

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3
4 JOHN DEMON MORGAN)

5 Appellant,)

6 vs.)

7
8 THE STATE OF NEVADA,)

9 Respondent.)

Electronically Filed
Mar 28 2017 10:29 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 70424

10
11 **APPELLANT’S MOTION TO RECONSIDER ORDER OF 03/08/17**
12 **ALTERNATIVELY,**
13 **MOTION TO KEEP COMPETENCY DOCUMENTS SEALED.**

14 Comes Now Appellant JOHN DEMON MORGAN, by and through
15 Deputy Public Defender SHARON G. DICKINSON, and requests Court
16 reconsider its 03/08/17 order denying John’s unopposed motion asking Court
17 to direct the Eighth Judicial District Court’s clerk’s office to transmit his
18 competency documents to the Court for use in his appeal. While the issue may
19 now be moot because defense counsel used great effort to obtain a copy of the
20 sealed or presumed confidential documents, John asks this Court to re-evaluate
21 the procedure he was required to use – as addressed in detail in this motion. In
22
23
24

25 ///

26
27 ///

1 this NRAP 27 Motion based upon the attached points and authorities and
2 declaration from defense counsel. John requests his competency records remain
3 sealed in this Court as they already are in district court.
4

5 DATED this 27th day of March, 2017.
6

7 PHILIP J. KOHN
8 CLARK COUNTY PUBLIC DEFENDER
9

10 By /s/ Sharon G. Dickinson
11 SHARON G. DICKINSON, #3710
12 Deputy Public Defender
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **POINTS AND AUTHORITIES**

2
3 John Morgan asked this Court to direct the Eighth Judicial District Court’s
4 Clerk’s Office to send mental health/medical reports from case C-14-302450-1 to
5 this Court to be included in his appendix for his appeal because he relied on the
6 documents in his brief. The public does not have access to his competency
7 reports in district court because they are considered confidential and placed in the
8 left side of the court’s file with the effect of being placed under seal. *See*
9 *Declaration.*

10
11 This Court said no, and directed counsel to obtain the documents, file them
12 in a separate appendix, and lodge them with the court while asking this Court to
13 seal them. Court added that documents filed for appellate purposes are
14 presumptively open to the public unless this Court determines they are not, citing
15 NRAP 30(d) and *Howard v. State*, 128 Nev. 736 (2012). *See Exhibit A.*

16
17 With due respect to the Court, NRAP 30(d) and *Howard* do not directly
18 apply in this instance. *Howard* involved pleadings first filed with this Court
19 which a party sought to seal while Morgan seeks to transmit documents already
20 deemed confidential in district court.

21
22 The *Howard* decision indicated all documents “filed in this court are
23 presumptively open to the public unless we exercise our inherent authority and
24 grant a motion to file specific documents under seal based on a showing that such
25 action is required by law or an identified significant competing interest.”
26
27
28

1 *Howard* at 139. This rule made sense in the *Howard* case because the document
2 the party wanted sealed was directly filed with this Court and never filed or
3 sealed in district court.¹

4
5 However, the *Howard* rule does not directly apply in this case because the
6 district court has already deemed these documents confidential and the public is
7 prohibited access to the documents in district court as addressed in ADKT 0410,
8 SRCR 7, and SRCR 3 (4)(f). The federal appellate courts also treat documents
9 already sealed or presumptively confidential in the lower courts differently from
10 those being sealed for the first time on appeal. Thus, a different rule should
11 apply.
12
13
14

15 The common practice in the Eighth Judicial Court is to place competency
16 documents in the left side of the district court file. This practice prohibits public
17 access to all competency records used by the court when deciding if a criminal
18 defendant is competent to stand trial. *See Declaration*.

19
20 The reason competency reports are placed in the left side of the district
21 court file is because mental health records are traditionally considered
22 confidential.² *Detroit News, Inc. v. Recorder's Court Judge*, 202 Mich.App. 595
23 (1993). This Court recognized the confidentiality of mental health records,
24
25

26
27 ¹ In *Howard*, Defense Counsel filed an ex parte substitution of attorney
28 motion in the Nevada Supreme Court, asking that his/her motion be filed under
seal without filing a specific motion. State opposed the motion.

² All documents listed above stem from court ordered mental health
evaluations of the Appellant. NRS 178.400 et seq.; NRS 179A.165.

1 finding there was a compelling privacy interest in keeping the information sealed
2 that outweighed the public's access to court documents. *Jones v. Nev. Comm'n*
3 *on Jud. Discipline*, 318 P.3d 1078, 1085, n. 3 (Nev. 2014).
4

5 The lower court's policy for prohibiting public access to competency
6 reports was allowed by this Court in ADKT 0410. On 07/22/12, in ADKT 0410,
7 this Court adopted a policy for handling filed, lodged, and presumptively
8 confidential documents such as competency documents. Through ADKT 0410,
9 this Court gave direction to the district, justice, and municipal court's clerk's
10 offices on how to handle confidential documents. Documents considered
11 presumptively confidential and non-public include: (1) any document sealed by
12 statute or court rule, and (2) medical records and mental health records (NRS
13 433)(HIPAA). ADKT 0410 (E)(1)(d) and (v) or AKDT 0410, Rule 5 (a)(5) and
14 (22), amendment 2015; also see 41 CFR part 2, NRS 433A.360, NRS 433A.715,
15 HIPAA.
16
17
18
19
20

21 Under ADKT 0410, a document listed as presumptively confidential is not
22 available to the public "until a sufficient threshold showing for disclosure has
23 been reached by way of motion." Thus, the party seeking access to the document
24 housed in district court has the burden to show disclosure is needed.
25

26 The *Howard* decision does not address ADKT 0410. *Howard* looked at
27 sealing requirements in federal court, the SRCR, and rules from other courts. The
28

1 *Howard* Court *only* discussed rules for documents *never* sealed and *never*
2 deemed presumptively confidential in the lower courts.

3
4 ADKT 0410, the SRCR, and the federal courts treat documents already
5 sealed differently.³ *Id.* at 142-43. John already explained that in ADKT 0410
6 mental health/medical records are presumed confidential.
7

8 As to the federal courts, in the first circuit, documents already under seal in
9 the lower court remain under seal when transmitted as part of the appendix. 1st
10 Cir. R. 11.0(c)(1). The third and seventh circuits automatically accept documents
11 already sealed or kept confidential in the lower court but require the party
12 seeking to keep the documents sealed to subsequently file a motion explaining
13 why the document should remain sealed. 3rd Cir. R. 106.1(c); 7th Cir. R. 10
14 operating procedures. The fourth circuit requires a party to file a certificate of
15 confidentiality for documents under seal in another court. 4th Cir. Local R. 25(c).
16
17 The Sixth circuit allows documents under seal in the lower court to be filed
18
19
20

21 ³ *Howard* Court relied on rules for documents not sealed in lower court. 1st
22 **Cir. R. 11.0(c)(2)** references documents not sealed in the lower court while 1st
23 **Cir. R.11.0(c)(1)** discusses documents already sealed. **3d Cir. R. 106.1(a)**
24 **references** the “general rules” for a request to seal a portion of a brief,
25 documents, or motion being filed in the Appellate court. However, 3^d Cir. R.
26 106.1(c) discusses documents already under seal. **4th Cir. R.25(e)(2)(B)**
27 discusses a request to seal documents while 4th Cir.R.25(1) explains procedures
28 for documents already sealed by another court. Court also relies on local rules
for federal district courts in South Carolina – not an appellate court.

1 without a motion and remain under seal unless further order by the court. *See* 6
2 Cir. R. 11(c); 6 Cir. R. 25(h). Hence, a majority of federal courts do not apply
3 the rules announced in *Howard* to documents previously sealed or deemed
4 confidential.
5

6
7 Also, the *Howard* Court did not recognize that the SRCR treats documents
8 presumed confidential or under seal differently from documents never sealed.
9 SRCR 7 indicates that documents already sealed in a civil court are available to
10 the Nevada Supreme Court and will remain sealed in the Nevada Supreme Court
11 subject to “further order of the that court.” SRCR 7.
12

13
14 Also, in SRCR 3 (4)(f) this Court determined that the public does not have
15 a compelling interest in access to mental health/medical records. “The public
16 interest in privacy or safety interests that outweigh the public interest in open
17 court records include findings that...the sealing or redaction includes medical,
18 mental health, or tax records.” SRCR 3 (4)(f). Thus, John’s request to keep his
19 mental health/medical records private outweighs the public’s right to access
20 judicial documents.
21

22
23 The *Howard* Court addressed SRCR 3 but not SRCR 7 and SRCR 3 (4)(f).
24 Therefore the *Howard* Court only provided rules and direction for sealing
25 documents in an appendix on appeal when the documents were not already sealed
26 or treated confidentially by the lower court. The *Howard* Court simply did not
27 address documents already sealed.
28

1 As this Court knows, there are no specific appellate rules for the handling
2 of competency/medical reports or sealed documents in criminal cases.

3
4 The only appellate rule addressing confidential documents included in an
5 appendix is NRAP 30(b)(6) which discusses a PSI. Under NRAP 30(b)(6) and
6 NRS 176.156(5), a PSI is not subject to public disclosure. When a party seeks to
7 place a PSI in an appendix, the party files a motion with the Court asking the
8 Court to order the district court to transmit the PSI to the Court in a sealed
9 envelope.
10
11

12 Because a PSI and competency reports are both kept confidential and
13 placed in the left side of the district court file, John attempted to use the NRAP
14 30(b)(6) procedure when he filed his motion and asked this Court to direct the
15 clerk's office to send the competency records to this Court. These documents are
16 unavailable to the public in the lower court and not a matter of public record.
17
18

19 Despite the fact that competency reports are mental health/medical reports
20 that are presumptively confidential and are sealed or kept from public access in
21 district court, this Court held John failed to make a sufficient showing for them to
22 be sealed or to remain sealed. So, John will address the *Howard* rules which
23 apply to sealing a document for the first time on appeal.
24
25

26 *Howard* requires discussion of four questions.

27 (1) file a motion and serve it on all parties in the criminal case,

- 28
- Here it is:

1 (2) identify the document or information to be sealed,

2 The documents are:

- 3
- 4 • Request for evaluation dated 12/01/14 and signed by judge on
 - 5 12/01/14.
 - 6 • Cover-sheet and report prepared by C. Philip Colosimo, Ph.D., dated
 - 7 12/14/14.
 - 8 • Cover-sheet and report prepared by Dr. Slagle dated 12/20/14.
 - 9 • Cover-sheet and report prepared by Lawrence Kapel, Ph.D., dated
 - 10 01/07/15.
 - 11 • Request for evaluation dated 04/16/15 and signed by judge on
 - 12 04/16/15.
 - 13 • Cover-sheet and report prepared by Mark Chambers, Ph.D., dated
 - 14 04/28/15.
 - 15 • Cover-sheet and report prepared by Gary Lenkeit, Ph.D., dated
 - 16 05/11/15.
 - 17 • Letter dated 12/02/15 from Dr. Neighbors, Director at Lake's
 - 18 Crossing, and accompanying evaluations from: H. Hale Henson,
 - 19 M.D., Debbie Fletcher, Ph.D., and Ruth Ann Wright, Ph.D.
 - 20

21 The documents are within Volume V pages 923-971. John is sending Volume V
22 by mail or drop box to this Court.

23

24 (3) explain why sealing is necessary by "identifying the grounds upon
25 which sealing the subject documents is justified" such as required by law
26 or by a significant competing interest and why less restrictive means are
inadequate. (Howard at 138, 143-44), and

27 As addressed previously, this Court finds mental health/medical records
28 confidential under ADKT 0410, SRCR 7 and SRCR 3 (4)(f). These documents
were placed in the left side of the file in district court and effectively were sealed

1 because the public has no access to the records. Mental health records are
2 traditionally considered confidential. *Detroit News, Inc. v. Recorder's Court*
3 *Judge*, 202 Mich.App. 595 (1993). Therefore, less restrictive means are
4 inadequate. John's right to privacy in his mental health/medical records
5 outweighs the public's interest in viewing judicial documents.
6

7
8 (4) "specify the duration of the sealing order" *Howard at 138, 144.*

9 The documents should remain sealed in this Court until completion of the
10 appeal and then returned to district court to be placed in the left side of the file.
11

12 CONCLUSION

13 John has made a sufficient showing that his competency records should
14 remain sealed on appeal. In the future, John asks this Court to use the procedure
15 already outlined in NRAP 30(b)(6) for a PSI when handling mental
16 health/medical reports (competency reports) on appeal. Alternatively, John asks
17 this Court follow the direction of SRCR 7, SRCR 3 (4)(f), and the first, fourth,
18 and sixth circuits by allowing mental health/medical reports to remain sealed
19 without filing a sealing motion requesting they be sealed or only requiring a
20 certification.
21
22
23

24
25 DATED this 27th day of March, 2017.

26 PHILIP J. KOHN
27 CLARK COUNTY PUBLIC DEFENDER

28 By /s/ Sharon G. Dickinson
SHARON G. DICKINSON, #3710
Deputy Public Defender

1 receive the copies of the sealed documents. However, the Deputy D.A.
2 handling this appeal did not want to sign the stip and order because she
3
4 mistakenly thought it relieved me of filing a motion with this Court. Because
5 the Deputy DA ignored my phone calls and email, I called the competency court
6
7 again and informed them of the problem. I also provided the competency court
8 with a copy of this Court's order. I finally received the documents on 03/14/17
9
10 from competency court.

11 I declare under penalty of perjury that the foregoing is true and
12 correct.

13 EXECUTED on the 27th day of March, 2017.

14
15
16 /s/ Sharon G. Dickinson
17 SHARON G. DICKINSON
18
19
20
21
22
23
24
25
26
27
28

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that this document was filed electronically with the
3 Nevada Supreme Court on the 27th day of March, 2017. Electronic Service of
4 the foregoing document shall be made in accordance with the Master Service
5

6 List as follows:
7

8 ADAM LAXALT
9 STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

10 I further certify that I served a copy of this document by mailing a
11 true and correct copy thereof, postage pre-paid, addressed to:
12

13 JOHN DEMON MORGAN
14 NDOC No: 1158013
15 c/o High Desert State Prison
16 P.O. Box 650
Indian Springs, NV 89018

17 BY /s/ Carrie M. Connolly
18 Employee, Clark County Public
19 Defender's Office
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEMON MORGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70424

FILED

MAR 08 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER

Cause appearing, the motion for an extension of time filed on February 6, 2017, is granted. NRAP 31(b)(3). The clerk shall file the opening brief received on February 7, 2017. Respondent shall have 30 days from the date of this order to file and serve the answering brief.

Appellant has also filed an unopposed motion requesting this court to direct the district court clerk to transmit sealed original exhibits from appellant's competency proceedings. Appellant fails to explain why the exhibits cannot be reproduced in a separate volume of the appendix and submitted for filing along with a motion to file that volume of the appendix under seal. See NRAP 30(d). Further, appellant fails to demonstrate that the exhibits are appropriate for filing under seal, and failed to submit the exhibits for this court's review. "[D]ocuments filed in this court are presumptively open to the public unless we exercise our inherent authority and grant a motion to file specific documents under seal." *Howard v. State*, 128 Nev. 736, 738, 291 P.3d 137, 138 (2012). A party who seeks to seal a document must file a written motion identifying the document the party wishes to seal and may submit the document separately from the motion. *Id.* at 746, 291 P.3d at 143. Such documents "will remain confidential for a reasonable period of time pending this

court's resolution of the motion." *Id.* The burden lies with the party seeking to seal a document to demonstrate adequate grounds for denying public access. *Id.* at 744, 291 P.3d at 142.

Accordingly, the motion is denied. Appellant may renew the motion if he can demonstrate why the exhibits are incapable of being reproduced in an appendix, and demonstrate adequate cause as to why the exhibits should be filed under seal.

It is so ORDERED.

Cherry, C.J.

cc: Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney