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SUPREME COURT
FILED

MAY 10 2010

Frederick K. O'Riagh Clerk

Deputy

In the Supreme Court of the State of California

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff & Respondent,

v.

JOHN CLYDE ABEL,

Defendant & Appellant.

CAPITAL CASE

Case No. S064733

Related Case
No. S175275

*Orange Co. Super. Ct.
Case No. 95CF1690*

**OPPOSITION TO APPLICATION FOR LEAVE TO FILE
UNDER SEAL SUPPLEMENTAL OPPOSITION TO
RESPONDENT'S MOTION FOR ACCESS TO JUNE 16, 1997
SEALED IN CAMERA HEARING TRANSCRIPT**

On April 27, 2010, John Clyde Abel filed an application for leave to file under seal a supplemental opposition to respondent's motion for access to Penal Code section 987.9 materials and the sealed reporter's transcript of

DEATH PENALTY

a June 16, 1997 *in camera* hearing. Respondent objects to the application and supplemental opposition because Abel did not file a redacted version of the supplemental opposition and he did not file a declaration containing facts sufficient to justify the sealing. Both are required by the California Rules of Court. As a result of Abel's failure to comply with the rules, the entirety of Abel's supplemental opposition and the reason Abel proffers for it to be sealed are unknown to respondent. Accordingly, Abel's request for leave to file the supplemental opposition under seal should be denied.

On February 25, 2010, respondent moved for access to Penal Code section 987.9 materials and the sealed reporter's transcript of an *in camera* hearing held June 16, 1997, in Abel's Orange County Superior Court trial, case number 95CF1690. Respondent seeks access to these materials to assist in filing an informal response to Abel's petition for writ of habeas petition filed in case number S175275. On April 6, 2010, this Court sent Abel's counsel a letter advising that the Court was considering whether to unseal, on its own motion, the June 16, 1997 reporter's transcript that was the subject to respondent's motion for access. On April 23, 2010, Abel filed an opposition to respondent's motion for access. On May 3, 2010, respondent filed a reply to Abel's opposition.

On April 27, 2010, Abel moved for leave to file under seal a supplemental opposition to respondent's motion for access to the sealed reporter's transcript, and the supplemental opposition was lodged conditionally under seal. However, Abel did not file a redacted copy of the supplemental opposition, and in his application for leave, Abel does not provide any basis for why respondent should be denied access to his supplemental opposition to respondent's motion for access to the June 16, 1997 *in camera* hearing transcript. In addition, Abel does not provide justification for filing the supplemental opposition under seal.

Abel cites California Rules of Court, rules 8.46¹ and 2.550(c)-(e), in support of his application to seal the supplemental opposition. (Appl. at p. 3.) Abel merely lists the criteria set forth in rule 2.550(d). (Appl. at p. 3.) However, Abel provides nothing to show he meets the criteria.² In addition, Abel's application contains no declaration to justify sealing the supplemental opposition. Further, Abel has not filed a redacted copy of the supplemental opposition to respondent's motion to access.

Rule 2.551 of the California Rules of Court is entitled "PROCEDURES FOR FILING RECORDS UNDER SEAL." The rule requires a copy of such a motion or application to be served on all parties.³ (Cal. Rules of Court, rule 2.551(b)(2).) "The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 2.551(b)(1).) A party seeking to file a

¹ Abel cites rule 8.160 (Appl. at p. 3); that rule was renumbered effective January 1, 2010, to 8.46.

² Rule 2.550(d) sets forth the factual basis a trial court must expressly find to seal a record as:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest.

Rule 2.550(d) codifies the criteria established in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-1218.

³ Abel served only the application cover page and proof of service on respondent. Counsel for respondent contacted Abel's counsel, Michael Belter, on May 5, 2010, and Belter provided respondent with a copy of the entire application *via* e-mail on that date.

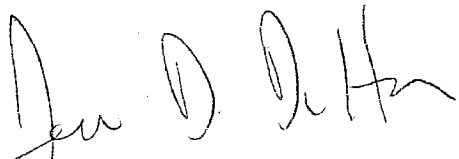
sealed record must file a public redacted version and lodge a complete version conditionally under seal. (Cal. Rules of Court, rule 2.551(b)(5).) While Abel has lodged the supplemental opposition conditionally under seal, no declaration accompanied his application and he has not filed a redacted version of the supplemental opposition. The sole basis for sealing the supplemental opposition provided in the application is that "Abel's sealed statement must be referenced." (Appl. at p. 2.) This is insufficient to justify sealing the supplemental opposition.

Respondent respectfully requests that Abel's application be denied and that the supplemental opposition not be filed under seal.

Dated: May 7, 2010

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. John Clyde Abel*
No.: **S064733**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 7, 2010, I served the attached **OPPOSITION TO APPLICATION FOR LEAVE TO FILE UNDER SEAL SUPPLEMENTAL OPPOSITION TO RESPONDENT'S MOTION FOR ACCESS TO JUNE 16, 1997 SEALED IN CAMERA HEARING TRANSCRIPT** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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SANTA ANA CA 92702-1994

ANTHONY J RACKAUCKAS
DISTRICT ATTORNEY
COUNTY OF ORANGE
P O BOX 808
SANTA ANA CA 92702

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 7, 2010, at San Diego, California.

STEPHEN MCGEE
Declarant


Signature