No. 39532-1-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Petitioner,

v.

MICHAEL PIERCE, Respondent,

JUDIE MORRIS, JEFFERSON COUNTY ELECTED OFFICIALS 1 THROUGH 5, AND THEIR EMPLOYEES JOHN DOES 1 THROUGH 50

RESPONSDENT'S RESPONSE BRIEF TO CONSOLIDATED BRIEF OF PETITIONERS

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A. STATEMENT OF THE CASE

On or about March 28, 2009, Mr. Michael Pierce was charged with two counts of premeditated first degree murder and alternatively with two counts of first degree felony murder. CP 1.[1] On July 17, 2009, the State filed a Second Amended Information charging Mr. Pierce with, along with several other felonies, two counts of aggravated first degree murder. CP 54. Because Mr. Pierce was subject to a potential sentence of death pursuant to RCW 10.95, the court, on May 26, 2009, appointed a death penalty qualified counsel consistent with Superior Court Special Proceeding Rules (SPRC). CP 30.[2]

In order to properly and effectively investigate the facts of the case as well as potential mitigation evidence, the defense, on June 11, 2009, filed various motions with the court, some of which were filed *ex parte* and under seal. For example, the defense filed a motion seeking funding for specific experts and defense team members to represent Mr. Pierce. The defense also moved the court for an order prohibiting the Jefferson County Jail from disclosing professional visits in preparation of State v. Michael Pierce, 09-1-00058-7 to the Jefferson County Prosecuting Attorneys' Office, and a motion for a protective order prohibiting the Jefferson County Jail from disseminating information contained in Mr. Pierce's Jefferson County Jail Records without a HIPPA

[1] CP refers to and is based upon on the Index to Clerk's Papers. VRP refers to Verbatim Report of Proceedings. The complete 8-14-2009 VRP is attached as Appendix A.

[2] On August 31, 2009, the State indicated it would not file a death notice. SPRC Rule 2 counsel was removed from the case on September 1, 2009. Both of these facts were done in an e-mail, not in open court or by formal documents, thus there are not clerk's papers indicating the same. The trial is currently scheduled for March 8, 2010.

compliant release, and then only to the person or persons specified on the HIPPA compliant release.[3]

When requesting motions be heard *ex parte* and under seal, counsel submitted supporting declarations and legal authority. On June 16, 2009, the Court upon reviewing counsels' motions, supporting declarations and legal authority, as well as considering all the factors set out in State v. Bone-Club, 128 Wn.2d 254, 258 – 59, 906 P.2d 325 (1995), concluded that Mr. Pierce's rights to a fair trial and effective representation, maintaining confidential attorney-client communications, and attorney work-product and strategies, necessitated a brief closure of the courtroom to address these matters. The Court also concluded that documents submitted as part of these motions included attorney-work product, defense strategies, and attorney-client communication, and thus should be sealed pursuant to Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, 66 (1985). The trial court memorialized these conclusions of a law and findings of fact in its order dated June 18, 2009. [Hereinafter June 18, 2009 order] CP 49 – 50.

Subsequent to the trial court sealing the orders appointing experts and their invoices and the invoices of defense counsel, defense counsel learned that other county departments become privy to confidential and sealed information. It was discovered, for instance, that once a court order approving payment for legal and expert fees and expenses is entered it is forwarded to the Auditor's Office with information identifying the person to whom payment is to be made and the specific amount to be paid. Once the Auditor's Office has approved court-ordered payment for legal and expert fees and expenses, the order is forwarded to the Commissioners' Office for payment authorization.

[3] The defense sought the protection order upon learning that Jefferson County Jail was providing confidential medical and mental information of Mr. Pierce to the Jefferson County Prosecuting Attorneys' Office without a signed release from Mr. Pierce, a violation of the Federal HIPPA laws.

Finally, the actual payment for legal and expert fees is made by the Jefferson County Treasurer's Office after authorization by the Commissioners' Office.[4]

To allow the Auditor's Office, Commissioners, and Jefferson County Treasurer's Office to properly perform their respective functions, while simultaneously complying with the Court's order and the express authority to seal privileged information, counsel for the defense requested the Court to direct the Auditor's Office, the Commissioners' and the Jefferson County Treasurer's Office to not disclose this information to any other party, person or entity beyond those integral to the payment process, so as to maintain Mr. Pierce's right to keep work product and confidential material privileged. The trial court issued an order on July 27, 2009, granting the defense motion. [Hereinafter July 27, 2009 order] CP 69 – 70.

The State/Petitioner sought review of both the June 18th and July 27th, 2009 orders to this Court. On July 30, 2009, the State filed with the trial court a Motion to Vacate its July 27, 2009 Order. CP 73-84. The hearing was scheduled for August 14, 2009.[5] At the August 14, 2009, hearing, the State/Petitioner argued that the trial court did not have authority to issue the July 27, 2009 order; that the July 27, 2009 order would effectively force Jefferson County officials to violate the Public Records Act (PRA); and the pre-trial identity of defense expert and team member were not privileged work-product. VRP 17 – 24.

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[4] Interestingly, each of these county officials is represented by Jefferson County Prosecuting Attorney, the same entity that is seeking to convict Mr. Pierce.

[5] On August 5, 2009, before the Motion to Vacate was heard, the State/Petitioner, filed a Notice for Discretionary Review to the Court of Appeals for the same July 27, 2009 Order. The defense, surprised by the State's procedural approach of seeking review with the Court of Appeals while simultaneously seeking a hearing before the trial court to vacate the same order, filed a Motion to Strike or Alternatively Reschedule the August 14, 2009 Argument. CP 111 – 117. The State objected and insisted that the trial court hear the matter on August 14, 2009. CP 127 – 135.

After hearing argument, the trial court concluded that it had jurisdiction to issue orders to facilitate and protect the defendant's right to fair trial and effective representation; that motions and declarations for expert services are properly filed *ex parte* and under seal pursuant to CrR 3.1(f) (1) – (2) and Jefferson County Ordinance No. 04-0323-09; that documentation surrounding defense funding are judicial records to which the PRA do not apply under Nast v. Michels, 107 Wn.2d 300, 307, 730 P.3d 54 (1986); and documentation in support of defense funds – except the amount – includes work-product, attorney-client privileged information that are exempt from the PRA if it did apply. The court's finding of facts and conclusion of law were formalized in writing on August 19, 2009 [hereinafter August 19, 2009 Order] CP 147 – 150. Specifically, the court ordered that:

1. The State's Motion to Vacate the Order dated July 27, 2009, is denied.

2. The detailed invoices of defense counsel, defense experts, and other service providers submitted for court approval shall remain sealed pursuant to the June16, 2009 Order.

3. In processing court-approved payment to defense experts, other service providers, and attorneys for work done in this case, County officials and staff in the Auditor's, Commissioners', and Treasurer's Offices shall not disclose names of the defense experts or other service providers or anything regarding the services that they or defense attorneys performed, except as set forth in §4 below, to any other person, party, or entity (including the county prosecutor's office and general public) beyond those county officials and staff integral to the payment process for court-approved invoices.

4. The July 27th Order is modified as follows: The total amount of court-approved payments in this case, for any given period, made to (1) defense counsel and (2) all experts and other service providers may be disclosed by the appropriate county department (i.e., from date to date: Attorneys - $xxxx, Expert and Other Service Providers - $xxxx).

5. This order is effective until the Superior Court proceeding in this matter is resolved or further order of this court or any appellate court.

CP 149.

The state and elected officials sought consolidated review of the protective order and both the July 27th and August 14th Orders. Discretionary review was granted on September 4, 2009. The Court Commissioner permitted the respondent to file a consolidated response brief addressing the issues raised by the Petitioner-State (State) and Petitioner-Elected Officials (Officials). For purpose of simplicity the term "petitioner" is used throughout the response, but each argument is under the petitioner raising the specific claim.

B. STANDARD OF REVIEW

The standard of review of a trial court's decision on a motion to seal or redact records is an abuse of discretion unless the trial court applied an incorrect legal standard, then it is remanded for application of the correct standard. Indigo Real Estate Services v. Rousey, 151 Wash.App. 941, 946, 215 P.3d 977, 979 (Div. 1, 2009). As noted below, since the trial court followed the proper legal standard the standard of review is an abuse of discretion. As such, where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971). See State v. Scott, 72 Wash.App. 207, 230, 866 P.2d 1258 (1993) (Forrest, J., dissenting), *aff'd. sub nom.* State v. Ritchie, 126 Wash.2d 388, 894 P.2d 1308 (1995); and State v. Marks, 90 Wash.App. 980, 989-990, 955 P.2d 406, 411 (Div. 3, 1998).

C. RESPONSE TO ISSUES RAISED BY PETITIONER-STATE

The petitioner sets out three issues in its appeal. Petitioners' Opening Brief, p. 2. All of the issues are encompassed into one argument. Id. at pp. 7 – 19. It appears the petitioner's position is that trial court erred in sealing the identity of defense experts and

services, the detailed invoices of those services, and signing a protection order regarding jail records. Id. at p. 13.

Since the legitimate basis for sealing motions for expert services, supporting memorandums and other documentation necessary to facilitate an indigent's right to effective representation and a fair trial is at the core of these claims, the response addresses that matter first.

1. The United States Constitution, the Washington State Constitution, Washington's Criminal Rules, and Jefferson County Ordinance Provide Ample Legal Support for Seeking Defense Experts and other Defense Services for an Indigent Defendant Ex Parte and Under Seal

The Sixth Amendment guarantees that Mr. Pierce receives effective assistance of counsel in a criminal proceeding. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The effectuation of this right imposes a duty to fully investigate known potential defenses, and where necessary to retain qualified experts to assist in the preparation of the defense. See e.g., In re the Personal Restraint Petition of Brett, 142 Wn.2d 868, 880, 85 16 P.3d 601 (2001). To comport with the Sixth Amendment, counsel must seek the assistance of necessary experts. See e.g., Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004). Additionally, since the case at that time was a potential capital case, counsel was simultaneously obligated to investigate evidence "to rebut any aggravating evidence that may be introduced by the prosecutor" and the investigation into mitigation evidence "should comprise efforts to discover *all reasonably available* mitigating evidence.'" *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines)* 11.4.1(C) (1989); Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 2537 (2003).

Since Mr. Pierce is indigent, the Fourteenth Amendment's Due Process Clause requires the court appoint necessary experts to assist him in his defense. Ake v. Oklahoma, 470 U.S. 68, 80-81, 105 S.Ct. 1087, 84 L.Ed. 2d 53(1985). This constitutional right has been codified in Washington's Criminal Rule (CrR) 3.1(f)(1) and (2). See also, State v. Kelly, 102 Wn.2d 188, 201 (1984). CrR. 3.1(f)(1) states that "A lawyer for a defendant who is financially unable to obtain investigate, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court." Furthermore, CrR 3.1(f)(2) states that such motions for these services "may be made *ex parte*, and upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court." Jefferson County has further codified CrR 3.1(f)(1) and (2) when, on March 23, 2009, it adopted Ordinance No. 04-0323-09 in order to be eligible to receive appropriated funds from the Office of Public Defense, which adopts the updated Standards for Public Defense Services by the Washington State Bar Association (Standards for Indigent Defense Services), including Standard Four: "...Requests for expert witness fees should be made through an *ex parte* motion. The defense should be free to retain the expert of its choosing and in no cases should be forced to select experts from a list pre-approved by either the court or the prosecution." (emphasis added).

When a defense expert is necessary, defense counsel must file a detailed declaration in support of a motion for funds that sets forth the legal and factual basis for the request. State v. Young, 125 Wn.2d 688, 692, 888 P.2d 142 (1995); State v. Adams, 77 Wn.App. 50, 888 P.2d 1207 (1995).[6] Defense counsel is therefore required to include

[6] Absent such a declaration, funds may be denied. State v. Heffner, 126 Wn.App. 803, 809, 110 P.3d 219, 223 (2005) (The court denied the motion for expert services because the defense failed to "identify the

specific information about the facts of the case, the client, and the specific expert requested in order to obtain funding. As a consequence, in order to obtain necessary experts and services, counsel is compelled to disclose the legal theories and facts upon which he is building his defense.

Counsel is also obligated to submit invoices for the work rendered for the court's approval of payment. These invoices require a detailed itemization of the work performed and include work-product, attorney-client privilege, and information that may have been given to the defense from their client under the attorney-client privilege. RCW 5.60.060(2); See e.g. Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 145 (1975). If that disclosure cannot be maintained under seal, an indigent defendant, unlike a defendant with means, is forced to choose between two now-competing aspects of the effective assistance of counsel: confidential case preparation and expert services. The Fourteenth Amendment's Equal Protection Clause prohibits such disparate treatment of indigent defendants. Bearden v. Georgia, 461 U.S. 660, 671-72, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

Even with substantial support that motions for experts and other services that involve privileged information should be filed *ex parte* and under seal in order to protect an indigent defendant's constitutional rights, the petitioner argues that these rights must give way to the public's right to access. Petitioner's Opening Brief, pp. 7 – 19. Although accurate that under Washington's Constitution, court proceedings and records should generally be open to the public, such a right, however, is not absolute. Washington

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expert witness he wished to present or the costs of the services, and he could not state with any specificity why an expert was needed.")

Constitution Art. 1 §10; Dreiling v. Jain, 151 Wn.2d 900, 867, 93 P.3d 861 (2004) ("Openness is presumed, but it is not absolute. The public's right of access may be limited to protect other significant and fundamental rights, *such as a defendant's right to a fair trial.*") (emphasis added). It is undisputed that the trial court, upon reviewing the necessary materials, concluded that a "significant and fundamental" right was at play. See e.g., CP 49 – 50 ("Upon balancing the public's right to an open proceeding and access with Mr. Pierce's rights to effective representation, confidential attorney client communication, and confidential preparation of his case without revealing possible trial strategy and attorney work product, the court closed the hearing and ordered documents sealed").

Moreover, the trial court complied with settled law when deciding to seal records and to close the courtroom. It is undisputed that the record demonstrates that the trial court on numerous occasions properly considered the factors set forth in State v. Bone-Club, 128 Wn.2d 254, 258 – 59, 906 P.2d 325 (1995), which include: (1) the proponent of closure of sealing must make a showing of a compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interest; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose.

First, the trial court's written order dated June 18, 2009 specifically illustrates that the trial court declined to consider the motions *ex parte*, or to seal, before considering the

factors set out in Bone-Club. CP – 50. Second, during the August 14, 2009, court hearing, the trial court stated:

> I'm going to look at the Ishikawa factors. This is the second time in open court, and the last time I balanced these was in open court, before I made that earlier order that seals the record [referencing the June 18, 2009 Order]. I looked at the Ishikawa factors, and Bone-Club factors. Mr. Alverez, you were even here and walked out of the courtroom when I called the case. VRP 41.

The trial court then proceeded to analyze each Bone-Club factor again. VRP 41 – 45. And finally, the trial court again specified its analysis under the Bone-Club factors in its July 27, 2009 Order. CP 147- 150.

The petitioner does not take issue that factors 1, 2 and 4 were satisfied, claiming instead that factors 3 and 5 are missing from court's orders sealing the identity of defense experts, detailed invoices, and jail records. Petitioners' Opening Brief, p.10 - 13.

2. Conducting Limited *Ex Parte* Hearings and Sealing Moving Documents that Pertain to the Appointment of Experts and Other Defense Services and Not Disclosing the Identity of such Experts is Necessary and Appropriate to Protect an Indigent Defendant's Rights

The petitioner argues that the identities of defense retained experts should be disclosed. Petitioners' Opening Brief, pp. 13.[7] The petitioner proposes three groundless bases for its position: (1) other jurisdictions hold that the identity of defense retained expert will not violate the attorney-client privilege or some other right; (2) the Washington Supreme Court adopted a similar position in State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) and State v. Pawlyk, 115 Wn.2d 457, 800 P.2d 338 (1990);

[7] It is unclear is whether the petitioner claims that the trial court did not comply with Bone-Club factors 3 and 5 before sealing defense services detailed invoices. A review of the record quickly demonstrates the court considered and rejected alternative means and did limit the duration of its orders. See e.g., CP 49 – 50; VRP pp 44 - 45 (trial court finding extraordinary time and effort of a least restrict alternative (i.e., redaction) unworkable); CP 47 (sealed until further order from the Court); CP 149 (This [August 19] Order is effective until the Superior Court proceeding in this matter is resolved or further order of this court or any other appellate court).

and (3) an amorphous policy concern that the identify of defense experts is warranted if that expert needs access to the state's evidence. Each of the petitioners' arguments fails.

First, the petitioner cites to numerous out-of-State cases to suggest that *ex parte* hearings for indigent expert services is not constitutionally required. Petitioners' Opening Brief, pp. 13 – 14. In making such a blanket assertion, the petitioner fails to appreciate the significant distinctions between the cases they cite and Washington law. For example, the petitioner seeks authority in State v. Alpelt, 176 Ariz. 349 (1993). Petitioners' Opening Brief, pg. 13. However, in Alpelt, the court concluded since there was no authority under Arizona law permitting *ex parte* hearings, to do so would violate Canon 3(A)(4) of the Code of Judicial Conduct, which forbids *ex parte* proceedings except where authorized by law. Alpelt, at 365. Unlike Arizona, Washington State and Jefferson County provide for the authorization for *ex parte* hearing for expert services. CrR (f) (1) – (2), Jefferson County Ordinance No. 04-0323-09.

Similarly, the petitioner cites to cases from North Carolina, South Dakota, Virginia, and Louisiana to argue its point. But again, those states have decided that an *ex parte* hearing for defense services is not required under their respective case law and statues. As noted, Washington State does. The Court in Moore v. State, 390 Md. 343, 370-371, 889 A.2d 325, 341 (Md.,2005) explains in great detail the split in authority, and concludes that the jurisdictions that require *ex parte* hearings, such as Washington State, is better reasoned:

> The [United States] Supreme Court, in Ake, referred to an *ex parte* hearing, stating that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." Ake, 470 U.S. at 82-83. Defendants may be required to reveal to the court the defense theory in order to

demonstrate entitlement to expert assistance. A defendant may request that these disclosures be made *ex parte*. Paul C. Gianelli, Ake v. Oklahoma: *The Right to Expert Assistance in a Post-Daubert, Post-DNA World,* 89 Cornell L.Rev. 1305, 1338, 1402-1404 (2004).

Courts have split as to the necessity of *ex parte* hearings. Several states have statutes requiring an *ex parte* hearing when an indigent defendant requests appointment of an expert.[8]

The courts in Alabama, Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, Oklahoma, Tennessee, Texas, and ***Washington have held that an ex parte hearing is required.***[9]

The courts in Arizona, South Dakota, and Virginia have held that whether to hold an *ex parte* hearing is within the trial court's discretion.[10]

We believe the better view is that an *ex parte* hearing, when timely requested, is required. Indigent defendants seeking state funded experts should not be required to disclose to the State the theory of the defense when non-indigent defendants are not required to do so. *See, e.g., Barnett,* 909 S.W.2d at 428 (holding that "[i]ndigent defendants who must seek state-funding to hire a[n] ... expert should not be required to reveal their theory of defense when their more affluent counterparts, with funds to hire experts, are not required to reveal their theory of defense.")

Moore v. State, 390 Md. At 370-371 (emphasis added).

The petitioner makes no reference to or disputes about the existence of Criminal Rule CrR 3.1(f)(2) or Jefferson County Ordinance No. 04-0323-09, both of which

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[8] See, e.g., Minn.Stat. § 611.21 (2003); S.C. Stat. § 16-3-26(c) (2003); Tenn.Code Ann. § 40-14-207(b) (2003); Nev.Rev.Stat. Ann. § 7.135 (Michie 1998); N.Y. County Law § 722-c (Consol.1977).

[9] See Ex parte Moody, 684 So.2d 114, 120 (Ala.1996); Wall v. State, 289 Ark. 570, 715 S.W.2d 208, 209 (1986); Brooks v. State, 259 Ga. 562, 385 S.E.2d 81, 83-84 (1989), *cert. denied,* 494 U.S. 1018, 110 S.Ct. 1323, 108 L.Ed.2d 498 (1990); Arnold v. Higa, 61 Haw. 203, 600 P.2d 1383, 1385 (1979); Stanger v. State, 545 N.E.2d 1105, 1115 (Ind.App.1989); People v. Loyer, 169 Mich.App. 105, 425 N.W.2d 714, 722 (1988); McGregor v. State, 733 P.2d 416, 416-17 (Okla.Crim.App.1987); Barnett, 909 S.W.2d at 428; Williams v. State, 958 S.W.2d 186, 192-94 (Tex.Crim.App.1997); State v. Newcomer, 48 Wash.App. 83, 737 P.2d 1285, 1291 (1987).

[10] See State v. Alpelt, 176 Ariz. 349, 861 P.2d 634, 650 (1993); State v. Floody, 481 N.W.2d 242, 254-56 (S.D.1992); Ramdass v. Commonwealth, 246 Va. 413, 437 S.E.2d 566, 571 (1993), *vacated on other grounds,* 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994). Louisiana requires an indigent defendant to show that he or she would be prejudiced if the hearing was not held *ex parte*. State v. Touchet, 642 So.2d 1213, 1220 (La.1994). The North Carolina Supreme Court has held that an *ex parte* hearing is required when the request is for a psychiatrist, State v. Ballard, 333 N.C. 515, 428 S.E.2d 178, 180 (1993), but not required when the request is for a non-psychiatric expert. State v. Phipps, 331 N.C. 427, 418 S.E.2d 178, 190-91 (1992).

expressly allow motions for expert services be done *ex parte* and under seal. Instead, the petitioner asks this court to ignore or overrule Washington case law, court rule, and county ordinance and accept the authority of these out-of-state cases. The petitioners' invitation should be rejected.

Second, the petitioner, citing State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) and State v. Pawlyk, 115 Wn.2d 457, 800 P.2d 338 (1990), claims that the Washington State Supreme Court has accepted its position. Petitioners' Opening Brief, pp. 14 – 16. The petitioners' reliance on these two cases is misplaced. At the outset, both Pawlyk and Hamlet involved CrR 4.7, Washington's discovery rule, not CrR 3.1(f)(1) – (2). Therefore, both cases found their support in CrR 4.7: "The court in Pawlyk held under these provisions [CrR 4.7(a)(1)(iv)] there was no work product protection for such materials where prepared by a defense-retained expert the defense did not intend to call as a witness." State v. Hamlet, 133 Wn.2d at 325 (emphasis added).

Moreover, the posture of Pawlyk and Hamlet are significantly different than the one present here. Both Pawlyk and Hamlet were premised on the fact that the defense was raising a mental health defense (i.e., insanity or diminished capacity) to the underlining offense. Here, the case is pre-trial. There is nothing in Pawlyk or Hamlet, or any other case the State's cites to support its proposition that the identity of defense experts should be revealed pre-trial. In fact, neither Pawlyk nor Hamlet discusses CrR (f)(1) and (2), which expressly authorizes request for expert services be made *ex parte* and remain under seal.

Lastly, the petitioner claims that identity of defense retained experts must be divulged because it may be necessary for these experts to have access to the state's

evidence. Petitioners' Opening Brief, p. 16. It is unclear the basis for the petitioners' speculative argument since the record is devoid of any facts to support that the mere request for defense experts and services extends to a request to view, to transfer, or to have access to any evidence held by the state. Moreover, in making this argument, the petitioner cites to Washington's discovery rule (CrR 4.7) not the court rule applicable in this case (CrR 3.1(f)(1) and (2)).

The petitioner has provided no support that the identity of defense expert and services should be disclosed pre-trial. There is, however, ample support to the contrary. Thus, the trial court did not error in permitting limited *ex parte* hearings and sealed documents/identities of defense experts and services. See e.g., U.S. Const. amendments 5th, 6th, and 14th, Ake v. Oklahoma, 470 U.S. 68 (1985), State v. Kelly, 102 Wn.2d 188 (1984); CrR 3.1(f) (1) - (2); and Jefferson County Ordinance No. 04-0323-09.

3. Sealing Invoices of Defense Experts and Other Defense Services is Necessary and Appropriate to Protect an Indigent Defendant's Rights

The petitioner next argues that attorney-client confidences and work product contained in applications for expert and defense services may warrant redaction, but the identity of the experts (discussed above), the anticipated number of hours of service, and the length of time necessary to perform the requested services are not privileged or protected and subject to disclosure. Petitioners' Opening Brief, pg. 17.[11]

The petitioner cites no authority to suggest any compelling interest that such information should be discoverable by the state. Instead, the petitioner seeks an extraneous connection between a case discussing whether attorney-client fee

[11] In its August 19, 2009 Order, the trial court modified its initial order to permit the disclosure of "court-approved payments in this case, for any given period, made to (1) defense counsel and (2) all experts and other service providers may be disclosed by the appropriate county department." (CP 147 – 150). It is unclear whether the state seeks review of this modification.

arrangements are discoverable for purposes of collecting a civil judgment and this case that involves detailed invoices of defense experts and services for an accused. Id. Undoubtedly, there exist significant differences. Unlike a fee arrangement between a client and an attorney, invoices for expert services at public expense are submitted to the court for approval. These invoices are not merely dollar amounts, but include detailed description of work performed, materials reviewed, and itemization of time spent on each which inherently includes work-product and attorney-client information.

In United States v. Nobles, 422 U.S. at 238, the Supreme Court explained the importance of the attorney work product doctrine in criminal cases:

> Although the work-product doctrine most frequently as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests in society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Although the Court noted that "at its core," the doctrine "shelters the mental process of the attorney," the Court also recognized that the doctrine "is an intensely practical one" that recognizes the reality that attorneys must often rely on the assistance of other investigators and agents in preparing for trial. Id.

The selection by the defense of expert witnesses to consult with Mr. Pierce at the Jefferson County Jail is precisely the type of mental process which the work-product doctrine is designed to shelter. Disclosure of the identity of those experts the defense concludes should be retained to meet with Mr. Pierce alerts the prosecution to theories and strategies counsel deem worthy of exploration.

Contrary to the petitioners' assertion, these invoices inherently include impressions, work-product, strategies and other confidential materials. The backup

documents for vouchers (i.e., hours and work performed) undoubtedly reveal information protected by the attorney work product. United States v. Gonzalez, 150 F.3d 1246, 1266 (1998). For example, information, such as the places which defense counsel or defense experts have traveled could reveal the location of potential guilt or penalty phase witnesses. Fear that this privileged work-product information is discoverable would make a defendant "reluctant to reveal information that could help the attorney in the defense of the case, or in analyzing the strength of the case for trial." Id.

The petitioner also argues that the trial court failed to consider lesser restrictive means than sealing the specific information relating to the invoices and supporting documentation. Petitioners' Opening Brief, p. 17. A review of the record suggest otherwise. The trial court did consider redaction, but found it unworkable:

> I will look at all, every bill that I authorized payment for, but I'm not going to sit there and analyze each one with the thought of, gee, should this be whited out, or this one shouldn't be? No, I'm not going to do that. And, quite frankly, I don't think anybody else should be doing it, and I don't think it should be left up to the discretion of the Auditor, the Commissioner's Office, or the Treasurer, to figure out what should or shouldn't be reacted and what should, or could, or shouldn't tip off the Prosecutor's Office about Mr. Pierce's defense. VRP 44 – 45.

The petitioner has not set forth any basis to demonstrate the trial court erred in sealing invoices of defense experts and other defense services in order to protect the respondent's right to a fair trial and effective representation.

4. The Protection Order Prohibiting the Jefferson County Jail from Disseminating the Identity and Capacity of Professional Members or Jail Records Regarding Mr. Pierce to the Jefferson County Prosecutor's Office Without Written Approval is Necessary and Appropriate to Protect Mr. Pierce's Rights

At the request of the defense, and in order to facilitate and not undermine its previous order, the trial court signed a protective order prohibiting the Jefferson County

Jail from disseminating the identity and capacity of any member of Mr. Pierce's legal team, including experts, attorneys, and investigators, or the date or type of professional visit to the prosecution or anyone. CP 41. The defense also sought an order prohibiting the Jefferson County Jail from disseminating jail records of Mr. Pierce (i.e., mental and medical records) without written consent of Mr. Pierce authorizing such release and then to only those individuals authorized. CP 43. This latter order was sought by the defense upon learning that Jefferson County Jail was providing to the prosecutors' office confidential information without consent or authorization by Mr. Pierce in violation of Federal HIPPA law.

The petitioner argues the protective order (CP 41) hinders the function of the Jefferson County Jail and should be disclosed to the prosecutor's office because:

> the jail staff ... is required to protect the community and other inmates from Mr. Pierce, and to protect Mr. Pierce from outraged citizens. The Jail staff satisfies its responsibilities through rules that govern who may visit an inmate, what records are made of visitors, when visits may occur, what items a visitor may bring into the institution, and when an inmate may be transported to a location outside the Jail. . . An expert may desire the transfer of the defendant to a hospital or clinic for testing when Jail staff is short-handed.

Petitioners' Opening Brief, p. 18.

The petitioners' factual assertions against the protective order are not only speculative but are not impacted by the court's order. It is inconceivable how the trial court's order prohibiting the disclosure of names to persons unrelated to Jefferson County Jail jeopardizes the safety of the community, other inmates, or Mr. Pierce. A defense team member is still required to comply with the proper Jefferson County Jail protocols to visit Mr. Pierce, including: ring the Jefferson County Jail staff for entry; show proper identification; be subject to searches of persons and/or property if deemed necessary; wait

for the security door to be unlocked; sign in and out; provide the date of entry, duration of visit, and describe purpose of visit. Furthermore, to facilitate the order and provide the necessary information to Jefferson County Jail, the defense team was to provide Jefferson County Jail a list of defense team members in advance. Contrary to the petitioners' claim, there is nothing in the record to demonstrate that the order, or its implementation jeopardizes Jefferson County Jail from governing who may visit, what records to keep of such visits, when visits may occur, or items brought in during the visit.

The petitioners' other contention – that an expert may desire to transfer the defendant outside of the jail – is also without merit. Again, nothing in the order discusses or permits transportation of Mr. Pierce outside the jail. If such transport became necessary, the defense undoubtedly would be required to seek a separate order explaining, in detail, the location, purpose, and duration of the transportation. In short, the petitioner takes a simple order that's purpose is to facilitate guarantees granted to an accused and attempts to conceive scenarios that the order neither covers, alters, or jeopardizes.

On the other hand, the Sixth Amendment to the United States Constitution guarantees the right not just to the assistance of counsel, but to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984). "The right to effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 565 (1984). A defendant's right to effective counsel is violated when the prosecution "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Strickland, 466 U.S. at 686. In the context

of capital cases (which this case was at the time of the orders), the Sixth Amendment requires defense counsel to conduct a thorough investigation into any potential mitigation evidence that may be presented in the penalty phase. Wiggins v. Smith, 539 U.S. 510, 520 (2003); see also Rompilla v. Beard, 545 U.S. 374 (2005). This places the burden on defense counsel to retain specialized experts to prepare adequately for the penalty phase and to ensure that such experts are given sufficient and appropriate information on which to base their opinions. Caro v. Woodford, 280 F.3d 1254, 1254 (9th Cir. 2002); Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999), cert. denied, 528 U.S. 1105 (2000); Bean v. Calderon, 163 F.3d 1073, 1079 – 80 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999).

The petitioners' argument that it should be privy to Mr. Pierce's visitation information compromises defense counsel's ability to provide effective assistance because it forces counsel to choose between maintaining confidentiality of defense strategies and conducting the investigation mandated by the Constitution. Under the petitioners' position, the prosecution would learn the identity of any defense member, including experts, who may visit Mr. Pierce simply by the fact that he is incarcerated. Based on the experts' field of practice, the prosecution derivatively learns defense strategies, whereas the defense has no comparable access to the prosecutions plans. Thus, the prosecution gains the ability to focus on specific defense tactics by directing its efforts to exploit this unwarranted knowledge at the guilt and/or penalty phase. The prosecution has no right to such an advantage, and without the benefit of these visitations logs, it would not be privy to such information. See State v. Mingo, 77 N.J. 576, 392 A.2d 590, 592 (1978) (defense counsel cannot exercise the "full investigative latitude" required to ensure a defendant receives effective assistance if he must "risk a potentially

crippling revelation" to the prosecution); State v. Doe, 161 N.J. Super. 187, 189 – 90; 391 A.2d 542 (1978) (notification of prosecutor every time confined defendant had need for a visit from an expert would have a "chilling effect on the conduct of effective and complete defense investigation").

While there may be a rational basis for Jefferson County Jail to collect visitation information, no rational basis can justify its dissemination to the state, especially when such dissemination impacts Mr. Pierce's other constitutional rights. State v. Doe, 161 N.J. Super. at 189 – 90 (ruling that policy of requiring defense counsel to notify the prosecutor that defendant was to be visited by an expert was improper; no rational basis exited for treating defendants in custody differently from defendants out of custody); see also Ake v. Oklahoma, 470 U.S. at 76 – 77 (referencing equal protection concepts as to indigent defendants in its due process analysis regarding the right to independent psychiatric assistance).

D. RESPONSE TO ISSUES RAISED BY PETITIONER-OFFICIALS

Subsequent to the trial court sealing the orders appointing experts and their invoices and the invoices of defense counsel, defense counsel learned that in order to facilitate payment of services at public expense (pursuant to CrR 3.1(f)) other county departments become privy to the names of defense experts/counsel and their sealed invoices, timesheets and payment requests when they process the necessary paperwork associated with the Court's order directing payment. For instance, once the trial court reviews the submitted request for payment and upon finding it reasonable, the trial court issues an order approving payment for legal and expert fees and expenses. Upon entering that order, it is forwarded to Auditor's Office with information identifying the person to whom payment is to be made and the specific amount to be paid. Once the Auditor's

Office has approved court-ordered payment for legal and expert fees and expenses, the order is forwarded to the Commissioners' Office for payment authorization. Finally, the actual payment for legal and expert fees is made by the Jefferson County Treasurer's Office after authorization by the Commissioners' Office.

The petitioners argue that the trial court's order prohibiting the dissemination of identity and work performed of defense experts by the individuals who are necessary to facilitate payment of invoices for defense services was in error. The petitioners' argument appears to be three-fold: (1) the petitioners were not parties so the trial court lacked jurisdiction to issue such an order; (2) the order was an infringement on the petitioners rights under Article I, §5; and (3) the order prohibited the petitioners from complying with the Public Records Act. Petitioner's Opening Brief, pp. 19 – 27. The trial court soundly, and properly, rejected each of these claims. 8-14-09 VRP; and CP 147 – 149. The trial court did not abuse its discretion in so doing.

1. Whether the Petitioners are a Party to the Criminal Action is Irrelevant Since a Trial Court has the Right, Authority and Obligation to Issue Orders that Protect and Facilitate Constitutional Rights of and Accused

The officials argue that only the State of Washington and Mr. Pierce are parties to the criminal matter and as such the trial court lacked jurisdiction to issue an order prohibiting the officials from disseminating information the court already concluded was privileged, confidential, and to remain sealed while the trial was pending. Petitioners' Opening Brief, pp. 20-21. The trial court quickly rejected the same argument:

> I'm going to resolve this [not a party] issue easily. First, I do have jurisdiction to make orders that are necessary to protect Mr. Pierce's constitutional rights. That issue is off the table. I do have jurisdiction to do that. Whether or not the auditors, the treasurer, or the commissioners are "parties" to a criminal proceeding has no bearing on my decision. I do have jurisdiction and authority to make orders that are necessary to protect, uh, these two – further these criminal proceedings and to keep

> them going in an orderly fashion. There's no question about that. So that issue's off the table. I'll rule on that. And let's go to another one.

8-14-09 VRP, pp. 23 – 24; See also CP – 147. The trial court did not err in finding that it had jurisdiction and authority to issue orders that protect and facilitate constitutional rights of an accused.

The petitioner cites three cases to argue that the trial court did err. However, placing each of the cases cited by the officials in their proper context does nothing to bolster the officials' argument. For example, the petitioner cites T.R. v. Cora Priest's Day Care Center, 69 Wn.App. 106, 847 P.2d 33 (1993) for support. The court in Cora, however, issued an order permitting a physical and/or mental examination be conducted to a non-party of a civil lawsuit. The appellate court reversed the order, explaining the trial court's order misapplied Civil Rule (CR) 35 because CR 35 specifically requires that the person being ordered to submit to such exams must be a party to the suit. In fact, CR 35(a) specifically requires as much: "When the mental or physical condition of a party..." (emphasis added). Here, the case is neither a civil matter, the order was not issued under CR 35, nor did the order compel any person to submit to any affirmative activity. The petitioners' reliance on this case is unwarranted.

The petitioners then cite to City of Seattle v. Fontanilla, 128 Wn.2d 492, 909 P.2d 1294 (1996) and a concurring opinion in Snohomish County v. Sperry, 79 Wn.2d 69, 483 P.2d 608 (1971). Petitioners' Opening Brief, p. 20. Neither case is factually or legally significant to the case at hand. Fontanilla, for example, considered whether the State, a non-party, can be bound to a financial judgment of reimbursement after a successful self-defense acquittal in a municipal court. The Sperry case involved a trial court's broad trial court order forbidding the press from reporting on any proceeding that was conducted

outside the presence of the jury (i.e., pre-trial motion to suppress evidence). Noteworthy is that Sperry was decided in 1971, over two decades before the issuance of the Bone-Club factors (1995).

The cases cited by the petitioner are a far cry from the trial court's narrow order here. There exist significant differences between judgments that involve financial compensation, restriction in employment, and other permanent restrictions against a non-party and a court order that is narrow in effect, limited in duration, and issued to facilitate and fulfill a constitutional guarantee of an accused. In fact, the petitioners are unable to point to a single appellate decision that holds a trial court in a *criminal* case does not have the authority to order information provided by the defense in order to obtain constitutionally-mandated services not be disclosed.

2. The Trial Court has the Right, Authority and Obligation to Issue Orders that Protect and Facilitate Constitutional Rights of an Accused

The petitioners next argue that court's July 27, 2009 order is equivalent to a "gag order" and curtails some elected officials and their staff from exercising their right to free speech. Petitioners' Opening Brief, pp. 19 – 21. Prior restraints are presumptively unconstitutional. Soundgarden v. Eikenberry, 123 Wash.2d 750, 764, 871 P.2d 1050, *cert. denied,* 513 U.S. 1056, 115 S.Ct. 663, 130 L.Ed.2d 598 (1994); State v. Coe, 101 Wash.2d 364, 372-73, 679 P.2d 353 (1984); and United States v. Salameh, 992 F.2d 445, 447 (2d Cir.1993). To overcome that presumption, a limitation placed on the speech "should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." Salameh, 992 F.2d at 447 (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073-74, 111 S.Ct. 2720, 2744, 115 L.Ed.2d 888 (1991)); Sheppard v. Maxwell, 384 U.S. 333, 361, 86 S.Ct. 1507, 1521-22, 16 L.Ed.2d 600 (1966)

(court may proscribe extrajudicial statements by lawyers, parties, witnesses, and court officials to protect the defendant's right to a fair trial). Finally, the order must be narrowly tailored to proscribe only those extrajudicial statements that threaten the defendant's right to a fair trial or the administration of justice. State v. Bassett, 128 Wn.2d 612, 615-616, 911 P.2d 385, 387 - 388 (1996). Under the First Amendment, this means that no restriction is permissible unless the court finds there is at least "a 'reasonable likelihood' that pretrial publicity will prejudice a fair trial." In re Application of Dow Jones & Co., Inc., 842 F.2d 603, 610 (2d Cir.), *cert. denied,* 488 U.S. 946, 109 S.Ct. 377, 102 L.Ed.2d 365 (1988) (quoting Sheppard, 384 U.S. at 363); see also Levine v. United States Dist. Court, 764 F.2d 590, 595 (9th Cir.1985), *cert. denied,* 476 U.S. 1158, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986) and Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir.1970) (both requiring a "serious and imminent threat" to the administration of justice). Also, the court must " 'explore whether other available remedies would effectively mitigate the prejudicial publicity' and consider 'the effectiveness of the order in question' to ensure an impartial jury.' " Salameh, 992 F.2d at 447 (quoting Dow Jones, 842 F.2d at 612 n. 1).

Here, the trial court properly concluded that Mr. Pierce, being indigent, has a right to obtain services for his defense at public expense. To this end, the trial court acknowledged that the defense, in order to get those funds, is obligated to submit documentation that includes work-product, confidential, and attorney-client privileged information, which should be protected from public exposure. The trial court therefore allowed this information to be filed under seal. See e.g., CrR 3.1(f)(1),(2) and Jefferson County Ordinance No. 04-0323-09. To ensure Mr. Pierce's right to a fair trial, the trial

court is merely ensuring the content of the sealed materials are not made public. Thus, the trial court may proscribe extrajudicial statements to protect the defendant's right to a fair trial. Furthermore, the trial court's order was "no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." State v. Bassett, 128 Wn.2d at 615-616; CP – 170 – 71; CP 147 – 149.

The petitioners do not submit any compelling state interest to overcome the trial court's proper finding. Instead the petitioners argue in the abstract that such an order "prevents the public from ascertaining whether Pierce is receiving an adequate defense, whether the public purse is being unduly strained, and other information that enhances the integrity of the judicial system." Petitioners' Opening Brief, p. 21. These claims are meritless. A concern over whether an accused is receiving an adequate defense rests solely on the judiciary, not the public. Strickland v. Washington, 466 U.S. at 684-86. Moreover, the trial court, when reviewing the defense documentation for expert services, is the gatekeeper in determining whether funds are appropriate. See e.g., CrR 3.1(f)(1). And finally, financial concerns should not be used as a justification for inhibiting the constitutional rights of criminal defendants. See e.g., State v. Wilson, 144 Wash.App. 166, 180, 181 P.3d 887, 893 (Wash.App. Div. 3,2008) citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); Stone v. City & County of San Francisco, 968 F.2d 850, 858 (9th Cir.1992).

3. The Public Record Act Does Not Apply

The petitioners also argue that the court's July 27th Order prevented them from complying with the Public Records Act (PRA). Petitioners' Opening Brief, pp. 21 – 26. To further this claim, the petitioners argue (1) the moving documents and court ordered payment for attorney, expert and defense services are subject to the PRA; (2) the

exceptions of the PRA do not apply; and (3) the documents, once forwarded to the County Auditor for payment are no longer court records. As discussed below, each of petitioners' positions fails.

First, the petitioners argue that the PRA does not apply to moving documents submitted to the court and the court orders for payment of attorney, expert and defense services. Petitioners' Opening Brief, p. 21. The trial court, following the holding in Nast v. Michels, 107 Wn.2d 300, 730 P.3d 54 (1986) rejected this argument. CP 147 – 149; VRP pp. 45 – 47. Nast, which has since been upheld and confirmed in City of Federal Way v. Koenig, --- Wn.2d ---, 217 P.3d 1172 (2009), concluded that the definitions found in the PRA do not specifically include either courts or case files and a reading of the entire public records section of the PRA indicates and the Washington State Supreme Court has found that they are not within the realm of the PRA.

Nevertheless, the petitioners cite to the publicity surrounding the case to "demonstrate that everything related to this case is newsworthy" and the petitioners make reference to litigation from Yakima County regarding "defense attorney invoices." Id.[12] Noteworthy is that in Yakima Herald Publishing v. Yakima County No. 82229-8 (argument scheduled for 3/9/10) Yakima County holds the position that documents surrounding defense services are "court documents" and not subject to the PRA. Jefferson County, however, does not take the same position, arguing instead the opposite. This separate treatment consequently raises an interesting denial of the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and Article 1, §

[12] The extensive publicity noted by the petitioner does nothing to support its claim whether the PRA applies; it does, however, provide support for limiting public access to court hearings and documents that contain privileged information. See e.g., Dreiling v. Jain, 151 Wn.2d 900, 867, 93 P.3d 861 (2004) ("Openness is presumed, but it is not absolute. The public's right of access may be limited to protect other significant and fundamental rights, *such as a defendant's right to a fair trial.*").

12 of the Washington Constitution which require that persons similarly situated with respect to the legitimate purposes of the law receive like treatment. Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978); In re Knapp, 102 Wn. 2d 466, 473, 687 P.2d 1145 (1984); and State v. Handley, 115 Wn. 2d 275, 290, 796 P.2d 1266 (1990) (a denial of equal protection occurs when a law is administered in a manner that unjustly discriminates between similarly situated persons).

As noted, Mr. Pierce has a Sixth Amendment right to effective assistance of counsel in a criminal proceeding, which imposes a duty to fully investigate known potential defenses, mitigation evidence and where necessary to retain qualified experts to assist in the preparation of the defense. Strickland v. Washington, 466 U.S. 668; In re the Personal Restraint Petition of Brett, 142 Wn.2d 868; Wiggins v. Smith, 539 U.S. 510; *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines)*; and Stankewitz v. Woodford, 365 F.3d 706 (9th Cir. 2004).

The petitioners' claim that this information is subject to the PRA requires a criminal defendant to choose between (1) forgoing his constitutional rights to effective counsel, due process and equal protection and (2) providing information to the court to effectuate those rights with the real possibility of having those disclosures published in the morning paper for review by the prosecution and prospective jurors. Whether the PRA specifically lists them as exemptions or not, these constitutional considerations must control over the provisions of a state statute, pursuant to the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI. The PRA cannot and does not require disclosure in this case.

Second, the petitioners argue the exemptions set forth in the PRA do not apply. Petitioners' Opening Brief, p. 22. The trial court disagreed and concluded that although the PRA does not apply, if it did, however, the exceptions were applicable. VRP p. 46. Moreover, the petitioner's assertion is contrary to the language of RCW 42.56.290, which reads:

> Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts.

Thus, the work product of an agency's attorney is exempt. Limstrom v. Ladenburg, 136 Wn.2d 595, 605, 963 P.2d 869 (1998). This exemption applies the common-law definition of work product. Id. (citing Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947)). Additionally, this exemption continues even after the litigation has ended. Soter v. Cowles Publishing, 162 Wn.2d 716, 732, 174 P.3d 60 (2007). If the petitioners insist the documents submitted by Mr. Pierce's attorneys are subject to the PRA, than those records must be exempt from disclosure as work product. Detailed explanations supporting a request for why the attorneys believed funds were necessary will by definition reveal work product.

Courts have also recognized documents which contain information protected by the attorney-client privilege pursuant to RCW 5.60.060(2) (a) are exempt from disclosure. Hangarner v. City of Seattle, 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004). The disclosures made by defense counsel to support their request for funds included information provided by Mr. Pierce. Thus, the information is protected by the attorney-client privilege.

Also, because nondisclosure is necessary to protect a vital government interest,

the information is exempt. RCW 42.56.210 and RCW 42.56.540 protect disclosure of information where nondisclosure is necessary to protect a vital government interest. The prosecution of criminal cases is undoubtedly a vital government interest. The provision of effective defense counsel is not only a vital government function, it is constitutionally mandated. U.S. Const. Amend. VI; Gideon, 372 U.S. 335. Therefore, the information disclosed by Mr. Pierce and his attorneys is exempt from disclosure.

Lastly, the petitioners suggest that the documents, upon being forwarded to the County Auditor for payment, are no longer court records. State's Opening Brief, p. 24. However, the Nast holding applies to judicial records regardless of where they are held, even if they are held by an agency which is subject to the PRA. This was precisely the scenario presented in Nast, as the King County Department of Judicial Administration, not the court, was in possession of the requested files. Nast, 107 Wn.2d at 305. Under the petitioners' theory anytime a public employee (i.e., treasure, auditor, commissioner, etc.) takes the confidential information from the court case file and places it anywhere else it is no longer exempt from disclosure. This rule would allow the actions of the State (or County), the very entity which is prosecuting Mr. Pierce, to effectuate a waiver of his rights even where he has no control over or even knowledge of the public employee's actions.

E. CONCLUSION

The trial court did not err when it concluded that the United States Constitution, the Washington State Constitution, Washington's Criminal Rules, Jefferson County Ordinance provide substantial legal support for Mr. Pierce, an indigent defendant, to seek defense services be filed *ex parte* and under seal. Furthermore, the trial court set forth its

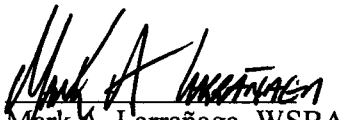
finding of Bone-Club factors before hearing these matters *ex parte* and sealing portions of the court record. Finally, the trial court's limited in scope and duration orders prohibiting Jefferson County Jail from disseminating privileged information and defense visits to the prosecutor's office was a proper, necessary and appropriate to protect Mr. Pierce's constitutional rights.

The trial court correctly concluded that moving documents, detailed invoices for payment for defense services are judicial documents and as such, the PRA does not apply. The trial court also correctly concluded that if the PRA did apply, the exceptions set forth in the statute exempt the disclosure of materials that are covered by work-product, attorney-client privileged, and which are necessary to protect a vital government interest, namely a right to a fair trial.

For the reasons stated above, the Respondent respectfully requests this Court to deny the petitioners' claims.

DATED this 29th day of December, 2009.

Respectfully Submitted:



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Certificate of Mailing

I certify that on December 29th, 2009, a true and correct copy of the RESPONSDENT'S RESPONSE BRIEF TO CONSOLIDATED BRIEF OF PETITIONERS was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

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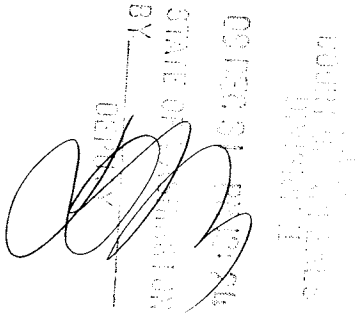

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APPENDIX A

AUGUST 14, 2009

VERBATIM REPORT OF PROCEEDINGS

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

STATE OF WASHINGTON, Plaintiff, vs. MICHAEL JOHN PIERCE, Defendant.	No.: 09-1-00058-7 COA: 39532-1-II

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 14th day of August, 2009, Jefferson County Cause No. 09-1-00058-7 came on for Motion Hearings and a Ruling Hearing before the Honorable Judge Craddock D. Verser sitting at the Jefferson County Courthouse, City of Port Townsend, State of Washington.

Beth Carlson
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WHEREUPON, the following proceedings were had and done to-wit:

(Motion Calendar in Progress)

COURT: State of Washington versus Michael Pierce, 09-1-00058-7. I read a lot of materials you guy presented. Um, one thing I didn't have though, and I haven't read is the...

MR. LARRANAGA: I'm sorry, with all due respect...

COURT: Oh, he's not here.

MR. LARRANAGA: Is Mr. Pierce going to...?

COURT: I'll wait for Mr. Pierce to get here.

MR. LARRANAGA: I think-- oh, oh, there he is.

COURT: All right. We are on the record. State of Washington versus Michael Pierce, 09-1-00058-7. Mr. Pierce, can you hear me down there?

MR. PIERCE: Yes, sir.

COURT: All right. Okay, I was just about to say, I've read a number of things that, uh, presented for this hearing. First is, uh, well, I'll just go ahead. Defense Motion to Extend Time for State to File-- to Decide Whether to File Death Penalty Notice and Continue Trial Date; uh, Memorandum of Authorities in Opposition to Motion for and Extending Statutory Deadline for Filing and

Serving Notice of Special Sentencing Proceedings; Declaration to File-- Motion and Declaration to File the Declarations of Mark Larranaga and Richard Davies in Support of the Defense Motion to Extend the Special Sentencing Notice and Continue the Trial Date under Seal and Ex Parte; um, Order Finding Good Cause to Extend; Reply to Defendant's Motion to Strike or Delay Oral Argument on Motion to Vacate; Defendant's Response to the State's Motion to Vacate; Defendant's Motion to Strike or, Alternatively, Reschedule Hearing Regarding State's Motion to Vacate, currently scheduled for today; and the Motion to Vacate.

Those-- that's what I've read. I did not see, uh, the declarations of Mr. Davies and Mr. Larianga?

MR. LARRANAGA: Larranaga.

COURT: Larranaga. Close. Uh, that were filed under seal. And those were in the Court file. I see that they are in here now. So, um, but I didn't see them. I didn't have bench copies and obviously they shouldn't.

MR. ROSEKRANS: I apologize for cutting...

COURT: Let's, let's talk about where we are, Mr. Rosekrans?

MR. ROSEKRANS: Okay, I cut it just, yeah, as

far as I don't want to cut the Court off. As far as a lot of that stuff goes, um, I believe that we've entered into an agreement to waive the State's deadline, which, which would actually be Monday, because it falls on a weekend. But, to waive the State's deadline to September the 12th. And, the State's mitigation investigation is complete, but this would certainly afford defense the opportunity to go ahead and get to us anything that we weren't able to obtain on our own, or anything that we, that would play into that decision to proceed on with, I guess, notification of special sentencing. And, I think that's, and if I've misspoken then I'll let Mr. Larranaga correct me on that.

COURT: Mr. Larranaga, regarding that issue?

MR. LARRANAGA: Regarding the, the extension?

COURT: Right.

MR. LARRANAGA: Your Honor, we are in agreement that there-- I think if I may just backstep a little bit.

COURT: Sure.

MR. LARRANAGA: It's not necessarily a waiver, it's actually a motion for the Court to find good cause to extend the time period. And, I think both parties are in agreement that there is good cause to

do that.

We are also in agreement that it's-- uh, setting that for September 12th.

COURT: Okay.

MR. LARRANAGA: Um, however, I want to make sure that it's also clear, and I've indicated to the State this, as well, we did provide this Court with a Motion to Find Good Cause and to Extend to a Certain Period. We are in agreement that it's September 12th. I only want to bring to the Court's attention that the State, which I've already indicated, that at the period of the 12th, um, it may be required for the defense to re-insert out motion to extend for that additional period. I don't want in any way to suggest because we're agreeing to the 12th today...

COURT: That that's enough time?

MR. LARRANAGA: Exactly. Thank you. Uh, and I also am well aware and, again, that if the Court is inclined to extend it even to this period, or any period in the future, that is not binding on the State with the authority about when they decide to make the decision, or whether they will seek death or not seek death. That is completely unto the, the authority of the State. This is only a time period

in which they have to make a decision. They can make a decision any time up to that. Uh, I don't know if the Court-- so, that's-- we're in agreement as to the September 12th.

COURT: All right. Let me talk with Mr. Pierce just a second. Mr.-- did you go over this, uh, waiver of 30 day time period for filing special notice-- notice of special sentencing proceedings with Mr. Pierce?

MR. LARRANAGA: No, I did not, Your Honor, for a couple reasons. Number one is, I don't think the waiver is necessary. But, I can assure the Court that I have gone over exactly what I just told the Court with Mr. Pierce. He is in agreement. I have the authority. He has given us authority to extend it. I'm going to ask for good cause to extend it for 30 days.

COURT: Okay, so there isn't any, he hasn't gone over this waiver?

MR. LARRANAGA: He has not.

COURT: And you don't intend to have him go over it and sign it?

MR. LARRANAGA: Um, I can put in writ-- into documentation what I have gone over with Mr. Pierce. But, I don't think it's necessary for a waiver. This

isn't actually a motion that the Court could find good cause, which both parties are agreeing that exist.

COURT: Okay. Mr. Rosekrans?

MR. ROSEKRANS: Well, I'm-- and we looked at a lot of case law on this and we don't necessarily agree that, you know, the Defense's good cause is really, uh, there. But, we do see, you know, in the statute that the Court can extend the time period, if the Court finds that there is good cause. But, we think that with the case here the fact that it would play into that would, that we have completed our mitigation investigation and that this would allow them the time, you know, the forty-five days or whatever September 12th works out to be, to get that mitigation evidence to us (inaudible) factor into. We've done everything we need to do. The only thing that it is lacking is the mitigation part of the investigation.

COURT: All right.

MS. DALZELL: And, Your Honor, if I just, if I might insert here.

COURT: Sure.

MS. DALZELL: We believe the waiver is required, and I think in one of the briefs we've submitted to

Your Honor we cite to State v. Marshall, that would indicate that the defendant has to sign the waiver. And, I gave a copy of the waiver to Mr. Davies, and I would be surprised if he didn't have it with him down at the jail.

MR. LARRANAGA: If I may just address State v. Marshall, Your Honor?

COURT: All right, please do so.

MR. LARRANAGA: In State v. Marshall, and I thought I had a copy, if the Court doesn't have it.

COURT: I don't.

MR. LARRANAGA: In State v. Marshall, um, what happened in that case is the defendant-- it was an aggravated murder case and they were going to extend the period. The defendant wasn't in court. Um, that both parties, the defense attorney and the State did it behind, basically outside the presence of the defendant, and outside the presence of the Court. They submitted it to the Court. In the interim-- the Court granted it.

In the interim of the first notice and the date of the second notice, the defendant submitted a letter to the Court saying he wanted to enter a plea of Guilty. By statute, when that notice period is still pending you cannot enter a plea to aggravated

murder. But then what happened was, those two attorneys, the defense attorneys withdrew out of, for conflicts of interest, because the defendant wanted to plead guilty. And they believed that that was unethical, or they were in a position that was contrary to their, to the defendant.

New attorneys came on the case and said that that extension was inappropriate because the defendant was not in court and did not give authority. The Court then asked those two attorneys, the previous attorneys that were withdrawn, or removed, to come in and testify about what they shared with their client. They refused to do that under the claim of attorney-client privilege. The Court demanded them to do it. They still refused. The Court found them in contempt.

That's the issue that went up to appeal on State v. Marshall. What the Court found was, the Court of Appeals found, is that, that the trial court was error to find them in contempt. But, all that was required-- there was no issue about waiver, all that was required was whether they had the proper authority to extend. And, I'm assuring the Court that we do. And, I'm assuring the State that we do. We have talked to Mr. Pierce. He is in

agreement, and he-- with our position that there is good cause to extend this.

MR. ROSEKRANS: And, I guess what we would need to hear from, you know, Mr. Pierce is that he understands that, and he assents, or agrees to pushing this back to September the 12th.

COURT: Mr. Pierce?

MR. PIERCE: Yes, Your Honor?

COURT: Have you heard what your, uh, Mr. Larranaga said?

MR. PIERCE: Yes, Your Honor.

COURT: Could you hear him? Is this all okay with you if we give the State an additional, well, until September...?

MR. ROSEKRANS: Twelfth.

COURT: Till September 12th of this year, to determine whether or not they're going to file the Notice to Seek the Death Penalty? Whether they're going to do that or not? It's okay with you if we extend that to September 12th?

MR. PIERCE: Yes, that's fine, Your Honor.

COURT: All right, I'm satisfied. I'm also satisfied that there's good cause for doing that. And, if-- do we need an order or do we have an order?

MR. LARRANAGA: Oh, we can draft one up.

MR. ROSEKRANS: Yeah, we'll-- I'll get one of the blank Orders and do that, Judge.

COURT: Maybe this would suffice. I don't know who has prepared that one.

MR. LARRANAGA: I don't know if the Court wanted to address, um, I'm sorry?

MR. ROSEKRANS: Yeah, I'm kinda getting to that.

MR. LARRANAGA: No, it wasn't that. Just talked about the sealing of the declarations? I realize at this point in...

COURT: The declarations from Mr. Larranaga and Mr. Davies in support, I will review. But, I would, uh, suspect that there's a reason to seal them and if I need to seal them, I will.

MR. LARRANAGA: Okay, thank you.

COURT: I will-- I haven't looked at them at this point.

MR. LARRANAGA: Okay. I guess I would just ask the Court, if the Court reviews them and is inclined not to seal them, if we have an opportunity...?

COURT: I'll give you notice.

MR. LARRANAGA: Thank you, very much.

COURT: You guys can fight about that.

MR. ROSEKRANS: Okay, if we, um, well, we're

working on that Order, Judge.

COURT: Well, that takes care of, uh...

MR. ROSEKRANS: And the original purpose for today's setting of, uh, August the 14th was actually a status hearing so we could bring the Court up to speed on where we were discovery wise and everything.

COURT: That's right.

MR. ROSEKRANS: Uh, so, let me advise the Court that, uh, the discovery as far as I can say is almost complete. I've talked to Detective Noll, there may be a few other little minor, uh, supplements out there that we're still gathering up. But, I would say that the actual discovery is almost complete. We're still continuing on that. The big issue I think and when we set this for the 14th was the forensic testing. The-- at least one of the items, the most important item, I think, for both parties was tested last Thursday, the 6th. And, I checked with the lab. They did do the testing but it may be a couple of weeks, two to three weeks before they can send us the report. So, uh, I think that was the main impetus for us setting this status hearing today was to, you know, light a fire under people.

COURT: That's right. It was to, uh...

MR. ROSEKRANS: Right.

COURT: ...at least track the progress on the forensic testing.

MR. ROSEKRANS: So, I think we're right on track as far as meeting the discovery obligations and getting the physical evidence tested. So, you know, that kind of brings us up to that issue of status. Also, I guess on the docket would be, uh, I think our last hearing Mr. Larranaga did make some oral motions regarding the, the pleadings that we had, and the Amended Information. We looked at what he said and we have, I think, fixed the, I guess for lack of a better term, inartful language that may have been used, and gave them a copy. And, I have a Third Amended Information, which I would hand up, which I think addresses those concerns. And, I'll let him, I guess, address whether or not we've successfully or adequately addressed those concerns.

All the counts remain the same as the last time, except the language that we changed in the, uh, in the alternative. We corrected the Maximum Sentence Range.

COURT: Mr. Larranaga, with reference to the Third Amended Information?

MR. LARRANAGA: Your Honor, it does appear that they struck the Aggravated First Degree Felony Murder as an alternative, which was really what the argument was about.

COURT: Right.

MR. LARRANAGA: Um, I can tell the Court that Mr. Davies and myself have gone over the Third Amended Information with Mr. Pierce. Um, we would waive any additional formal reading and at this time enter-- remain, well, enter into a Not Guilty to all counts.

COURT: All right, first, I will sign the Order permitting the Third Amended Information. That is correct, I think. And...

MR. ROSEKRANS: And, uh, one matter, I guess-- I'm sorry, Judge.

COURT: Just one more sec.

MR. ROSEKRANS: Okay, sorry.

COURT: Mr. Pierce, you've gone over this Third Amended Information with your attorneys?

MR. PIERCE: Yes, Your Honor, I have.

COURT: All right. Well, and you'll enter a Not Guilty plea then to the Third Amended Information. I understand Mr. Larranaga waived reading of that Third Amended Information. We'll enter a Not Guilty

plea to all eight counts, and the alternatives to Counts I and II in the Third Amended Information. Okay.

MR. ROSEKRANS: Okay. And, okay. I guess that being said and that being done, Judge, it probably-- it's a matter I need to, I probably should have addressed at the other Amended Information. But, anyway, pursuant to Rule 3.2(g), you know, when you file it on somebody for a, uh, Aggravated Murder or Capital Law offense that, uh, they should, unless good cause is shown, be held without bond. And, so I'm handing up an Order Amending Conditions of Release, and ask that he be held without bond. And, the Court can put in no bond, or whatever.

COURT: Mr. Larranaga, any probably with this Order?

MR. LARRANAGA: Not at all.

COURT: All right. All right, I've signed the order holding Mr. Pierce without bond. Next?

MR. ROSEKRANS: Okay. And, I think that gets us to the...

COURT: Motion to Vacate.

MR. ROSEKRANS: Motion to Vacate, which Mr. Alvarez is prepared to, uh, address the Court on those issues.

COURT: Mr. Alvarez, your motion?

MR. ALVAREZ: Thank you, Your Honor. Um, this is a Motion to Vacate brought by elected county officials. Um, the first thing I'd like to say is, um, thank you for reading the materials. Uh, um, the major, one of the major problems with this, um, Order to Seal is that, um, the Court did not follow the *Ishikawa* factors. That's 97 Wn.2d 30, a (1982) case. I'll hand up a copy of the case.

COURT: I'm very familiar with it.

MR. ALVAREZ: Okay.

COURT: But, you can hand it up if you want.

MR. ALVAREZ: Okay. And, so there's five, there's five, it's a mandated process for closing or sealing. And, uh, Mr. Larranaga did not dispute the applicability of this case in any of his pleadings. So there's a five part test: a proponent of closure or sealing must make some showing of need. And here the right to a fair trial was argued.

Anyone present when the closure or sealing motion is made must be allowed the opportunity to object to the suggested restriction. Again, that could have been done simply by providing the Court (inaudible) with the proposed form of order without revealing any other strategy or the analysis behind

that proposed form of order.

Number three is the requested method for curtailing access both the least restrictive means available and effective and protecting the interests threatened. And there's where, this is where the Court fell short. Redaction of the work product, while allowing the public to see the time spent, the date incurred, and the total paid, would protect all interests under the Public Records Act. Again, the Public Records Act is very clear that outside attorney bills do apply. There's no distinction made between bills that are submitted by an attorney representing an indigent criminal defendant, or an attorney representing the County on a land use matter, or any other civil matter.

COURT: Might that be because they know that the Public Disclosure Act doesn't apply to Superior Court records?

MR. ALVAREZ: Well, I also provided the case of *Lindstrom v. Lindberg* where it is clear that depending on who holds-- has custody of those records, there is a, um, there is a-- that there can be a different status under the Public Records Act.

COURT: Okay.

MR. ALVAREZ: That the cases, the work product--

the same police reports that the Sheriff had to surrender are work product when they were in the custody of the prosecutor in that case.

So, the fourth, um, the fourth factor is, the court must weigh the competing interests in the defendant and the public. And, here the Court did not consider the duties of the Auditor and other officials, nor did the Court consider 42.56 RCW.

COURT: How does preventing the Auditor and other public officials from discussing the details of bills affect their ability to perform their work at all?

MR. ALVAREZ: They have to provide those bills. They have to try to (inaudible) back up to the State Auditor. They have to have the bank see the bills. They may have a question about one of the vendors. Um, it may affect the budget issues later, if this turns out to be a large budget, um, budget, uh, a large drain on the county budget.

And, also, there's also the issue of just simply the communication between the Auditor and the commissioners, or the commissioners and the treasurers. All those technically violate the Act. All of that violates the Order...

COURT: But, does it, does that Order in any, in

any way interfere with the ability of the Auditor to talk to the Commissioner?

MR. ALVAREZ: It says that he can't reveal it to any other person.

COURT: Other person, right?

MR. ALVAREZ: Yeah.

COURT: Okay, go ahead.

MR. ALVAREZ: And, finally, the order must be no broader in application or duration than is necessary to serve its purpose. So, this order gags persons who are not party to the criminal action, and is of indefinite duration. So, it fails, it fails four of the five *Ishikawa* factors that were not considered or not introduced by the Court.

I've also, in my Reply Brief, stated why the Public Records Act applies. First of all, *Nast v. Michaels*. The record is there where it remained in the custody of the Court. I provided the paragraph in my brief that states-- yes, it's called, it has a different name to it, but there's still within the judicial realm when *Nist*-- where *Nast* asked for those records. Those records were still within the judicial realm.

Nast does not answer the question of what happens when a record goes to a different section of

the same county. And, *Lindberg-- Lindstrom* does answer that question. In the custody of the Auditor, the bills do not represent court records. They are, instead, vendor backup for payment. Redactions are always possible. We can always get to the point where it says "meeting with..." "Conference with..." "Legal research into..."

And, finally, the idea that somehow there will be confusion arising from the dollar amounts, that's simply not a reason to disclose. There's nothing in the state statute that says people are going to withdraw, people are going to come to a bad conclusion, and, therefore you can't, um, you can't release that information.

And, also, other points, all of which are in the original motion papers of the County, the Court lacks jurisdiction to order elected officials to not carry out their duties. To carry administrative, as I've laid out before, um, this is all laid out in the original brief. The, uh, Court had no in personam jurisdiction over the Auditor or the commissioners or the treasurer. And I point the Court to *TR (inaudible) Priest*, and the *Fontanella* cases, both of which are in the briefing submitted by the County. Again, allowed this is in the

county...

COURT: How were those cases, how were those cases remotely applicable to me saying, Gee, Auditor, Treasurer and Commissioners don't reveal the details of these bills?

MR. ALVAREZ: They're all-- because, in each case...

COURT: How-- what have they got to do with it?

MR. ALVAREZ: In each case a judge issued an order that impacted the behavior of a person that was not before that court. The case of the civil, the civil distinction, the civil distinction is not an accurate distinction in this sense, because the person did not have, is not before the Court, had no knowledge of the decision, had no knowledge of the ex parte motion and was not before Your Honor, and it basically affected his, his or her behavior.

COURT: Okay.

MR. ALVAREZ: Thank you, Your Honor.

COURT: Mr. Larranaga?

MR. LARRANAGA: Your Honor, actually, I was going to address all of their issues, because they seem to be raising quite a few and at times have kind of changed them. The last one in particular that the State just indicated was that this Court

did not have authority over non-party members. I guess I need clarification. The initial brief to vacate was signed by the civil criminal division, excuse me, in which case they said they don't represent the County elected officials. We replied to that.

Then we have a brief that's now signed by the civil division saying they represent the elected officials. And the civil division is here arguing on their behalf. Where I'm confused is, at one side they're saying this Court doesn't have authority over non-interested parties, yet those interested parties are here. On the other side-- if that's the case, then they should have done a Motion to Intervene if they're not a party in this matter. I'm just bringing it up to this Court's attention that...

COURT: I'm going to resolve this issue easily. First, I do have jurisdiction to make orders that are necessary to protect Mr. Pierce's constitutional rights. That issue is off the table. I do have jurisdiction to do that. Uh, whether or not the auditor, the treasurer, or the commissioners are "parties" to a criminal proceeding has no bearing on my decision. I do have jurisdiction and authority to

make orders that are necessary to protect, uh, these two-- further these criminal proceedings and to keep them going in an orderly fashion. There's no question about that. So that issue's off the table. I'll rule on that. And let's go to another one.

MR. LARRANAGA: Um, well, I was going to comment on the Court's, we have a Sixth Amendment. The Court's already indicated that there is a right here for them to be sealed and to be filed ex parte. The Court already has done that, and properly done so under the *Ake* Criminal Rule 3.1(f)(1)-(2) and the difference in Ordinance 04-0323-09 that they are properly-- which actually directs us to submit our materials to the Court ex parte under seal. The Court has done, properly ruled that we have that-- the Court has that jurisdiction. And, in fact, we are to some extent obligated to do that, to protect not only Mr. Pierce's Sixth Amendment right to have a fair trial, but also his Fourteenth Amendment right to have a defense at public expense, since he has been deemed indigent.

So, what I'd really like to focus on is whether the Public Disclosure Act applies here. Uh, first of all, I think it's interesting that the State is arguing that a lot of speculation. I have yet to see

any case or controversy here meaning, as far as I know, there has never been a public disclosure request submitted in this case. We're talking about speculation about the possibility of one. But, that being said, I realize that's merely an invitation for somebody to do one, so we will inevitably be back here anyways probably arguing the same thing. So, we're better for everybody just to address it.

Um, the State, one of their first arguments is that we, the defense misreads *Nast*, the *Nast* case. What I would like to do is hand up to the Court, if I could put it into the Court file, this is, and by no means is it authority to the Court, and here's a copy for the State. What it is basically is that the Yakima County Prosecutor's Office has the exact same interpretation that we do on dealing with *Nast* and concluding that, that, in fact, it does-- the Public Disclosure Act does not apply in this situation. That case is currently up on the Supreme Court. In that case, the *Yakima Herald* has tried to get the funding, and the Yakima County Prosecutor's Office agreed that opposite...

COURT: You know, I heard, I read something about this case in the papers, the first time I heard of it. Was there a published decision at the

Court of Appeals level on this?

MR. LARRANAGA: I'm not-- you know, that's a good question.

COURT: I couldn't find it.

MR. LARRANAGA: I think what happened is the Court accepted it directly to the Supreme Court.

COURT: Okay. So, there's no published decision on this case?

MR. LARRANAGA: There is not.

COURT: All right.

MR. LARRANAGA: And I only bring it up for this reason. Clearly, it has no authority for this Court.

COURT: Right.

MR. LARRANAGA: The reason I'm bringing it up is that it's a potential equal protection argument. That if this was happening in Yakima County, or in King, or in Pierce, then the position clearly from the Yakima County Prosecutor's Office is it's not subject to the Public Disclosure Act. However, here the Jefferson County Prosecutor's Office is taking a different approach saying that it does apply. And, so it's not authority, only is illustrative of a potential equal protection argument.

I think the Court is right on, that these are Court records. The Court has the obligation to

review our materials. We have to give detailed information about who we are asking for funding for, why we are asking for it, and for what purpose. And we do that under seal, and the Court reviews it. The Court is the gatekeeper of whether our requests are reasonable. The Court can always deny us. The Court can always trim us. The Court can give us additional funding if we make and when we make the appropriate and reasonable request.

The mere fact that the Court signed the order and somehow because it has to go to an auditor or a treasurer which, to be quite honest with you, I don't know where those offices are physically here in Jefferson County, whether it's in the same building, or in a different building.

COURT: They are.

MR. LARRANAGA: They are? I don't think it really matters. Um, it would be absurd to suggest that the County, the same individuals that want to prosecute Mr. Pierce asks him to choose, you either have effective counsel by getting funding, but, if you do that, because of the process in order to get that funding it will be open to the public. You cannot have a system where it pits Mr. Pierce's right to effective representation, yet waive the

privilege because of the Public Disclosure Act. Not to mention, that would be purely the issue about whether a volunteer or a waiver would rest solely on the County.

Mr. Pierce isn't agreeing that this stuff should be, uh, released. Yet, because of the way it apparently is set up to get his fundings requested, the County itself can waive them. Um, so it's, it's inconceivable to think that the mere fact that we go through a process to get paid, that that should be open to the public. There is no question that these are judicial documents. They're Court sealed, they're Court ordered, and they remain judicial documents. Whether they're sent to the auditor, whether they're sent to the treasurer, whether they're sent to the commissioner, um, that's the process in Jefferson County to, uh, to fulfill the Sixth and the Fourteenth Amendment of a person that's accused.

If the Public Disclosure Act does apply, which we, again, state that it does not. There's clearly exceptions to it. And exceptions are work product and attorney-client privilege, and the Court has already found, and properly so, that the materials that we submit is work product, is attorney-client

privilege, does have defense strategies, and so it would be exempt from the Public Disclosure Act.

Now, the State then says, well, let's look at the one provision of the statute that talks about attorney invoices. The only case that I found on this, in that issue is a 2008 case, the *West* case. And that was a case in which Mr. West sought the invoices from the County of the, of the law firm that represented the County in a civil suit. And the Court said, clearly, those invoices are minus redactions of whatever work product, but the invoices themselves are subject to the Public Disclosure Act.

That's a far cry from what we have here. First, of all, it's a civil case. Second, here we have a Sixth Amendment right to have funding, to have it sealed, and to have a fair trial. So, the *West* case doesn't support the broad interpretation of that statute that attorney invoices apply here. Additionally, and again, we're not conceding that, but, additionally, if the Court reads that that attorney invoice section is applicable, then that's my invoices only. It's not experts, not other defense team members. It's attorney invoices. So, if the Court's inclined to say that provision applies

then it would be only really for the attorney invoices. But, again, there's no case law that supports that proposition at all.

I don't know if the Court wants me to get into, probably not, but, I don't know if the Court wants me to get into, uh, their argument about, the expert names were suppressed because there was a closed hearing. Um, it doesn't sound like that's an issue. Or, whether the identity of our experts is privileged. Um, I do want to comment on that, I guess, if I may. There is no question that 3.1, *Ake* and the Jefferson Ordinance says when we submit requests for funding for defense team members we do it ex parte and sealed. The rationale is clear, work product, attorney-client privilege.

The State says, uses a case, two cases really, *Pavlick* and *Hamlet* to suggest somehow that the Washington Supreme Court has said attorney, or, excuse me, that the names of the experts, in those two cases, mental health experts, um, do not have a privilege of attorney-client privilege. It's-- we have to be very clear how the context of those cases. *Pavlick* was dealing with an insanity defense. The defendant raised the issue of Not Guilty by Reason of Insanity, affirmative defense.

Hamlet is a very similar but it raised Diminished Capacity. The cases were already set for trial, they raised those as affirmative defenses. The State said, pursuant to 4.7 of the discovery rules we should have all the names of your mental health providers, their notes, their raw data, their scores, whatever. The Court, the Supreme Court said, "In that context you have waived the attorney-client and the work product because you affirmably requested or raised Not Guilty by Reason of Insanity. You defended-- had put the mental state into issue."

That's a far cry from where we are now. This is at pretrial stage in which we're simply trying to get funding to suggest that *Pavlick* and *Hamlet* in any way suggests at a pretrial stage in which at no time have we raised NGI, Not Guilty by Reason of Insanity, or Diminished Capacity, or any other mental defense. We have not raised those. If we do then clearly the attorney-- under the case law clearly the attorney-client privilege is presumably waived. But, as of now, absolutely not. I just think I needed to raise that to make sure it's clear.

And, one final thing, we did ask for this hearing to be stricken. To be quite frank, it's

clear this Court has authority to continue to hear it. But, I think it's important to know the posture of the case. I don't know if the Court knows where it is, um, in the sense of the Court of Appeals, sorry. You know where it is here. But, where it is in the Court of Appeals.

Prior to today's hearing, the State, um, on the behalf of the civil division, has filed a Notice for Discretionary Review on this issue, the (inaudible) the July 27th Order. The Court of Appeals, um, well, then, unbeknownst to the defense we got a note, a letter faxed to us from the Court of Appeals on Wednesday, indicating that the State had submitted a Motion for Discretionary Review, a motion to accelerate this review with the earlier one that the Court, or, that the State also filed to the Court of Appeals, um, a Motion to Consolidate those so they were both heard by the Commissioner to determine whether the Court of Appeals will accept review, which is scheduled on August 26, uh, and a Motion to Stay.

We then got those, eventually got those motions from the State. And we are ordered to reply within 24 hours, and we did. And what we replied to the Court of Appeals is, we agreed to accelerate it.

Meaning, this one, the July 27th can be accelerated and heard by the Commissioner on August 26th. We agreed to consolidate the two notices. We agreed to accelerate it to consolidate. We were unclear about what the request was for a stay. Because, at one point in their pleadings they said they wanted to stay this entire proceeding, and then in another one they just wanted to stay this July 27th order. We only said we were unclear about what that meant. Bottom line is the Court of Appeals has granted the Motion to Accelerate, has granted the Motion to Consolidate, and has denied the State's Request for a Stay. So, in essence, on the 26th we're going to be arguing to the Commissioner, one way or the other, about whether the Court of Appeals should accept review of the July 27, 2009 Order. That was the only reason we made a motion to strike this hearing. Because, at some point it could be a moot issue because it's going to be-- it may, granted the Court of Appeals may not accept review. But, it's in front of the Commissioner about whether they will or not. So, that's the current posture of where it's percolating up in the Court of Appeals, that the State has filed these various motions for discretionary review.

COURT: Mr. Larranaga, you cited a case, um, and I read a lot of them quickly, *Gonzales*, I think.

MR. LARRANAGA: *United States v. Gonzales*, right.

COURT: Right. About the proposition that even releasing the total amounts paid affects Mr. Pierce's Sixth Amendment rights.

MR. LARRANAGA: Right.

COURT: Tell me why they can't release-- for instance, uh, thus far, $130,000 in attorney's fees and $200,000 for experts. No more detail than that. Why can't that be released to the public?

MR. LARRANAGA: In the, um, I think it's best if I just quote from *Gonzales*?

COURT: Sure, go for it.

MR. LARRANAGA: And, it actually cites the *United States v. McVey* case.

COURT: Okay.

MR. LARRANAGA: It says, "Revealing only the amounts of interim payments," which is what the Court, I think, is suggesting, "is not a reasonable alternative to full disclosure." That's because sometimes we're submitting the invoices monthly versus at the very end of the trial.

COURT: Uh huh.

MR. LARRANAGA: "It would distort the public's perception about the fairness of the process because the expenditures out of context," meaning if you only gave the amounts, "out of context, would emphasize costs without any information about the benefits obtained. Public access to these cost figures would be detrimental and not helpful to the functioning of the Court at this stage of the proceeding," meaning this stage was pretrial.

We're not disputing that at the end of the period in this case the public has an absolute right to know. But, as of now, merely seeing the amount without context, and you can't put the context in there because of the attorney-client privilege or the work product, distorts the perception of the public. And, it does have an impact on Mr. Pierce's right to have funding at public expense, and the right to a fair trial.

You know, it really boils down to, if this was a private case the public would not have a right to know the invoices.

COURT: Okay. Mr. Alvarez, response? And, particularly that last part of it?

MR. ALVAREZ: Well, that's, that's an argument that just simply should be ignored by this Court.

New Mexico, I checked, there's public records acts in New Mexico and in Oklahoma. Neither of those statutes has a section like our section that says, "attorney invoices are disclosable."

Not only that, Section 904 of the Public Records Act clearly distinguishes between facts and work product. It says you have to disclose facts. A fact would be, the meeting occurred on July 28th. A fact would be, it took 1.6 hours. A fact would be, that it cost the County $500, or whatever it would be. The rest, where Mr.-- the defense counsel goes in and says, "We discussed X, Y, and Z. We tried to figure out if Y, and A, B, and C were good arguments." That would be non-disclosable. We absolutely would consent to that. That's what 904 calls for. And the fact that the only case on 904 is a civil case simply means that that's the first one that percolated through the system. The amended only came about in 2007.

COURT: How do you address...?

MR. ALVAREZ: Sorry, Your Honor?

COURT: How do you address the Criminal Rule 3.1(f)(1)-(2) that talk about these motions for expert services can be submitted ex parte, as well as the orders appointing them, and then seal? I

mean, that-- as well as the Jefferson Ordinance 04 whatever it is, I wrote down the number, 0323-09? I mean, they specifically deal with what we're dealing with here, not some civil attorney's bills and that kind of stuff.

MR. ALVAREZ: Well, I think that the statute just has to be given as much weight as the court rules.

COURT: Do you think the Public Records Act statute that talks about revealing attorney's fees overrides Mr. Pierce's Sixth Amendment right to have those things sealed, that's addressed specifically?

MR. ALVAREZ: No, that is not what I said, Your Honor.

COURT: Okay, go ahead.

MR. ALVAREZ: What I said was...

COURT: Tell me what are you arguing, then?

MR. ALVAREZ: The distinction is that Mr. Larranaga presented you with a false choice. He said that it's either the Public Records Act or my client's fair right to a trial. That's simply not out there. What is out there with the ability to redact is all the protection that he requires: time, dates, and amounts...

COURT: Who's going to redact it, me? Are you

suggesting that I screen that...?

MR. ALVAREZ: No, this office would not redact it. I would have to give general advice to the auditor, and the auditor would have to do the redacting, and I would never see, I would never see the records. Because, clearly I can't, my office can't see the records. The Auditor or the Commissioner, or whoever it was, would have to redact those records, and they'd have to do the best they could. They could be reviewed by Mr. Larranaga before they went out. But, my office cannot do the redacting. The Auditor or the Commissioner or the Treasurer would have to do the redacting. So, to say that there's only, there's a black and white situation is not accurate.

Also, *Hamlet* and *Pavlick* do apply. We are pretrial. If things are going to be released, when would they be released? They're always released pretrial.

COURT: Well, in both of those cases though, those are CR 4.7 cases where-- isn't Mr. Larranaga right? The defendant in those cases waived, I mean, waives the privilege to conceal mental health experts because he's raising a mental health defense.

MR. ALVAREZ: Well, in this situation-- and, 4.7 is just as applicable as 3.1. The fact that the particular defense has come about didn't even matter in that case, because they had to reveal the name of a non-retained expert in that case, Harris. If a person wasn't retained, wasn't used and they still had to reveal his name in *Hamlet*. So, I think I would argue that the point, that this is a distinction without a difference.

And, for *Gonzales*, I've simply said that there's no, that this is not, this is not New Mexico, this is not Oklahoma. This is a state that has a strong public policy, that things, things will be disclosed. There's no distinction in that statute between what a criminal attorney supplies to a county and what a civil attorney applies to a county. You have a state statute staring you right in the face.

COURT: Okay. Um, first, uh, Mr. Larranaga at the end mentions something that's kind of, I've been trying to use to guide myself. And that is, what if Mr. Gates was a multi-mill-- Mr. Pierce was a multi-millionaire? Would he, what would he have to reveal in terms of preparing his defense? In terms of defending his case? And, I think that's, that's kind

of where I start, and I'm saying this mostly to the public. You guys probably know this. But, that's kind of where I stop.

What, what, why are his rights different because he's poor and the County's paying for it, as opposed to what a person who has the resources to pay for these defenses? Why is his defense different? Well, the answer to that is, it really shouldn't be. And that's what the Criminal Rule, this 3.1, Criminal Rule 3.1, and the Jefferson County Ordinance, try to protect, that's Mr. Pierce's rights to a fair and impartial proceeding where he doesn't have to reveal who he's hired to help him. He doesn't have to reveal why he's paid them this much money. Because, the Prosecutor could look at that and say, okay, so he's focusing on this, so we know something about what he's doing. We know what his attorney's are doing. If his, uh, and we know who's visiting him in the jail, for instance.

So, I try to think that what, I am certainly not perfect, and I do make mistakes. And, perhaps, by signing as broad an order as I did on, uh, what day I signed, the July 27th order, uh, I was wrong. And, I've thought about that, and I've looked at it,

and I've looked at the cases. And so that is a fairly broad order. And, uh, perhaps I was wrong. And, I am certainly not perfect.

But, we're going to look at, I'm going to look at the *Ishikawa* factors. This is the second time in open court, and the last time I balanced these was in open court, uh, before I made that earlier order that seals the record. I looked at the *Ishikawa* factors, and *Bone-Club* factors. Mr. Alvarez, you were even here and walked out of the courtroom when I called the case, that earlier one. And, I did, on the record, look at the *Ishikawa* factors. That case came out in what, '9-- I don't know.

MR. ALVAREZ: *Ishikawa* is 1982, I think, Your Honor, if that's the case you're referring to.

COURT: Yeah, '82. There's a more recent case, *Bone-Club*?

MR. ALVAREZ: *Bone-Club*, right.

COURT: That applies those same factors, and looks at them in terms of closing trials. But, they apply the same factors. And, if you look at *Bone-Club* at 128 Wn.2d 258, they discuss these five factors. In the very first one, the one that Mr. Alvarez cited that says, uh, "a proponent must make a showing of a right that grants them the privilege

of having records sealed." And, if you look at *Bone-Club*'s quote of that and, interpreted by another case, as well, you'll find that it says "unless a proponent must make a showing when, based on a right other than the accused's right to a fair trial."

In other words, they say, okay, these *Ishikawa* factors apply, the *Bone-Club* factors apply, other than when you're considering an accused, in this case, a person accused of the most serious crimes he can commit, uh, other than when it's based on his right to have a fair trial. So, in other words, Mr. Pierce, at this stage doesn't even have to make a showing of why the record should be sealed. But, nevertheless, I remember balancing these on the records, and I did that then.

And, I will try to articulate as best I can that when he's preparing to defend this case he's entitled to have the assistance of experts such as private detectives, such as, possibly, mental health people, such as, possibly, forensic people, DNA people, fingerprint people. Whatever the case calls for, and his attorneys move for, he's entitled to have those experts assist him to prepare his defense.

And, the Court rule that specifically addresses

this, and this is Criminal Rule 3.1(f) specifically addressed this says, Defendant, you can ask for this stuff without telling the State you're asking for it. You can ask for what's called ex parte without making a formal public motion for this. And, Court, you can seal these records so that the State doesn't know what type of defense, uh, Mr. Pierce, in this case, is preparing. Or what any defendant is preparing. He's got a right to that fair trial.

And, so, balancing that first *Ishikawa/ Bone-Club* factor, I mean, there is a need. Not only a need, I don't know that they need to show that, because the Court rule specifically addresses that, but, there certainly is that need to seal parts of these records to protect Mr. Pierce's right to effective assistance of counsel, and for a defense.

The second part of it is the opportunity to object. There's no question that the State is here objecting. And, so they do have the opportunity to object, I've given them the opportunity to object. And, before I passed the last order I gave anybody the opportunity to object, but the people weren't here.

All right. So, I've listened to the objections and I understand, the public wants to know. Hey,

Judge, you're spending a bunch of County money, and that's what it looks like to the public. This judge is up here spending County money and they want to know why? Well, that's, that's a legitimate thought. But, you have to balance that with Mr. Pierce's right to a fair trial, and right to effective assistance of counsel. You have to balance those things.

The least-- all right, so, anyway, people have the right to object, and they have objected. The least restrictive method to protect it. And, Mr. Alvarez says, well, gee, they can redact and they can call up my office to find out what's supposed to be redacted and what isn't. And, I'm certainly not, I will look at all, every bill that I authorized payment for, but I'm not going to sit there and analyze each one with the thought of, gee, should this be whited out, or this one shouldn't be? No, I'm not going to do that. And, quite frankly, I don't think anybody else should be doing it, and I don't think it should be left up to the discretion of the Auditor, the Commissioner's Office, or the Treasurer, to figure out what should or shouldn't be redacted and what should, or could, or shouldn't tip off the Prosecutor's Office about Mr. Pierce's

defense. That shouldn't be, those people should not do the redacting.

And, I don't, I don't believe that redacting is an appropriate method to keep the public informed, as well as, um, as well as protect Mr. Pierce's rights under this particular proceeding. The cases that you cite, Mr. Alvarez, and the cases that are relied upon are largely civil cases, and they're not concerned with protecting a person accused of a death penalty crime, uh, protecting his rights and his, his, uh, attorney client privilege rights, as well as case preparation rights.

So, you weigh these interests, weigh the interests of Mr. Pierce against really, and what we're talking about is the public rights, public's right to know. I do not believe that the Public Disclosure Act is applicable to judicial records. It's that simple. And, whether the Treasurer's office has these judicial records, the Auditor's office has these judicial records, or the Commissioners have these judicial records, the Public Records Act does not apply to those records. And, uh, that's my belief as far as the Public Disclosure Act, uh, yeah, Public Records Act. As far as that is concerned it simply doesn't apply to

Superior Court records, and I think the *Nast* case makes that clear.

Even if it did apply, the exemptions as cited by Mr. Larranaga also would apply, even if they possibly could apply. But, I don't believe it applies. And, so, you weigh the interests of the public right to know what's going on. How much money are you spending? How much taxpayer money is being spent? Well, the public does have a right to know that.

And that's where I was wrong, in override-- in making such a broad order as I did on July 27th. And, I'm going to modify that order. I'm not going to vacate the order, but I'm going to modify it to allow the-- I don't know which is the more appropriate office, probably Auditor's office, can reveal, in broad terms, 1) the amount of expenditures for attorneys; 2) the total amount of expenditures for experts and other support staff. That's it.

In other words, it can be: Attorneys, $40,000; Experts and Support Staff, $40,000. Under those two categories those figures can be released, upon a proper request. But, that's it. No more detail than that. I reject-- I, I got the idea on *Gonzales*. And,

I looked at that but, I don't think that, I don't think that's going to-- I mean, the public, hopefully, can understand what we're dealing with here and that, uh, I, I just don't think it'll harm the public perception as this proceeds. But, that's, so that's the order.

MR. ALVAREZ: Shall we fill out a blank order, Your Honor?

COURT: Uh, fill out something, if you want. Take your time. I don't think we're in any big hurry.

MR. LARRANAGA: Your Honor, can I just...?

COURT: Yes?

MR. LARRANAGA: Um, request one matter? If the Court's inclined, which it is, obviously, is to modify the order.

COURT: I am.

MR. LARRANAGA: Right. And, clearly, we submitted some materials under the previous order.

COURT: Right. I haven't looked at those yet, purposely.

MR. LARRANAGA: Okay. I appreciate that. What I would ask the Court to do is to hold off on signing an order until Wednesday. And, let me tell you the reason why Wednesday.

COURT: Okay.

MR. LARRANAGA: Wednesday's the date in which we have to respond to the State's Motion for Discretionary Review on this matter.

COURT: Okay.

MR. LARRANAGA: It would be, I think, problematic if the Court signs an order in the Court of Appeals. I can't tell whether we're going to object to the Discretionary, or whether they're even going to withdraw it now, with the Court's modification. Um, but, if we do challenge this Court's finding, the current finding, I think it would be problematic if the Court signs the order now and we do do this, and the Court of Appeals accepts it, and the Court is wrong, it's irrevocable.

All, I'm saying is, give us till Wednesday before the Court signs, whether, and Mr. Davies and myself can discuss whether we're going to...

COURT: Sure. I'm going to, I'm going to be off Monday.

MR. ALVAREZ: I'm not sure I understand what you mean. What would be irrevocable? I'd have to...

MR. LARRANAGA: If the Court's...

COURT: Well, once the information's released.

MR. ALVAREZ: Oh.

COURT: If the Auditor's office releases we spent, you know, $60,000 in attorney's fees and $50,000 in expert's fees and then, uh, the Court of Appeals says, "You shouldn't have done that. Mr. Larranaga was right." How is that going to affect, um, how is it-- but that's, you know, that's what you guys have moved for and that's the risk you guys are taking. How is that going to affect Mr. Pierce's right to a fair trial?

And would that possibly even void the prosecution against Mr. Pierce? Mandate a dismissal? I don't know the answer to those questions. But, that's the position your office took was that I should be revealing all of this stuff. I think that would be a great risk to the State, quite frankly, in pursuing this case. But, as a matter of fact, I'm off Monday and Tuesday, anyway, because my daughter and granddaughter are here, and so I'm not going to look at this stuff, and I'm certainly not going to look at it this afternoon. So, it'll probably be Thursday or Friday of next week before I would get around to it anyway. So, I certainly won't be signing it today.

MR. LARRANAGA: Okay.

MR. ALVAREZ: Let me just make-- but, if the Court of Appeals accepts review why would it matter when you signed the order?

MR. LARRANAGA: All I'm saying is, that on Wednesday we have to tell the Court of Appeals whether we're going to fight the Motion for Discretionary Review of the July 27th order, or, perhaps, join in it now, with the Court's new modification.

COURT: Yeah.

MR. LARRANAGA: All I'm suggesting is, we might want to be careful. Um, if the Court of Appeals accepts review, and the State is wrong, and the Court has already let this out, there's nothing that can happen, uh, to bring that back in.

COURT: I agree.

MR. LARRANAGA: To state the proverbial, the bell has been on-- has already rung.

COURT: I absolutely agree.

MR. ALVAREZ: All right. Thank you, Your Honor.

COURT: All right.

MR. LARRANAGA: Thank you. Is there anything else, Your Honor?

COURT: I don't think there's anything else. You tell me? Is there anything else, Mr. Alvarez?

MR. ALVAREZ: No, there's not, Your Honor.

COURT: Anything else Mr. Larranaga?

MR. LARRANAGA: No, thank you.

COURT: Mr. Davies, we've been kind of ignoring you down there. Is there anything else?

MR. DAVIES: Uh, no, Your Honor.

COURT: All right.

(Motion Calendar Continues)

CERTIFICATE OF COURT CLERK AND

ELECTRONIC COURT REPORTER

STATE OF WASHINGTON)
) ss
COUNTY OF JEFFERSON)

I, Beth Carlson, Official Electronic Court Reporter of the Superior Court of the State of Washington in and for Jefferson County, do hereby certify as follows:

That the foregoing Verbatim Report Of Proceedings, numbered from page 1 through and including page 51, is a true and correct transcript of Motion Hearings and a Ruling hearing held August 14, 2009, in the matter of State of Washington, Plaintiff vs. Michael John Pierce, Defendant, Jefferson County Cause No. 09-1-00058-7, before the Honorable Judge Craddock D. Verser, sitting at the Jefferson County Courthouse, Port Townsend, Washington, on the date hereinbefore mentioned.

DATED at Poulsbo, Washington on this 20th day of August, 2009.

_____
Court Reporter

CERTIFICATE