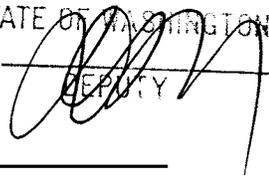


FILED  
COURT OF APPEALS  
DIVISION II

09 NOV 17 AM 11:31

NO. 39532-1-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

---

STATE OF WASHINGTON, Petitioner,

v.

MICHAEL PIERCE, Respondent,

---

STATE OF WASHINGTON, Petitioner,

v.

MICHAEL PIERCE, Respondent,

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

Petitioners.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

---

CONSOLIDATED BRIEF OF PETITIONERS

---

*DAVID ALVAREZ*, WSBA No.29194  
*THOMAS A. BROTHERTON*, WSBA No. 37624  
Deputy Prosecuting Attorneys  
c/o Prosecuting Attorney's Office  
PO Box 1220  
Port Townsend, WA  
Phone: (360) 385-9180  
Fax: (360) 385-9186

*P.M. 11/16-2009*

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1

A. STATE OF WASHINGTON..... 1

B. PETITIONER ELECTED OFFICIALS..... 1

II. STATEMENT OF ISSUES. .... 2

III. STATEMENT OF THE CASE..... 3

IV. ARGUMENT. .... 7

A. ARTICLE I, § 10 OF THE WASHINGTON CONSTITUTION  
REQUIRES THAT COURT PROCEEDINGS AND RECORDS  
REMAIN OPEN TO THE PUBLIC TO THE GREATEST EXTENT  
POSSIBLE..... 7

B. ARTICLE I, § 5 OF THE WASHINGTON CONSTITUTION  
PROHIBITS THE ENTRY OF AN ORDER REQUIRING NON-  
PARTIES TO REFRAIN FROM SPEAKING ABOUT A COURT  
PROCEEDING. .... 19

V. CONCLUSION. .... 27

TABLE OF AUTHORITIES

TABLE OF CASES

*Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087,  
84 L. Ed.2d 53 (1985). . . . . 15

*Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211,  
848 P.2d 1258, 21 Media L. Rep. 1278 (1993). . . . . 7-10

*Cohen v. Everett City Council*, 85 Wn.2d 385, 535 P.2d 801 (1975). . . . . 7

*Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584,  
637 P.2d 966 (1981) . . . . . 9

*Dreiling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004).. . . . . 7-9

*In re Det. of D.F.F.*, 144 Wn. App. 214, 183 P.3d 302,  
*review granted*, 164 Wn.2d 1034 (2008) . . . . . 8

*Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103,  
937 P.2d 154, 943 P.2d 1358 (1997). . . . . 19

*Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006).. . . . 24

*Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993),  
*rev'd on other grounds sub nom.*, 512 U.S. 1217 (1994).. . . . . 14

*Rauch v. Chapman*, 16 Wn. 568, 48 P. 253 (1897).. . . . . 7

RCW 36.27.020(2).. . . . . 18

*Rufer v. Abbot Laboratories*, 154 Wn.2d 530,  
115 P.3d 1182 (2005).. . . . . 8, 9

*Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).. . . . 6, 8-  
11, 18

<i>Seattle Times v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986) . . . . .	9
<i>Seattle v. Fontilla</i> , 128 Wn.2d 492, 909 P.2d 1294 (1996) . . . . .	20
<i>Seventh Elect Church in Israel v. Rogers</i> , 102 Wn.2d 527, 688 P.2d 506 (1984) . . . . .	17
<i>Soundgarden v. Eikenberry</i> , 123 Wn.2d 750, 871 P.2d 1050 (1994). . . . .	20
<i>State ex rel. Snohomish County v. Sperry</i> , 79 Wn.2d 69, 483 P.2d 608 (1971) . . . . .	20
<i>State v. Loukaitis</i> , 82 Wn. App. 460, 918 P.2d 535 (1996) . . . . .	9
<i>State v. Apelt</i> , 176 Ariz. 349, 861 P.2d 634 (1993), <i>cert. denied</i> , 513 U.S. 834 (1994) . . . . .	13
<i>State v. Ballard</i> , 333 N.C. 515, 428 S.E.2d 178 (1993) . . . . .	14
<i>State v. Bassett</i> , 128 Wn.2d 612, 911 P.2d 385 (1996) . . . . .	21
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995) . . . . .	6, 8-11, 18, 19
<i>State v. Boyd</i> , 160 Wn.2d 424, 158 P.3d 54 (2007) . . . . .	16
<i>State v. Coe</i> , 101 Wn.2d 364, 679 P.2d 353 (1984).. . . . .	19
<i>State v. Coleman</i> , 151 Wn. App. 614, 214 P.3d 158 (2009) . . . . .	8
<i>State v. E.J.Y.</i> , 113 Wn. App. 940, 55 P.3d 673 (2002). . . . .	19
<i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006). . . . .	9
<i>State v. Floody</i> , 481 N.W.2d 242 (S.D. 1992) . . . . .	14
<i>State v. Hamlet</i> , 133 Wn.2d 314, 944 P.2d 1026 (1997).. . . . .	14-16
<i>State v. Pawlyk</i> , 115 Wn.2d 457, 800 P.2d 338 (1990).. . . . .	14

<i>State v. Phipps</i> , 331 N.C. 427, 418 S.E.2d 178 (1992) .....	14
<i>State v. Strode</i> , ___ Wn.2d ___, 217 P.3d 310 (2009) .....	8, 9
<i>State v. Touchet</i> , 642 So. 2d 1213 (La. 1994) .....	14
<i>State v. Waldon</i> , 148 Wn. App. 952, 202 P.3d 325, <i>review denied</i> , 166 Wn.2d 1026 (2009).....	8
<i>State v. Yates</i> , 111 Wn.2d 793, 765 P.2d 291 (1988) .....	12
<i>State v. Young</i> , 89 Wn.2d 613, 574 P.2d 1171 (1978) .....	26
<i>T.R. v. Cora Priest's Day Care Center</i> , 69 Wn. App. 106, 847 P.2d 33 (1993).....	20
<i>United States v. Arroyo-Angulo</i> , 580 F.2d 1137 (2nd Cir.), <i>cert. denied</i> , 439 U.S. 913 (1978)).....	12
<i>United States v. Harris</i> , 707 F.2d 653 (2nd Cir.), <i>cert. denied</i> , 464 U.S. 997 (1983) .....	12
<i>United States v. Nixon</i> , 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974).....	12
<i>Wallace v. State</i> , 486 N.E.2d 445 (Ind. 1985) .....	11
<i>Walters v. Superior Court</i> , 80 Cal. App. 4th 1074, 95 Cal. Rptr. 2d 880 (2000).....	16

## CONSTITUTIONS

Const. art. I, § 10. ....	1, 7, 8, 13, 27
---------------------------	-----------------

Const. art. I, § 22 .....	7
Const. art. I, § 5 .....	2, 5, 19, 27
Fourteenth Amendment .....	13
Sixth Amendment .....	14

## STATUTES

Chapter 10.95 RCW.....	23
CrR 3.1(f).....	4, 5, 12, 13, 17
GR 15(c)(1). .....	1, 2, 12, 13
RCW 10.95.120.....	23
RCW 36.22.010(4).....	25
RCW 36.29.010(1) .....	26
RCW 36.32.120(5) .....	25
RCW 36.32.120(6).....	25
RCW 42.56.904.....	22
RCW 42.56.904 . .....	2
RCW 43.09.230 . .....	25

RULES AND REGULATIONS

CR 65(b)..... 19

CrR 3.1(f)(2) ..... 12

CrR 4.7(h)(1) ..... 16

GR 15(a)..... 12

GR 15(c)(2)(C) ..... 8

GR 31(j) ..... 8

Mental Proceedings Rule 1.3 ..... 8

RPC 3.3(f). ..... 26

## I. ASSIGNMENTS OF ERROR

### A. STATE OF WASHINGTON

The Petitioner, State of Washington, assigns error to the following:

1. The trial court erred by hearing Michael Pierce's motions to seal documents other than his applications for investigative, expert, and other services ex parte in violation of GR 15(c)(1).

2. The trial court erred by entering the June 16, 2009, order precluding the Jefferson County Jail from disseminating any records regarding Michael Pierce or from communicating with the Jail's legal counsel about Michael Pierce. CP 43-44.

3. The trial court erred by entering the June 16, 2009, order sealing all orders appointing experts. CP 33-34.

4. The trial court erred by ordering the sealing of records in violation of Const. art. I, § 10.

### B. PETITIONER ELECTED OFFICIALS

The Petitioners, Judi Morris, Jefferson County Elected Officials 1 Through 5, and Their Employees John Does 1 Through 50 (hereinafter "Elected Officials"), assigns error to the following:

1. The trial court erred by hearing Michael Pierce's motion for an order enjoining the Elected Officials from taking certain actions regarding invoices related to the Michael Pierce criminal action on an ex parte basis.

2. The trial court erred by entering an order in a criminal case, CP 69-70, that prohibits non-party, executive branch officials, from speaking of matters arising in the course of their official duties.

3. The trial court erred by entering an ex parte order that directs the non-party Elected Officials to not disclose invoices and other public documents related to the Michael Pierce matter in violation of the mandates of the Public Records Act, specifically RCW 42.56.904. *See* CP 69-70.

4. The court erred by entering an ex parte order that directs the non-party Elected Officials from discussing matters related to the cost of the Michael Pierce matter in public, thus violating the Elected Officials' Const. art. I, § 5 rights, and the Open Public Meetings Act.

5. The court erred by denying, in part, the Elected Official's motion to vacate the illegal ex parte gag order. *See* CP 73-84.

## II. STATEMENT OF ISSUES

1. Whether a defendant, in a criminal case, may bring a motion to seal papers requesting relief beyond the appointment of investigative, expert, or other services, without providing the notice required by GR 15(c)(1)?

2. Whether a defendant, in a criminal case, may bring a motion for an injunction or order prohibiting non-party, executive branch officials, from disclosing information obtained by the executive officials in the course of their duties to the executive officials' counsel or the public, in an ex parte proceeding?

3. Whether a court, in a criminal proceeding may enter an injunction or order prohibiting non-party, executive branch officials, from disclosing information obtained by the executive officials in the course of their duties to the executive officials' counsel or the public, without a showing by the defendant of an immediate and irreparable harm that cannot be alleviated by lesser means?

### III. STATEMENT OF THE CASE

On March 18, 2009, James and Janice Yarr. were brutally murdered in their Jefferson County home. Michael Pierce has been charged with the commission of these murders. CP 138-142. Pierce is being held without bail, as the charges include counts of first degree murder with aggravating circumstances. *Id.*; CP 143, 144.

On June 16, 2009, Pierce, acting through one of his attorneys, brought a motion for entry of an order sealing all motions and declarations for expert services, all orders appointing experts, and all invoices, timesheets, and requests for payments for the defense of Pierce. CP 31-50, 59-61. This motion was brought ex parte, with no notice to counsel for the State. *Id.* The court granted the ex parte motion in a closed hearing, signing the proposed orders that were prepared by Pierce. 6/16/09 RP 7; CP 43-044. The order finds that the documents are restricted “pursuant to CrR 3.1(f)” *Id.*

On June 16, 2009, Pierce also obtained, ex parte, an order that bars the Jefferson County Jail from “disseminat[ing] the identity and capacity of any member of Mr. Pierce’s legal team including, but not limited to, attorneys, paralegals, investigators, and experts, or the date or type of professional visit to the prosecution or anyone.” CP 43-44. Because the jail had been provided with no notice of the motion or the hearing, the ex parte order directed Pierce’s attorneys to “serve a copy of this order on the Jefferson County Jail so that [it] may comply with the Court’s order.” *Id.* The legal analysis submitted in support of the order and the factual showing is unknown to the State or the jail as the court ordered the defense’s ex parte motion sealed under “General Rule (GR) 15(c)(2)(f).” *Id.*

The State, upon learning about the June 16, 2009, orders, filed a timely motion for discretionary review in the Court of Appeals. CP 51.

On July 24, 2009, Pierce filed an ex parte motion “pursuant to CrR 3.1(f)”, for an order directing the “Jefferson County Auditor’s, Commissioners’ and Treasurer’s Offices [to] not reveal the names, description of work performed, or the amount of compensation approved by the court for the work performed of defense experts and counsel retained in the above-captioned case until further order of the court.” CP 65-68. Pierce gave no notice of this motion to counsel for the State of Washington or any of the elected or appointed officials who would be subject to this gag order. No hearing was held in open court<sup>1</sup> on the motion before the court entered an order granting the motion. *See* CP 69-70.

The affected Elected Officials promptly moved to vacate the gag order on the grounds that: (1) the court lacked personal jurisdiction over the Jefferson County Commissioners, Jefferson County Auditor, Jefferson County Treasurer, and their employees; (2) the gag order violates Const. art. I, § 5; (3) the doctrine of separation of powers precludes the court from ordering these executive branch actors to not fulfill their duties; (4) the gag

---

<sup>1</sup>*See* Declaration of Jefferson County Clerk, appendix A.

order violates public policy; and (5) the information protected by the gag order is not privileged. CP 73-84.

A hearing on the Elected Officials' motion to vacate was held on August 14, 2009. That hearing was the first time that Judge Verser purported to balance the *Bone-Club* or *Ishikawa* factors in the presence of counsel for the State or the Elected Officials. Even then, Judge Verser totally ignored two of the five factors, choosing to focus on the alleged non-applicability of the Public Records Act to the invoices and bills that defense counsel were submitting. 8/14/2009 RP 43-46. Judge Verser, in an order dated August 19, 2009, affirmed his earlier ruling regarding the gag order, although he grudgingly allowed release of the lump sums spent on defense counsel and defense experts. CP 147-49.

The Elected Officials filed a timely motion for discretionary review. CP 110. This motion was heard at the same time as the State's previously filed motion for discretionary review. CP 51. Both motions for discretionary review were granted by Commissioner Eric B. Schmidt in an order dated September 4, 2009. The same order consolidated the appeals.

#### IV. ARGUMENT

##### A. ARTICLE I, § 10 OF THE WASHINGTON CONSTITUTION REQUIRES THAT COURT PROCEEDINGS AND RECORDS REMAIN OPEN TO THE PUBLIC TO THE GREATEST EXTENT POSSIBLE

Washington Constitution art. 1 §10 states, “Justice in all cases shall be administered openly, and without unnecessary delay.” Compliance with this constitutional provision is mandatory, and extends to both court records and court proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004), citing *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975); *Rauch v. Chapman*, 16 Wn. 568, 575, 48 P. 253 (1897).

The purpose of Const. art. I, § 10 and the related open trial provision of Const. art. I, § 22 is to foster confidence in the courts. “Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.” *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258, 21 Media L. Rep. 1278 (1993). “The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified.” *Dreiling*, 151 Wn.2d at 903-04.

A court is not excused from making the required carefully considered, specifically justified decision to close a court proceeding or record by the existence of a statute or court rule. *See State v. Coleman*, 151 Wn. App. 614, 622, 214 P.3d 158 (2009) (court rules cannot be interpreted to circumvent or supersede a constitutional mandate).<sup>2</sup> This requirement exists because every document and pleading filed with a court is presumptively accessible to the public. *Dreiling*, 151 Wn.2d at 909-13. Sealing of documents requires the identification of a “compelling interest” and the balancing of that interest against the public’s interest in open courts. No “per se” list of “compelling interests” that will always justify closure can be compiled as the Constitution requires a case-by-case analysis. *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 550, 115 P.3d 1182 (2005).<sup>3</sup>

---

<sup>2</sup>A number of cases have applied this principle to strike down statutes and/or to vacate sealing orders. *See, e.g., Allied Daily Newspapers v. Eikenberry, supra* (a law that required courts to ensure that information identifying child victims of sexual assault not be disclosed to the public or the press in the course of judicial proceedings or in any court records was unconstitutional as it did not permit trial courts to comply with the *Ishikawa* guidelines); *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009) (although GR 31(j) provides that individual juror information is presumed to be private, a court may engage in a *Bone-Club* analysis before sealing juror questionnaires); *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325, *review denied*, 166 Wn.2d 1026 (2009) (although GR 15(c)(2)(C) lists the vacation of a conviction as a ground for sealing a court record, a court must apply the *Ishikawa* factors to such a motion); *In re Det. of D.F.F.*, 144 Wn. App. 214, 183 P.3d 302, *review granted*, 164 Wn.2d 1034 (2008) (Mental Proceedings Rule 1.3 violates article I, section 10 by making mental illness commitment proceedings presumptively closed).

<sup>3</sup>A case-by-case consideration of asserted “compelling interests” has produced the following results:

Privacy cannot justify the closure of a hearing or a pleading, absent full consideration of the *Ishikawa/Bone-Club* factors and exhaustion of other options. *See, e.g., State v. Strobe*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 310 (2009) (privacy of prospective juror); *Allied*

To assist courts in deciding whether a motion to restrict access to court proceedings or records meets constitutional requirements, a five factor test referred to as both an *Ishikawa*<sup>4</sup> analysis and a *Bone-Club*<sup>5</sup> analysis must be undertaken. *See, e.g., State v. Strode*, \_\_\_ Wn.2d \_\_\_, 217 P.3d 310 (2009); *Dreiling*, 151 Wn.2d at 909-13. The failure to perform such an analysis is reversible error. *See, e.g., State v. Easterling*, 157 Wn.2d 167, 170-71, 179, 137 P.3d 825 (2006).

An *Ishikawa/Bone-Club* analysis requires consideration and application of five factors:

---

*Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258, 21 Media L. Rep. 1278 (1993) (privacy of child victims of sexual assault); *State v. Loukaitis*, 82 Wn. App. 460, 918 P.2d 535 (1996) (embarrassment to defendant and defendant's family members).

Economic interests will generally not be sufficient to justify the closure of a hearing or a pleading. *See, e.g., Ruser v. Abbot Laboratories*, 154 Wn.2d 530, 115 P.3d 1182 (2005) (trade secrets).

The integrity of criminal investigations may support a limited closure to allow for the safe service of a search warrant, but may not support a closure to protect the identity of an informant. *See State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) (courtroom could not be closed to avoid compromising an officer's undercover activities); *Seattle Times v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986) (search warrants may be sealed until charges are filed); *Cowles Publishing Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981) (search warrants may be sealed until files are charged).

A criminal defendant's right to a fair trial may be, but is not always, a sufficient basis for closing a hearing or for sealing pleadings. *See, e.g., State v. Loukaitis*, 82 Wn. App. 460, 470, 918 P.2d 535 (1996) (juvenile offender's declination hearing could not be closed to protect the defendant's right to a fair trial as other alternatives, including a change of venue, change of venire, extensive voir dire, sequestration of the jury, or admonition of the jury, can be used to avoid prejudice).

<sup>4</sup> *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982).

<sup>5</sup> *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (paraphrasing the *Ishikawa* test).

“1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

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

“3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

“4. The court must weigh the competing interests of the proponent of closure and the public.

“5. The order must be no broader in its application or duration than necessary to serve its purpose.”

*State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

The record is devoid of any indication that Judge Verser analyzed or considered *Ishikawa/Bone-Club* factors 3 and 5 when ruling that not only the ex parte motion papers, but also the names of the experts, the contacts Pierce has at the County Jail, any statements Pierce's might make at the County Jail and the legal invoices were all off-limits to all of the public. Nor is there any evidence that Judge Verser applied the *Ishikawa* factors separately for each such order sought by the defense counsel, although each request clearly provided a different set of facts to analyze, e.g., a request to silence

Jail-Prosecuting Attorney communication had to be weighed against the fact that the Prosecuting Attorney is legal counsel to the Jail through its representation of the elected Sheriff and would be entitled to know if Pierce has made any admissions against interest while incarcerated.<sup>6</sup>

Instead, it appears that Pierce's right to a fair trial, in the opinion of Judge Verser, simply bulldozed over any and all other considerations, including the state constitution and state statutes, which are quite relevant to the requests made ex parte by defense counsel. The alleged need for sealing records is only one of five *Ishikawa* factors and is not, by itself, controlling. *See State v. Loukaitis*, 82 Wn. App. 460, 470, 918 P.2d 535 (1996) (juvenile offender's declination hearing could not be closed to protect the defendant's right to a fair trial as other alternatives, including a change of venue, change of venire, extensive voir dire, sequestration of the jury, or admonition of the jury, can be used to avoid prejudice).

The identification of concerns necessary to properly apply the *Ishikawa/Bone-Club* factors is nearly impossible to develop in an ex parte proceeding. For this reason, the court rule that "sets forth a uniform

---

<sup>6</sup>More than one defendant has feigned mental illness in order to avoid the consequences of his actions. *See, e.g., Wallace v. State*, 486 N.E.2d 445, 451-52 (Ind. 1985) (describing defendant's efforts to feign mental illness and the role jail staff and fellow inmates played in exposing those efforts). The gag order signed by Judge Verser is so broad, jail staff would be unable to advise the prosecutor if another inmate reported admissions made by Pierce regarding Pierce's efforts to bolster a claim of mental illness or changes in behavior noticed by the jail staff when Pierce's experts are not about.

procedure for the destruction, sealing, and redaction of court records,” GR 15(a), generally requires that notice be given to persons with heightened interest in the openness of the proceeding. With respect to criminal proceedings, GR 15(c)(1) states that

any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

The single exception to the prior-notice requirement must be construed narrowly as *ex parte* communications are severely limited by law because they undermine the integrity of the judicial system and the public's confidence in the fairness of the adversarial system. *Cf. United States v. Harris*, 707 F.2d 653 (2nd Cir.), *cert. denied*, 464 U.S. 997 (1983) (quoting *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1141 (2nd Cir.), *cert. denied*, 439 U.S. 913 (1978)); *State v. Yates*, 111 Wn.2d 793, 799, 765 P.2d 291 (1988) (citing *United States v. Nixon*, 418 U.S. 683, 709, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)).

CrR 3.1(f), which governs a defendant's motion for investigative or expert services at public expense authorizes the potential sealing of a single set of documents – the moving papers. CrR 3.1(f)(2) (“The motion 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.”). A request for the sealing of any additional records, falls outside the “prior notice” exemption of GR 15(c)(1).

In the instant case, Pierce’s motion to seal went far beyond the moving papers. Pierce’s ex parte motions sought the sealing of the orders appointing experts, the bills, and jail records. The improper ex parte nature of the motions resulted in an excessively broad order that violates Const. art. I, § 10.

Pierce’s motions to seal asserted a presumption of privacy that is absent from CrR 3.1(f) and that is barred by Const. art. I, § 10. CrR 3.1(f) requires a showing of good case, and Const. art. I, § 10 requires a balancing of interests and of other mechanisms that exist to avoid prejudice. Both would require redaction of critical passages, over the sealing of entire documents.

Pierce’s motions to seal claimed that the Sixth Amendment required concealment of his expert’s identities. Multiple jurisdictions have held that disclosing the mere identity of a defense retained expert will not violate the attorney-client privilege or some other right. *See, e.g., State v. Apelt*, 176 Ariz. 349, 861 P.2d 634, 649-50 (1993), *cert. denied*, 513 U.S. 834 (1994) (neither the Fourteenth Amendment's guarantee of due process nor that of

equal protection entitles defendants to an ex parte hearing on a motion for expert services); *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178, 180 (1993) (constitutional right to an ex parte hearing on the appointment of a defense expert is limited to psychiatric experts); *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, 190-91 (1992) (no constitutional right to an ex parte hearing on applications for investigative or non-psychiatric expert services); *State v. Floody*, 481 N.W.2d 242, 256 (S.D. 1992) (no constitutional grounds for ex parte hearing); *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 570 (1993) (rejecting both federal and state constitutional arguments for an ex parte hearing), *rev'd on other grounds sub nom.*, 512 U.S. 1217 (1994). *See also State v. Touchet*, 642 So. 2d 1213 (La. 1994) (defendant must demonstrate a particularized prejudice from the holding of a public adversarial hearing on an application for the appointment of an expert or the provision of some other service before the motion can be heard ex parte and/or sealed).

The rule adopted by these jurisdictions was embraced by the Washington Supreme Court in *State v. Hamlet*, 133 Wn.2d 314, 319-23, 944 P.2d 1026 (1997), and in *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 338 (1990). In both of those cases, the Court held that neither the attorney-client privilege nor the Sixth Amendment right to counsel is violated by the ordered disclosure of the name of a non-testifying expert retained by the defense. The

Washington Supreme Court explained in *Hamlet* that while *Ake v. Oklahoma*, 470 U.S. 68, 72, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985), established a constitutional right to the assistance of a mental health professional in an appropriate case, "*Ake* [did] not address the issue of confidentiality." *Hamlet*, 133 Wn.2d at 322.

The attorney-client privilege does not apply to protect the name and reports of the expert. The work product rule codified in CrR 4.7(f)(1) protects from disclosure "legal research or . . . records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv)." CrR 4.7(a)(1)(iv) concerns reports or statements of experts made in connection with the case, including results of mental examinations. The court in *Pawlyk* held under these provisions 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. *Pawlyk*, 115 Wn.2d at 477-78. It follows that the expert's name and the fact that Defendant retained him are not protected either. Moreover, we do not agree that the name of that expert, and whether he or she is retained by the defense fall within "opinions, theories or conclusions" of defense counsel.

Amicus WACDL argues the defense decision to hire Dr. Harris is protected by the constitutional rights to counsel and due process. WACDL reasons that the right to counsel includes the right to confidentiality of defense counsel's decision to consult expert witnesses, and cites several cases for the proposition that allowing the jury to learn that defense retained the expert is unduly prejudicial. Then, WACDL argues, it is a violation of due process to force defendant to give up another constitutional right, i.e., the right to confidentiality in consulting experts.

In *Pawlyk*, we rejected the defendant's argument that the attorney-client privilege is part of the Sixth Amendment right to counsel. *Pawlyk*, 115 Wn.2d at 469. Moreover, cases which WACDL may cite addressing issues of potential prejudice have not identified this concern as being founded in the Sixth Amendment. Finally, as explained above, we do not agree with WACDL's argument that *Ake* requires nondisclosure. WACDL's argument based on the Sixth Amendment right to counsel and due process is unpersuasive."

*Hamlet*, 133 Wn.2d at 325.

There are sound reasons for rejecting a rule that the identity of a defense expert should be cloaked in secrecy. The identity of a defense expert must necessarily be made known to the prosecution if the services rendered by the defense expert requires that expert to access the State's evidence. The evidence collected by the State does not "belong" to the court, and the court cannot enter orders that surreptitiously transfers State evidence to a defense expert. *Walters v. Superior Court*, 80 Cal. App. 4th 1074, 95 Cal. Rptr. 2d 880 (2000). An ex parte order transferring evidence from an investigative agency to a defendant is antithetical to the prosecutor's obligation to protect the integrity of the evidence. *Id.*, at 882.

The State is entitled to be heard as to the timing of any transfer of evidence, the steps to be taken to protect the chain of custody, and the desirability of any protective orders. *See, e.g.*, CrR 4.7(h)(1) (defense may not impede the prosecution's investigation of its case); *State v. Boyd*, 160

Wn.2d 424, 438, 158 P.3d 54 (2007) (protective orders to control dissemination of child pornography that is released to defense counsel and to defense experts).

The State concedes that there are sound reasons for redacting any attorney/client confidences or work product that is contained in the application for services under CrR 3.1(f) during the pendency of the trial. Disclosure of the proposed dollar rate to be paid the expert, the identity of the expert, the anticipated number of hours of service, and the length of time necessary to perform the requested services, however, are not privileged or otherwise protected from disclosure. *Cf. Seventh Elect Church in Israel v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1984) (fee arrangements between an attorney and his client are ordinarily not privileged or otherwise protected from disclosure).

Neither Pierce nor Judge Verser identified how disclosure of the identity of the appointed experts and/or the amount approved for their services would prejudice Pierce's right to a fair trial. Neither Pierce nor Judge Verser explained how alternative remedies, such as a change of venue, is inadequate to address any prejudice that might arise from the disclosure of this information. Neither Pierce nor Judge Verser considered whether the "serious interest" to be protected could be accomplished by redacting the documents instead of totally sealing the documents. Their failure to provide

the required notice and to fully analyze the *Ishikawa/Bone-Club* factors requires the vacation of the sealing orders.

One of the ex parte orders signed by Judge Verser prohibits the County Jail staff from discussing with the prosecutor any issues arising from Pierce's interactions with experts. The Jail staff, however, is required to protect the community and other inmates from Pierce, and to protect 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.

While the Jail strives mightily to accommodate the requests of a defense expert, conflicts can arise. An expert may desire the transfer of the defendant to a hospital or clinic for testing at a time when Jail staff is short-handed. Or an expert may desire the transfer of a defendant who is too dangerous to safely secure outside the walls of the Jail. When such a conflict arises, the Jail requires the assistance of their legal advisor – the Prosecuting Attorney. *See generally* RCW 36.27.020(2). Judge Verser's order, however, leaves the Jail without representation and with no means of bringing irreconcilable positions to the court for resolution.

The trial court did not consider whether any option, short of sealing records, could have protected Pierce's rights as required under *Bone-Club*. This failure mandates the vacation of the sealing orders.

B. ARTICLE I, § 5 OF THE WASHINGTON CONSTITUTION  
PROHIBITS THE ENTRY OF AN ORDER REQUIRING  
NON-PARTIES TO REFRAIN FROM SPEAKING ABOUT  
A COURT PROCEEDING

Const. art. I, § 5 is expansive: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Const. art. I, § 5. Due to its broad language, Article I, § 5 has been held to provide greater protection for pure noncommercial speech in a public forum and to strictly prohibit prior restraints on free speech. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114-15, 937 P.2d 154, 943 P.2d 1358 (1997); *State v. E.J.Y.*, 113 Wn. App. 940, 946, 55 P.3d 673 (2002). This constitutional provision precludes restrictions on the reporting of information lawfully collected regarding court proceedings and matters. *State v. Coe*, 101 Wn.2d 364, 378, 679 P.2d 353 (1984).

An order precluding someone from speaking on a topic is generally referred to as a "gag order." A gag order, like any other type of injunction, may not be issued without notice to the adverse party. *See* CR 65(b). This requirement stems from the due process clause which will not allow the government to restrain an individual's liberty without appropriate procedural

safeguards. At a bare minimum, procedural due process “requires notice and an opportunity to be heard.” *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994).

The sole parties to a criminal case are the State of Washington and the individual who is charged with a crime. The entry of an order commanding individuals who are not parties to a suit is not a matter of judicial discretion, but rather an invalid exercise of the court's jurisdiction. *T.R. v. Cora Priest's Day Care Center*, 69 Wn. App. 106, 847 P.2d 33 (1993). An individual who is not party to a case is not bound by an order of the court in the case. *See generally Seattle v. Fontilla*, 128 Wn.2d 492, 502, 909 P.2d 1294 (1996) (“consistent with the general rule that ‘one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process’, a municipal court in a criminal matter is without jurisdiction over the State of Washington). This rule logically also applies to gag orders entered in criminal cases. *See State ex rel. Snohomish County v. Sperry*, 79 Wn.2d 69, 78, 483 P.2d 608 (1971) (Rosellini, J., concurring) (an order prohibiting the press from reporting about a judicial proceeding is void as the press are not parties to the criminal case).

Despite the lack of jurisdiction over the officials that Pierce wished to have silenced, Judge Verser granted Pierce's ex parte motions for gag orders. In doing so, Judge Verser made no findings as to how extrajudicial

statements by these individuals threatened Pierce's right to a fair trial. Nor did Judge Verser explore any other alternatives that might mitigate any prejudice that could arise from the speech of the Elected Officials. *See generally State v. Bassett*, 128 Wn.2d 612, 911 P.2d 385 (1996) (identifying the minimum showing necessary to support a gag order).

One of the ex parte gag order signed by Judge Verser prohibits the Elected Officials from informing the public of the cost arising from the double murder charges against Pierce. This order clearly violates the Elected Officials and their staff's right to free speech and 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. The order also chills full debate by the County Commissioners with respect to any budget modifications that may be needed to accommodate the cost of Pierce's defense.

The gag order also prevents the Elected Officials from complying with their obligations under the Public Records Act, which as of 2007 contains the following statement regarding the disclosure of invoices for legal services:

It is the intent of the legislature to clarify that no reasonable construction of chapter 42.56 RCW has ever allowed attorney invoices to be withheld in their entirety by any public entity in a request for documents under that chapter. It is further the intent of the legislature that specific descriptions of work

performed be redacted only if they would reveal an attorney's mental impressions, actual legal advice, theories, or opinions, or are otherwise exempt under chapter 391, Laws of 2007 or other laws, with the burden upon the public entity to justify each redaction and narrowly construe any exception to full disclosure. The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources, including through liability insurance, upon private legal counsel or private consultants.

RCW 42.56.904.

In light of the oft-repeated and legislatively reaffirmed policy that Public Records Act exemptions are to be narrowly construed and that the local government (not the requester) has to justify why records or information is withheld, this Court can reasonably conclude that the billing records of defense counsel are public records subject to disclosure after partial redaction. The redactions would remove what RCW 42.56.904 acknowledges are attorney thought processes or strategy or "value added" to the client's case by virtue of the attorney's legal training.<sup>7</sup> The remainder, as discussed *supra*, is information that is not protected by the attorney-client privilege.

The Peninsula Daily News and other local media have covered the double murder allegations quite extensively with numerous front-page stories. These articles demonstrate that everything related to this case is

---

<sup>7</sup>For example, a detailed invoice item stating "Legal Research into Issue such and such" could be redacted for public consumption to simply state "Legal Research." "Conference with client regarding Issue such and such" could be redacted to simply state "Conference with Client." "Write brief on issue x" would become "write brief." In none of these cases would the reader learn the attorney's strategy or thought process since every case involves legal research, client conferences and brief writing.

newsworthy,<sup>8</sup> and, in fact, Public Records Acts requests for the legal defense invoices have been made by employees of both newspapers that cover Jefferson County government. The County government may certainly anticipate future Public Records Act requests for the billing records of defense counsel and other subcontractors. *See, e.g.,* Chris Bristol, *YH-R, Lawyers Battling Over Murder Case Records*, Yakima Herald-Republic (May 6, 2009) (detailing a chapter in a protracted Public Records Act battle to obtain copies of defense counsel’s billing records in an aggravated first degree murder case). In fact litigation in Yakima County over the release of defense attorney invoices has reached the Washington Supreme Court. *See Yakima County v. Yakima Herald Republic*, No. 82229-8 (argument not yet scheduled).

If the billing records of defense counsel (or defense counsel subcontractors) are requested under the Public Records Act and wrongfully withheld it will *not* be a lawful defense for the County to point to the July 27, 2009 gag order. Such a statement is true because there is no exemption in the Public Records Act that would allow otherwise disclosable records to be withheld from disclosure simply because a court injunction is in place preventing release of those records. Additionally, the daily penalties that

---

<sup>8</sup>A review of the judicial reports that have been filed with the Washington Supreme Court pursuant to RCW 10.95.120 establish that Pierce is the first aggravated murder prosecution since Chapter 10.95 RCW was enacted in 1981.

accrue against a local government that wrongfully withholds requested Public Records would continue to accrue during the time that the injunction purportedly prevented disclosure of those records. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006).

Additionally, the invoices from an outside attorney (or any expert or consultant hired by the defense counsel) are, quite arguably, no longer court records once they are forwarded to the County Auditor for payment. Instead, for the Auditor these invoices serve an entirely different purpose: providing support and documentation for the disbursement of public funds to the defense counsel or their subcontractors, who would just be one or a few of the hundreds of vendors Jefferson County pays each and every year.

It is inevitable that for any of many conceivable reasons the Auditor will be asked or required to disclose information found on those invoices in direct violation of the August 19, 2009 gag order<sup>9</sup> which prevents any disclosure to any person because it states that:

(2) The detailed invoices of defense counsel, defense experts, and other service providers submitted for court approval shall remain sealed pursuant to the June 16, 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, Commissioner's, and Treasurer's Offices shall not disclose

---

<sup>9</sup>The August 19, 2009, order modified, albeit slightly, the original July 27, 2009. *See CP 69-70*.

the names of the defense experts or service providers or anything regarding the services that they or defense attorneys performed, except as set forth in item 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.

CP 149.

The first scenario where disclosure to another person will be mandated by state law arises because the County Auditor's records are subject to a regular periodic audit by the State Auditor's office. *See* RCW 43.09.230. This dovetails with the mandate imposed upon the County Auditor by RCW 36.22.010(4), which states the County Auditor "shall make available a complete exhibit of the prior-year finances of the county ..... in accordance with standards developed by the state auditor."

The second scenario where the Auditor discloses information that is otherwise not disclosable pursuant to the gag order is when the Auditor sends the warrants to the County Commissioners for approval, since the County Commissioners control the County's purse strings and must approve all warrants for payment. *See* RCW 36.32.120(5) and RCW 36.32.120(6). Recall that the Auditor cannot reveal any information about the defense counsel or his subcontractors to any other person according to the gag order. This could also arise in the context of the County Commissioners determining the impact of the defense legal costs on the county's budget.

Finally, if some inconsistency or confusion arises about a particular invoice or item on an invoice, then before payment could be authorized, the Auditor would have no choice but to contact the department head who forwarded the bill to her<sup>10</sup> or, possibly, to contact the vendor directly. Again the Auditor would have contacted a third-party about the information that is the subject of the now-challenged gag order.

These same three scenarios could apply to the County Treasurer who is obligated by RCW 36.29.010(1) to "receive all money due to the county and disburse it on warrants issued and attested by the county auditor...." Similarly, as stated above the County Commissioners could also be forced to disclose if they had questions about a particular warrant.

Because Pierce's motions for gag orders were heard *ex parte*, Judge Verser failed to consider the myriad statutes that require the gagged non-parties to disgorge the information Pierce asked to have protected. The failure of Pierce's counsel to advise Judge Verser of this adverse information is clearly contrary to the spirit, if not the letter of RPC 3.3(f).

Pierce's failure to cite any legal authority in his *ex parte* motion that authorizes a court to gag non-parties to the criminal action should have alerted Judge Verser to the impropriety of Pierce's request. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (when a party does not cite

---

<sup>10</sup>Presumably that would be Court Administrator.

legal authority, the court may assume that counsel, after a diligent search has found none that support the proposition). But it did not. The orders granting Pierce's unlawful ex parte requests for gag orders must be promptly vacated as void.

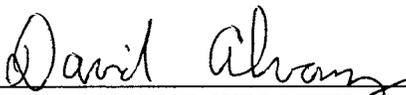
#### V. CONCLUSION

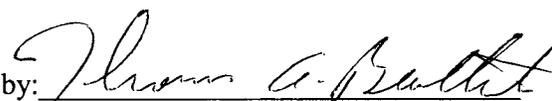
The orders sealing the orders appointing experts, the motion for the gag orders, and the portions of the motions for the provision of services that do not contain attorney-client confidences or work product must be vacated as violative of Const. art. I, § 10.

The gag orders must be vacated as violative of Const. art. I, § 5, and of the Elected Official and jail staff's due process rights.

Respectfully submitted on November 16, 2009.

JUELI DALZELL Jefferson County Prosecutor

by:   
DAVID ALVAREZ, WSBA#29194  
Chief Civil Deputy Prosecuting Attorney  
Attorney for the Elected Officials

by:   
THOMAS A. BROTHERTON, WSBA# 37624  
Deputy Prosecuting Attorney  
Attorney for the State of Washington

## ATTACHMENTS

	Description	Date entered	Where in record (CP)
A	Order entitled "Order for a Protective Order" (first Order gagging the County Jail from disseminating information about visits and mail relating to Mr. Pierce	June 16, 2009	41, 42
B	Order entitled "Order for a Protective Order" (second Order gagging the County Jail)	June 16, 2009	43, 44
C	Order entitled "GR 15 Order" (Order to seal)	June 16, 2009	45, 46
D	Order entitled "Order sealing records" (sealing the name of the experts and all invoices or timesheets they might submit)	June 16, 2009	47, 48
E	Judge Verser's "Memorandum Opinion and Order for Closed Hearing and Sealing Records"	June 18, 2009	49, 50
F	Order entitled "Order Directing Jefferson County Officials Not to Disclose Confidential Defense Material." (Order gagging elected officials who are not parties to the criminal matter)	July 27, 2009	69, 70
G	Order entitled "Order Modifying the July 27, 2009 Order" (self-explanatory)	August 19, 2009	147 to 150

FILED

HONORABLE CRADDOCK, VERSER

JEFFERSON COUNTY  
RUTH GORDON, CLERK

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

STATE OF WASHINGTON,

Plaintiff,

v.

MICHAEL JOHN PIERCE,

Defendant.

CAUSE NO. 09-1-00058-7

[PROPOSED] ORDER FOR A  
PROTECTIVE ORDER

**\*CLERK'S ACTION REQUIRED\***

The Court has received and reviewed defense MOTION & DECLARATION TO SEAL  
ORDER DIRECTING THE JAIL NOT TO DISCLOSE PROFESSIONAL VISITS.

The Court HEREBY ORDERS that:

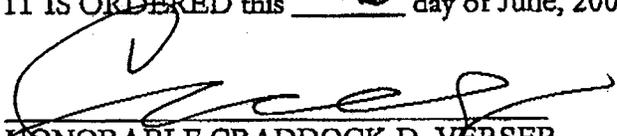
1. The Jefferson County Jail shall not disseminate the identity and capacity of any member of Mr. Pierce's legal team including, but not limited to, attorneys, paralegals, investigators, and experts, or the date or type of professional visit to the prosecution or anyone.
2. The Jefferson County Jail shall not open, copy, read or disseminate legal correspondence from Mr. Pierce's legal team to Mr. Pierce or from Mr. Pierce to his legal team.
3. It is further ordered that Mr. Pierce's attorneys shall serve a copy of this order on the Jefferson County Jail so that may comply with the Court's order.

**ATTACHMENT A**

1 4. Because the information contained in the *Defense Motion and Declaration For an Order to Seal*  
2 *and an Order Directing the Jefferson County Jail not to Disclose Professional Visits* includes  
3 matters that fall under attorney-client privilege and work-product, the court finds a basis under  
4 General Rule (GR) 15(c)(2)(f) that said *Motion and Declaration* shall be sealed.

5 5. \_\_\_\_\_  
6 \_\_\_\_\_  
7 \_\_\_\_\_  
8 \_\_\_\_\_  
9 \_\_\_\_\_

10 IT IS ORDERED this 15<sup>th</sup> day of June, 2009.

11   
12 HONORABLE CRADDOCK D. VERSER  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FILED

09 JUN 16 AM 11:50

HONORABLE CRADDOCK D. VERSER  
JEFFERSON COUNTY  
RUTH GORDON, CLERK

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

STATE OF WASHINGTON,  
Plaintiff,

v.

MICHAEL JOHN PIERCE,  
Defendant.

CAUSE NO. 09-1-00058-7

[PROPOSED] ORDER FOR A  
PROTECTIVE ORDER

**\*CLERK'S ACTION REQUIRED\***

PROTECTIVE ORDER

The above entitled Court having reviewed Mr. Larrañaga's motion and declaration for a protective order *ex parte*,

HEREBY ORDERS AS FOLLOWS:

1. The motion for a protective order is granted.
2. The Jefferson County Jail shall not disseminate records regarding Mr. Pierce to anyone other than to his attorneys, Mark A. Larrañaga and Richard Davies or anyone designated in writing by them.
3. Because the information contained in the *Defense Motion and Declaration in Support of Motion for a Protective Order* contains information that is categorized as attorney-client

PROTECTIVE ORDER

1

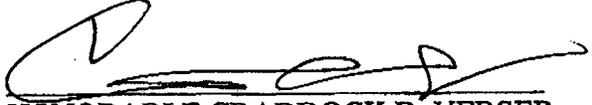
WALSH & LARRANAGA  
705 2<sup>ND</sup> AVE., #405  
SEATTLE, WA 98104  
PH (206) 325-7900  
FAX (206) 322-4305

ATTACHMENT **B**

1 privilege and work-product, the court finds a basis under General Rule (GR) 15(c)(2)(f) that  
2 said *Motion and Declaration* shall be sealed.

3  
4 4. \_\_\_\_\_  
5 \_\_\_\_\_

6 IT IS ORDERED this 15 day of June, 2009.

7  
8   
9 HONORABLE CRADDOCK D. VERSER

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FILED

09 JUN 16 AM 11:50  
HONORABLE CRADDOCK D. VERSER  
JEFFERSON COUNTY  
RUTH GORDON, CLERK

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

STATE OF WASHINGTON,

CAUSE NO. 09-1-00058-7

Plaintiff,

[PROPOSED] GR 15 ORDER

v.

MICHAEL JOHN PIERCE,

Defendant.

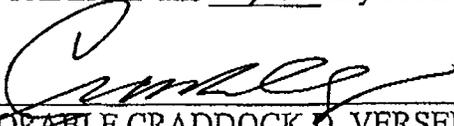
The Court has received and reviewed defense Motion & Declaration seeking an order to seal said Motion & Declaration and motion to seal the Motion RE: Status of Counsel. The court finds, pursuant to General Rule 15 General Rule (GR) 15(c)(2)(f), that the Motion & Declaration to Seal and the Motion RE: Status of Counsel contain work-product and attorney-client privileged material permitting said documents to be sealed.

HEREBY ORDERS that:

1. The Motion to Seal said Motion & Declaration to Seal is **GRANTED**:
2. The Motion to Seal Motion Re: Counsel Status is **GRANTED**.
3. \_\_\_\_\_

**ATTACHMENT C**

1 IT IS ORDERED this 16 day of June, 2009.

2  
3   
4 HONORABLE CRADDOCK D. VERSER

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FILED

09 JUN 16 AM 11:50  
HONORABLE CRADDOCK D. VERSER  
JEFFERSON COUNTY  
RUTH GORDON, CLERK

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

STATE OF WASHINGTON,  
Plaintiff,

v.

MICHAEL JOHN PIERCE,  
Defendant.

CAUSE NO. 09-1-00058-7

[PROPOSED] ORDER SEALING  
RECORDS

**\*CLERK'S ACTION REQUIRED\***

Defendant, appearing *ex parte*, moves that the documents referenced below be placed under court seal. The grounds for this motion are that these records are confidential, privileged and governed by rules of confidentiality for attorney work product, CrR 3.1(f).

The court finds that said documents, pursuant to CrR 3.1(f), are protected by the attorney-client and work product privileges, and are not subject to disclosure to the state or to the public.

Now, therefore, IT IS HEREBY ORDERED THAT the following documents shall be sealed and shall not be opened without further order from this Court:

1. Motion & Declaration to seal declaration in support of request for expert services dated June 15, 2009.
2. Declaration of Larrañaga in support of request for expert services and all attachments to Larrañaga's declarations dated June 15, 2009.

ORDER SEALING RECORDS

1

ATTACHMENT **D**

WALSH & LARRANAGA  
705 2<sup>ND</sup> AVE., #405  
SEATTLE, WA 98104  
PH (206) 325-7900  
FAX (206) 322-4305

1 3. The order appointing said experts.

2 4. All invoices, timesheets and requests for payment for said defense expert on the above  
3 entitled case.

4 The above documents shall be made available only to the Appellate Court and to the attorneys for  
5 Mr. Michael John Pierce

6  
7 Signed and dated this 16 day of June, 2009.

8   
9 \_\_\_\_\_  
HONORABLE CRADDOCK D. VERSER

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26 ORDER SEALING RECORDS

2

WALSH & LARRANAGA  
705 2<sup>ND</sup> AVE., #405  
SEATTLE, WA 98104  
PH (206) 325-7900  
FAX (206) 322-4305

FILED

09 JUN 18 PM 1:47

JEFFERSON COUNTY  
RUTH GORDON, CLERK

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

STATE OF WASHINGTON

Plaintiff,

vs.

MICHAEL JOHN PIERCE

Defendant.

Case No.: 09-1-00058-7

MEMORANDUM OPINION AND ORDER FOR  
CLOSED HEARING AND SEALING RECORDS

MOTIONS

This matter came on for hearing on June 16, 2009 upon Mr. Pierce's motion for ex parte orders regarding the status of counsel, directed to the Jefferson County Jail to prohibit release of jail/medical records related to Mr. Pierce, to prohibit the jail from disclosing the visits to Mr. Pierce by members of his legal team, for appointment of experts to assist in Mr. Pierce's defense, and to seal records related to the invoices of members of Mr. Pierce's legal team including counsel and to seal the declarations filed in support of these motions.

Mr. Pierce appeared by way of video from the Jefferson County jail with his attorney, Richard Davies. Mr. Larranga, Mr. Pierce's other attorney appeared personally in open court.

**ATTACHMENT E**

CRADDOCK D. VERSER  
JUDGE

Jefferson County Superior Court  
P.O. Box 1220  
Port Townsend, WA 98368

MEMORANDUM OPINION - 1

OPINION

1  
2  
3 The court declined to consider the motions "ex-parte" without any  
4 record. In open court the court considered the factors set forth in State  
5 v. Bone Club, 128 Wn. 2d 254, 258-59, 906 P.2d 325 (1995), on the record.  
6 While the Bone Club factors are considered in reference to a defendant's  
7 right to an open trial, the court felt it was appropriate to consider those  
8 factors even when the defendant was requesting a closed hearing. Upon  
9 balancing the public's right to an open proceeding with Mr. Pierce's rights  
10 to effective representation, confidential attorney client communication, and  
11 confidential preparation of his case without revealing possible trial  
12 strategy and attorney work product, the court closed the hearing related to  
13 the above referenced motions.  
14

15 Upon a showing that disclosure of the declarations made in support of  
16 the various motions could have revealed attorney work product, possible  
17 defense strategy, and attorney/client communications that would otherwise be  
18 protected and considering the Court's opinion in Ake v. Oklahoma, 470 U.S.  
19 68, 105 S. Ct. 1087, 84 L.Ed.2d 53, 66 (1985), the court ordered the  
20 declarations sealed and the record sealed until this case is resolved.  
21

ORDER

22  
23  
24 The Motions are GRANTED except as indicated during the closed hearing.  
25

26  
27 Dated this 18<sup>th</sup> day of June, 2009.  
28

29  
30   
31 CRADDOCK D. VERSER, JUDGE  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50

CRADDOCK D. VERSER  
JUDGE  
Jefferson County Superior Court  
P.O. Box 1220  
Port Townsend, WA 98368

FILED

2009 JUL 27 AM 8:12  
HONORABLE CRADDOCK D. VERSER  
IN SUPERIOR COURT  
JEFFERSON COUNTY CLERK

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

STATE OF WASHINGTON,  
Plaintiff,  
v.  
MICHAEL JOHN PIERCE,  
Defendant.

CAUSE NO. 09-1-00058-7

~~PROPOSED~~ ORDER DIRECTING  
JEFFERSON COUNTY OFFICES NOT  
TO DISCLOSE CONFIDENTIAL  
DEFENSE MATERIAL

\*CLERK'S ACTION REQUIRED\*

This matter having come before the court on Defendant's Ex parte Motion for Order Directing Jefferson County Offices not to Disclose Confidential Defense Material; and

The motion is made pursuant to CrR 3.1(f) and concerns privileged and work product defense material; and

The court having previously ordered that the names, description of work performed, and the amount of compensation for defense experts and counsel be sealed (See Order Sealing Records, dated June 16, 2009);

ATTACHMENT **F**

ORDER DIRECTING JEFFERSON COUNTY  
OFFICES NOT TO DISCLOSE CONFIDENTIAL  
DEFENSE MATERIAL

*See to Defense Council*

WALSH & LARRANAGA  
705 2<sup>ND</sup> AVE., #405  
SEATTLE, WA 98104  
PH (206) 325-7900  
FAX (206) 322-4305

1  
2 IT IS HEREBY ORDERED THAT:

3 Elected officials and staff in the Jefferson County Auditor's, Commissioners', and  
4 Treasurer's Offices shall not disclose to any other party, person or entity the name of any defense  
5 expert or vendor, or the amounts paid to any expert, vendor or defense counsel. The names of  
6 vendors and experts are provided to the Auditor's, Commissioners', and Treasurer's Offices solely  
7 for the purpose of processing payment for each expert, vendor and defense counsel. The description  
8 of work performed and the amounts paid to any expert, vendor or defense counsel shall not be  
9 disseminated to anyone outside of the Auditor's, Commissioners', and Treasurer's Offices. Certified  
10 copies of this order shall be provided to defense counsel and defense counsel shall serve a certified  
11 copy of the order on the Jefferson County Auditor's, Commissioners' and Treasurer's Offices.  
12

13 *This order is effective until the Superior Court  
14 matter is resolved. out*  
Signed and dated this 27 day of July, 2009. *7/27/09*

15   
16 HONORABLE CRADDOCK D. VERSER

17  
18  
19  
20  
21  
22  
23  
24  
25 ORDER DIRECTING JEFFERSON COUNTY  
26 OFFICES NOT TO DISCLOSE CONFIDENTIAL  
DEFENSE MATERIAL.

2  
WALSH & LARRANAGA  
705 2<sup>ND</sup> AVE., #405  
SEATTLE, WA 98104  
PH (206) 325-7900  
FAX (206) 322-4305

Handwritten mark

FILED

2009 AUG 19 PM 3:19

IN SUPERIOR COURT  
JEFFERSON COUNTY CLERK

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

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

STATE OF WASHINGTON, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 MICHAEL PIERCE, )  
 )  
 ) Defendant. )  
 )

NO. 09-1-00058-7

ORDER MODIFYING THE  
JULY 27, 2009 ORDER

THIS MATTER having come before the Court on the State's Motion to Vacate, and the Court having reviewed and considered the following submissions:

- Motion to Vacate;
- Defendant's Response to State's Motion to Vacate;
- Defendant's Motion to Strike or Alternatively Reschedule the Hearing ....; and
- Reply to Defendant's Motion to Strike or Delay Oral Argument on the Motion to Vacate;

and having heard argument of the parties on August 14, 2009, the court finds that:

1. In the context of disclosure of and payment to court appointed defense experts, other service providers, and defense counsel, the court does have jurisdiction over the parties, as well as the Jefferson County Auditor's, Treasurer's and Commissioners'

ORDER MODIFYING THE  
JULY 27, 2009 ORDER  
Page 1

**ATTACHMENT G**

JEFFERSON ASSOCIATED COUNSEL  
333 BENEDICT STREET  
PORT TOWNSEND, WA 98368  
(360) 385-5613

Handwritten mark

1 Offices, to issue orders necessary to protect the defendant's constitutional rights and  
2 to insure that this matter proceeds in an orderly fashion.

3 2. CrR 3.1(f) and Jefferson County Ordinance 04-0323-09 authorize the court to  
4 consider *ex parte* and sealed submissions of defense counsel for expert services and  
5 other service providers.

6 3. Given the present posture of the case, the identity of defense experts and other  
7 service providers and the work they and defense attorneys do in this case is  
8 confidential work product and attorney-client privileged information. The State's  
9 reliance on *State v. Pawlyk*, 115 Wn.2d 457, 800 P.2d 314 (1990) (attorney-client  
10 privilege waived when NGL asserted) and *State v. Hamlet*, 133 Wn.2d 314, 944 P.2d  
11 1026 (1997) (attorney-client privilege waived when diminished capacity defense  
12 asserted) to the contrary is misplaced.

13 4. The Public Records Act, RCW 42.56 et. seq., does not apply to judicial records  
14 concerning the *ex parte* appointment of defense experts, other service providers, and  
15 attorneys or their court-approved invoices for work completed. That the court-  
16 approved invoices are then processed by other county departments for payment does  
17 not subject these judicial records to disclosure under the Public Records Act. *Nast v.*  
18 *Michels*, 107 Wn.2d 300, 307, 730 P.3d 54 (1986).

19 5. After considering the factors set forth in *State v. Bone Club*, 128 Wn.2d 254, 258,  
20 906 P.2d 325 (1995), a balance must be struck between the public right to know how  
21 much money is being spent in *State v. Michael Pierce*, 09-1-00058-7 and the  
22 accused's right to a fair trial.

1 **THEREFORE, IT IS HEREBY ORDERED THAT:**

- 2 1. The State's Motion to Vacate the Order dated July 27, 2009, is denied.
- 3 2. The detailed invoices of defense counsel, defense experts, and other service providers
- 4 submitted for court approval shall remain sealed pursuant to the June 16, 2009 Order.
- 5 3. In processing court-approved payment to defense experts, other service providers, and
- 6 attorneys for work done in this case, County officials and staff in the Auditor's,
- 7 Commissioners', and Treasurer's Offices shall not disclose the names of the defense
- 8 experts or other service providers or anything regarding the services that they or defense
- 9 attorneys performed, except as set forth in §4 below, to any other person, party, or entity
- 10 (including the county prosecutor's office and general public) beyond those county
- 11 officials and staff integral to the payment process for court-approved invoices.
- 12 4. The July 27<sup>th</sup> Order is modified as follows: The total amount of court-approved
- 13 payments in this case, for any given period, made to (1) defense counsel and (2) all
- 14 expert and other service providers may be disclosed by the appropriate county
- 15 department (i.e., From date to date: Attorneys - \$xxxx, Experts and Other Service
- 16 Providers - \$xxxx).
- 17 5. This order is effective until the Superior Court proceeding in this matter is resolved or
- 18 further order of this court or any appellate court.

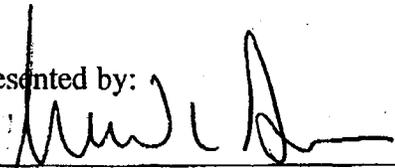
19 DATED: August 17, 2009

20 

21 JUDGE

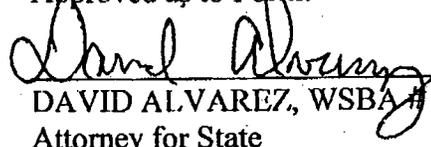
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

Presented by:



RICHARD L. DAVIES, WSBA # 18502  
Attorney for Defendant

Approved as to Form:



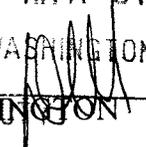
DAVID ALVAREZ, WSBA # 29194  
Attorney for State



MARK A. LARRANAGA, WSBA # 22715  
Attorney for Defendant

FILED  
COURT OF APPEALS  
DIVISION II

09 NOV 17 AM 11:31

STATE OF WASHINGTON  
BY 

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

STATE OF WASHINGTON, )  
)  
Petitioner, and )  
)  
JUDI MORRIS, JEFFERSON COUNTY )  
ELECTED OFFICIALS 1 through 5, et al )  
)  
Petitioners, )  
)  
vs. )  
)  
MICHAEL JOHN PIERCE, )  
)  
Respondent. )

Case No. 39532-1-II

Superior Court Cause No. 09-1-00058-7

**DECLARATION OF SERVICE**

Thomas A. Brotherton declares:

That all times mentioned I was over 18 years of age and a citizen of the United States, that on the 16<sup>th</sup> day of November, 2009 I mailed a copy of the "Consolidated Brief of Petitioners" with Attachments postage pre-paid to the following:

David C. Ponzoha, Clerk  
Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma WA 98402-4454

Mark A. Larranaga  
Walsh & Larranaga Law  
705 Second Ave., Suite #405  
Seattle WA 98104

Richard L. Davies  
Jefferson Associated Counsel  
333 Benedict Street  
Port Townsend, WA 98368

Hand delivered to:  
  
DPA Scott Rosekrans

**DECLARATION OF SERVICE**

Page 1

**JUELANNE DALZELL**  
PROSECUTING ATTORNEY  
FOR JEFFERSON COUNTY  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180

1 I declare under penalty of perjury pursuant to the laws of the State of Washington that foregoing  
2 declaration is true and correct.

3 Dated this 16<sup>th</sup> day of November, 2009 at Port Townsend, WA

4   
5 \_\_\_\_\_  
6 Thomas A. Brotherton

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

**DECLARATION OF SERVICE**

Page 2

23

24

**JUELANNE DALZELL**  
PROSECUTING ATTORNEY  
FOR JEFFERSON COUNTY  
Courthouse -- P.O. Box 1220  
Port Townsend, WA 98368  
(360) 385-9180