). In so ruling, that court emphasized that RCW 10.77.210 provides a statutory basis to limit disclosure. *See id.* (Conclusion 2). Moreover, the court concluded that the public interest in an agreed competency finding is limited and is outweighed by the defendant's privacy and safety concerns. *See id.* (Conclusion 5).³ Here, by contrast, the superior court reached a very different conclusion when denying the Appellant's motion to seal the WSH evaluation report.

Due process requires that a defendant be competent at the time of trial. *See Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975). RCW 10.77.050 provides that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” A determination of whether a

³ In *DeLauro*, the superior court also found that redaction of the evaluation would not be feasible or effective.

competency examination should be ordered rests generally within the discretion of the trial court. If these same courts make competency reports available to the public, it may chill a defendant's willingness to participate in an evaluation, resulting in a decrease in the accuracy and completeness of the evaluation. It may also cause a defendant to resist the efforts of their attorneys to bring competency concerns to the court's attention. This would ultimately lead to a greater likelihood of a defendant being tried while incompetent.

Given the values at stake, this Court should accept direct review and issue guidelines for future courts facing these vexing issues. Such guidelines will help to promote the due process protections intended by the competency evaluation procedure and the rights and responsibilities of the attorneys and defendants participating in the procedure.

RESPECTFULLY SUBMITTED this 17 day of May, 2012.



TODD MAYBROWN, WSBA #18557
Attorney for Appellant

PROOF OF SERVICE

Todd Maybrow swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 18th day of May, 2012, I sent by U.S. Mail, postage prepaid, one true copy of the Statement of Grounds for Direct Review to attorney for Respondent:

Donald Raz
Sr. Deputy Prosecuting Attorney
King County Prosecutor's Office
516 Third Ave., W554
Seattle, WA 98104

One copy was hand delivered to Appellant Louis Chen.

DATED at Seattle, Washington this 18th day of May, 2012.



Paula Smeltzer
Paralegal to Todd Maybrow

APPENDIX A

FILED
KING COUNTY, WASHINGTON
APR 09 2012
SUPERIOR COURT CLERK

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

STATE OF WASHINGTON, Plaintiff, v. LOUIS CHAO CHEN, Defendant.	No. 11-1-07404-4 SEA ORDER ON MOTION TO SEAL FORENSIC PSYCHOLOGICAL REPORT [Clerk's Action Required]
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Defendant is charged with murder. The court entered an Order Staying Proceeding and directing that the defendant be evaluated pursuant to RCW 10.77.060 as to whether he was competent to stand trial. That statute provides, in relevant part, that the evaluator shall be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. 10.77.060(1)(a).

By report dated 5 January 2012, Margaret D. Dean, M.D. and Daniel Ruiz-Paredes, M.D., of Western State Hospital, found the defendant to be competent to stand trial. Neither the State nor defense took issue with those opinions. On 26 January 2012, the court found defendant

competent and lifted the stay. The order was agreed in form and substance. Defense counsel moved to seal the WSH report, and the State objected.

The issue now before the court is whether the report should be sealed.

In consideration of defendant's motion, the court reviewed Ch. 70.02 RCW, RCW 10.77.210, RCW 10.77.065, GR 15, and 31, and Article 1 sections 7, 10 and 22 of the Washington Constitution, as well as *Seattle Times v. Ishikawa*, 97 Wash.2d 30 (1982), *Dreiling v. Jain*, 151 Wash.2d 900 (2004), and *State v. Momah*, 167 Wash.2d 140, 217 P. 3d 321 (2009). Additionally, while GR 22 does not apply, it does provide some guidance to the court.

The Supreme Court addressed sealing records in *Seattle Times v. Ishikawa*, 97 Wash.2d 30 (1982) and articulated the factors a trial court must consider before it can seal records.

1. The proponent of closure and/or sealing must make some showing of need.

The defendant has done so in this case.

- a. The defendant has constitutionally protected rights of privacy and to a fair trial. These are compelling concerns. Indeed, they are among the most basic rights guaranteed by our State constitution.
- b. The defendant was ordered by the court to participate in a competency evaluation. It was not voluntary.
- c. The report contains information about the defendant's social, criminal, medical and psychiatric history, disclosure of which may cause significant harm to the defendant's right to privacy.
- d. Chapter 70.02 RCW is entitled Health Care Information Access and Disclosure and contains legislative findings:

(1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests. RCW 70.02.005(1).

(3) It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

Health care information is defined as "any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care. RCW 70.02.010(7).

The legislature has stated that individuals have a fundamental interest in protecting the privacy of health care information. The fact that a person has been accused of a crime, in and of itself, does not mean that privacy right is forfeited. The records reviewed by the evaluator and the report itself fit within the definition of "health care information". The legislature recognizes the danger of disclosure of that information except in limited circumstances.

2. Anyone present when the sealing motion is made must be given an opportunity to object.

The State has objected. The court infers that defendant did not give notice of the motion to seal to the alleged victim's family; such failure is not fatal to defendant's motion. First, a complainant is not among those entitled to receive a copy of the

report under Chapter 10.77. Second, the rights of victims have been addressed in Article 1 section 35 of the State Constitution:

Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend.

An alleged victim tells the prosecutor he or she wants to be notified of a hearing, and the prosecutor may then notify the alleged victim of the hearing.

3. The court should analyze whether the requested method is the least restrictive means available and effective in protecting the interests threatened.

The court determines, in this case, that the appropriate remedy is to redact the report. Those portions of the report necessary to the court's finding that the defendant is competent will be left unredacted. The bulk of the report is analogous to the material produced in discovery in *Dreiling v. Jain*, 151 Wash.2d 900, 210 (2004): "As this information does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure."

4. The court must weigh the competing interests of the defendant and the public.

Defendant was ordered to undergo an evaluation. His status is not entirely unlike a party in a domestic relations or guardianship proceeding who was forced to participate in a parenting evaluation or for whom there was a CPS referral. In the latter context GR 22 provides any reports must be filed under seal. The defendant has a privacy interest in his medical, psychological and social history. The public does not have an unfettered right to that information simply because the defendant was accused of a crime. Should any of the information in the report be the basis of a

subsequent claim for relief from a decision by the court or trier of fact, the issue of whether or how much of the report should be sealed may be revisited.

5. The order must be no broader in its application or duration than necessary.

The entire report will not be sealed. The parts which were relevant to the court's determination of the issues whether the defendant is competent will not be redacted.

GR 15, adopted in 1989, addresses sealing and redacting records and provides that the court consider whether the sealing or redaction is permitted by statute. RCW 10.77.210(1) expressly limits the use and distribution of forensic mental health evaluations: "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." Although the statute continues to list additional health and law enforcement officers who may receive copies of the report, nowhere does it suggest the report be made available either to the victim or to the public.

The State's argument that RCW 10.77.210 merely limits to whom Western State can distribute the report but does not also limit the prosecutor, defense lawyer and court in their distribution of the report would make the statute meaningless and is rejected.

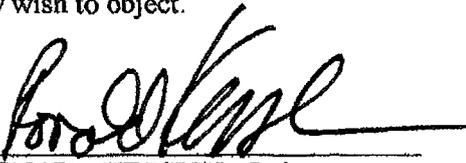
The issue of whether information contained in the WSH report may be admissible at trial is not before this court, and is distinct from the issue of whether the report should be filed in the public record.

Accordingly, the defendant's motion to seal the report in its entirety is denied. The court will file the redacted report, stayed pending defendant's motion for discretionary review. The

portions of the report that were considered by the Court in signing the order finding the defendant competent will not be redacted. On the court's motion, an unredacted copy of the entire report will be filed, under seal, available only for appellate review or for release should the court unseal the document. The clerk is directed to review the court file to assure that the original WSH reports have been properly sealed.

Plaintiff shall notify the complainant's family, if any, of this order and shall schedule a hearing should the complainant's family wish to object.

DATED April 9, 2012



RONALD KESSLER, Judge

APPENDIX B

FILED
KING COUNTY, WASHINGTON

MAY 16 2012

SUPERIOR COURT CLERK

SUPERIOR COURT FOR THE STATE OF WASHINGTON
KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

LOUIS CHAO CHEN,

Defendant.

No. 11-1-07404-4 SEA

COURT'S CERTIFICATION OF
ISSUE PURSUANT TO RAP 2.3(b)(4)

This Court having heard Defendant Louis Chen's motion asking this Court to certify, pursuant to RAP 2.3(b)(4), that the Order on Motion to Seal Forensic Psychological Report, dated March 22, 2012 and filed April 9, 2012, involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate appellate review of the Order may materially advance the ultimate termination of the litigation on this issue; and the Court having heard and considered the arguments of counsel on this issue;

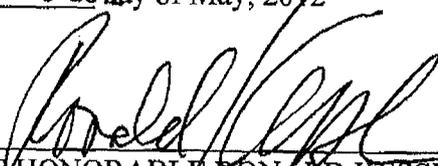
THIS COURT HEREBY CERTIFIES that the Court's Order on Motion to Seal Forensic Psychological Evaluation involves a controlling question of law as to which there

COURT'S CERTIFICATION OF ISSUE PURSUANT TO
RAP 2.3(b)(4) - 1

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1 is substantial ground for a difference of opinion and that immediate appellate review of this
2 Order may materially advance the ultimate termination of litigation on this issue by
3 resolving whether the competency evaluation report should be sealed

4 DONE IN OPEN COURT this MAY 16 2012 day of May, 2012

5
6 
7 THE HONORABLE RONALD KESSLER, Judge

8 Presented by:

9
10 _____
11 TODD MAYBROWN
12 WSBA No. 18557
13 Attorney for Defendant

14
15 _____
16 BARRY L. FLEGENHEIMER
17 WSBA No. 11024
18 Attorney for Defendant

19
20 _____
21 RAYMOND C. McFARLAND
22 WSBA No. 12257
23 Attorney for Defendant

18 Approved as to form only;
19 DANIEL T. SATTERBERG
20 KING COUNTY PROSECUTING ATTORNEY

21 By: 
22 DONALD J. RAZ
23 WSBA No. 17287
Senior Deputy Prosecuting Attorney

COURT'S CERTIFICATION OF ISSUE PURSUANT TO
RAP 2.3(b)(4) - 2

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APPENDIX C

DECLARATION OF DARON MORRIS

Daron Morris declares:

1. I am an attorney licensed to practice in the State of Washington (WSBA No. 32524) and am competent to testify. The matters set forth in this declaration are based on my personal knowledge and belief.

2. I am the Felony Supervisor and Deputy Director for The Defender Association, one of the public defender firms in Seattle. I have practiced criminal law in Seattle for approximately 11 years. There are approximately 22 lawyers working in the Felony Division of The Defender Association and they handle over 1500 felony cases per year.

3. Competency evaluations, in which criminal defendants are evaluated by psychiatrists at Western State Hospital (WSH) to determine their competency to stand trial, are very common in felony cases in King County Superior Court. In my experience, the number of competency evaluations required in King County has increased in recent years. I do not have exact statistics but I am aware that WSH reports that they conducted a total of over 1500 competency evaluations of criminal defendants in 2011 (for all counties that WSH serves).

4. Up until just a few years ago, judges would typically file written WSH competency evaluations under seal or would not file them at all. This practice was not considered controversial in light of the sensitive, privileged mental health information contained in those reports.

5. In light of recent cases and concerns about open courts, this practice has changed in the last few years, but the current practice among judges in King County is inconsistent. Some judges will seal or redact these reports, while other judges will not.

6. This inconsistent treatment of WSH competency reports and the risk that information in a WSH report may end up publicly available in the court file present problems for both criminal defendants undergoing competency evaluations and the attorneys representing and advising them. When there is a risk that anything a defendant says during a competency evaluation may end up publicly available in a competency evaluation report that is filed in the court file, defendants will be discouraged from fully and candidly participating in the evaluation, or may refuse to participate altogether. This undermines the due process protections intended by the competency evaluation procedure.

7. Many defendants are floridly incompetent and their attorneys cannot effectively advise them regarding the lack of confidentiality of the process. The limited dissemination of the reports mandated by RCW 10.77.065 (1)(a)(i) provided some protection for the privacy rights of these defendants but this protection is lost when the report is publicly available in the court file.

8. The risk that information in a WSH report may end up publicly available in the court file also damages the attorney-client relationship in these cases. Criminal defendants undergoing competency evaluations are often distrustful of their attorneys and many are being ordered to participate in the competency evaluation process against their wishes. This distrust and the concerns these defendants have increase when they are advised that anything they say may end up publicly available in the court file. Any palliative effect of being able to advise the client that these reports are essentially confidential is lost.

9. Redacting these reports is not a workable remedy because sensitive confidential information is often interwoven with the conclusions that judges rely upon and judges unwilling to seal these reports feel this sensitive information should remain unredacted because they relied upon it in reaching their decision about competency.

10. A clear ruling from this Court that dissemination of WSH competency evaluation reports should be limited to those parties specified in RCW 10.77.065 (1)(a)(i) and should not be publicly available in the court file best serves the due process protections intended by the competency evaluation procedure and the rights and responsibilities of the attorneys and defendants participating in the procedure.

THIS DECLARATION IS MADE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON.

SIGNED this 15th day of May, 2012 at Seattle, Washington.



DARON MORRIS

APPENDIX D

Declaration of Louis A. Frantz

Louis A. Frantz, declares as follows:

I am licensed to practice law in the State of Washington, WSBA # 12326. I was admitted to the bar in 1982. I am competent to testify and the matters addressed in this declaration are based on my personal knowledge and belief.

I am the supervisor at Associated Counsel for the Accused (ACA). I supervise the felony unit at the Regional Justice Center in Kent. I currently supervise eight attorneys. I have been the supervisor for 4 years. Prior to this position I was a Senior Attorney at ACA. I have been a public defender for 27 years; 16 of which have been spent in a felony practice.

My office does not keep statistics on the number of clients who require competency evaluations. Based on my experience I would estimate that 5% to 10% of our felony clients require a competency evaluation from Western State Hospital (WSH). Some clients have their competency restored only to decompensate later; these clients may require more than one evaluation. Competency is an issue for a number of other clients but the question is resolved, usually by using a retained expert, without the need for an evaluation by WSH.

In King County, for many years, the evaluations from WSH were not filed in the court file. I believe this was due to the sensitive nature of the information in the evaluations. In my experience, when evaluations were filed, they were also frequently sealed, particularly in more serious cases. I represented a client beginning in 2001 who was charged with aggravated murder. The evaluations were always filed, there were multiple evaluations in the case, and the court granted the defense motion to seal based in part on RCW 10.77.210. The court considered GR 15 and the Ishikawa factors before deciding to seal the evaluations.

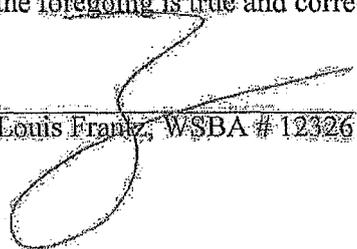
However, over the past few years, the court's response to WSH competency evaluations has changed. Some judges required that evaluations be filed while others did not. The issue of filing the evaluations was resolved in State v. DeLauro, 163 Wn. App. 290 (2011). In DeLauro, on remand, the reasons the trial court relied upon in declining to file the evaluation were used to support the trial court's ruling to seal the evaluation. See attached. There is not a uniform approach by the court's in responding to the motions to seal the competency evaluations; some courts will seal the evaluations, others will not and some will redact varying amounts of information. If there is a uniform approach regarding redaction by the Superior Court judges, I'm not aware of it.

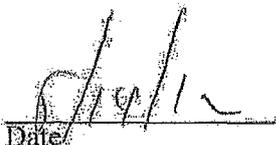
The diverse rulings by the trial courts have made a difficult situation even more complex. Defense counsel usually seeks to establish some level of trust with the client. That is always difficult with clients who are mentally ill. It is even more difficult when we are unable to assure a client to what extent, if at all, the information they provide to the WSH evaluators will be kept confidential. This can make clients less willing to share

information with the evaluator, which limits the accuracy of the evaluation. Additionally, with some clients, the disclosure of the evaluation will exacerbate their paranoia, making it more difficult to establish trust and work effectively with the client.

Unfortunately, many clients are so mentally ill they are not able to understand or properly consider the ramifications of being committed to WSH. At the conclusion of the evaluation, the report is submitted to the court and, depending on the court, filed and not sealed or redacted. Confidential information regarding the client is then made public simply because the client is too mentally ill to proceed to trial. If the client is incompetent the client never has the opportunity to understand what has happened or to provide any response to the court's decision not to seal the evaluation.

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


Louis Franz, WSBA # 12326


Date

FILED
KING COUNTY, WASHINGTON

MAR 07 2012

SUPERIOR COURT CLERK
REVEF. Y ANN ENEBRAD
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

1	STATE OF WASHINGTON,)	
2)	
3)	
4)	
5)	
6)	
7)	
8	Plaintiff)	No. _09-1-02387-1 KNT
9)	
10	v.)	MOTION AND ORDER TO SEAL
11	CHARLES DELAURO)	DOCUMENTS
12)	
13)	(ORS)
14	Defendant)	
15)	CLERK'S ACTION REQUIRED

MOTION

The defendant, by and through his attorney of record, Louis Frantz, moves that the documents referenced below be placed under court seal. The documents listed are records or reports which were generated pursuant to RCW 10.77. RCW 10.77.210 limits the release of all records and reports made pursuant to that chapter. RCW 10.77.210 states in part:

... Except as provided in RCW 10.77.205 and 4.24.550 regarding the release of information concerning insane offenders who are acquitted of sex offenses and subsequently committed pursuant to this chapter, 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. All records and reports made pursuant to this chapter shall also be made available, upon request, to the department of corrections or the indeterminate sentence review board if the person was on parole, probation, or community supervision at the time of detention, hospitalization, or commitment or the person is subsequently

MOTION AND ORDER TO SEAL DOCUMENTS

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1 convicted for the crime for which he or she was detained, hospitalized, or
2 committed pursuant to this chapter.

3 RCW 10.77.210 (Emphasis added).

4 A statutory basis exists to seal the records listed :

- 5 1. Western State Hospital evaluation dated September 22, 2009.

6 DATED this 16th day of February 2012.

7 Louis A. Frantz WSBA # 12326
8 Attorney for Defendant

9 **FINDINGS OF FACT**

- 10 1. The defendant was ordered to Western State Hospital (WSH) by the court. The
11 defendant had no discretion in whether to go to WSH.
- 12 2. At the time of the evaluation the defendant was told the evaluation was not
13 confidential but he was not told that it would be available to the public.
- 14 3. At the time he was informed the evaluation was not confidential he was
15 incompetent and his ability to understand that information was compromised.
- 16 4. Competency was not contested and an agreed order finding the defendant
17 competent was entered. There was no contested hearing regarding the
18 defendant's competency.
- 19 5. The evaluation, if not sealed, would be accessible to other inmates and could put
20 the defendant at risk of harm.
- 21 6. Redaction of the defendant's statement would not address the courts concerns
22 since the statements of the evaluators rely on and relate back to the statements of
23 the defendant.
- 7. There were no objections from members of the public to the sealing and the
defendant was not in custody or on supervision so notice to DOC was not
required.

19 **CONCLUSIONS OF LAW**

- 20 1. The lack of advisement that the evaluation could be made public, the defendant's
21 inability to decline to go to WSH and the risk to the defendant if other inmates
22 obtained the evaluation supports sealing the evaluation.
- 23 2. The sealing is statutorily authorized since RCW 10.77.210 limits the release of all
records and reports generated by Western State Hospital pursuant to a
competency evaluation.

MOTION AND ORDER TO SEAL DOCUMENTS

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- 3. The statutory limitation on dissemination of the records and reports provides, pursuant to GR 15, a sufficient compelling privacy interest which outweighs the public interest in access to these records.
- 4. Redaction of the evaluation would not be feasible or effective since information provided by both the defendant and the evaluator would need to be completely redacted.
- 5. The public interest in an agreed finding of competency is limited and is outweighed by the defendant's privacy and safety concerns.

ORDER

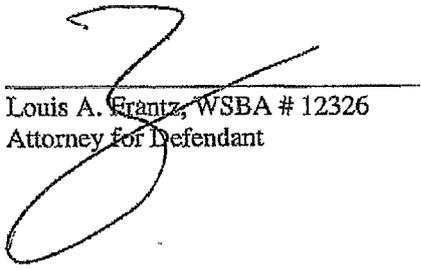
Now, therefore, it is hereby ordered that the following documents be placed under court seal. The documents shall not otherwise be disclosed to the public or the state absent further order of the court. However, this order does not limit the dissemination of any documents or records pursuant to RCW 10.77.210.

- 1. Western State Hospital evaluation dated September 22, 2009

SO ORDERED this 7th day of March 2012.


 JUDGE GAIN

Objections to seal noted on the record.


 Louis A. Grantz, WSBA # 12326
 Attorney for Defendant


 King County Deputy Prosecutor ~~2022~~

MOTION AND ORDER TO SEAL DOCUMENTS