FILED

OCT 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO: 27535-3-III

COURT OF APPEALS DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent

v.

MARIO G. MENDEZ
Appellant/Defendant

YAKIMA HERALD-REPUBLIC, INTERVENOR

STATE'S SUPPLEMENTAL BRIEF

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I. STATEMENT OF THE CASE

The statement of facts in the brief of the appellant and intervenor are sufficient to address the issues present in the briefs. Additional facts are added to supplement those facts when necessary.

II. ARGUMENT

1. The Supreme Court's decision in *State v. Sanchez* does not affect this court's decision in the present case.

General Rule 15 authorizes courts to seal and unseal records. GR15(c) permits sealing court records in criminal cases, and does not require notice for motions to seal documents entered pursuant to CrR 3.1(f), which is the manner in which the documents in question were sealed. GR 15 (e) addresses the grounds and procedure for requesting the unsealing of sealed records. The rule provides that "(1) [s]ealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record."

Subsection (2) of GR 15 (e) addresses the unsealing of records in a criminal case, stating: "[a] sealed court record in a criminal case shall be ordered unsealed only upon proof of compelling circumstances, unless

otherwise provided by statute, and only upon motion and written notice to persons entitled to notice under subsection (c)(1) of this rule except ...."

In *State v. Sanchez*, 170 Wn.2d 775, 802, 246 P.3d 768 (2011), the court acknowledged that the court had "recognized that the Ishikawa factors may have application in the context of sealing or unsealing records. *See, e.g., Dreiling v. Jain*, 151 Wn.2d 900, 909-10, 93 P.3d 861 (2004)." The *Sanchez* court remanded the case for the trial court to conduct a hearing under GR 15(e) to determine if sealing remains appropriate given the current posture of the case. *Sanchez*, supra at 803. Although the *Sanchez* court did not specifically state the standard to be used, this court recognized that the Supreme Court in *Rufer* used the *Ishikawa* factors. "We hold that any records that were filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines--pursuant to Ishikawa --that there is a compelling interest which overrides the public's right to the open administration of justice. We are merely articulating the standard a trial court should use when confronted with a motion to seal records. It is within the trial court's discretion to apply that standard and determine if the interests asserted by the party wishing to seal records are compelling enough to override the presumption of openness. We can posit several interests that may override the presumption of openness, but we hesitate to

list them here because they are not found in the facts before us and this analysis must be done on a case-by-case basis." *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549-550, 114 P.3d 1182 (2005).

Arguably only the fourth Ishikawa factor is applicable, that is that the trial court weigh the competing interests of the defendant and the public and do so with specificity. *State v. Mendez*, 157 Wn. App. 565, 584, 238 P.3d 517 (2010). In this case, the defendant, Mr. Mendez, plead guilty pursuant to a plea agreement, whereby in exchange for dismissal of some counts and amendment of others, he would testify against his co-defendant, Jose Luis Sanchez. (CP 87-93). His case became final on the date of sentencing. RCW 10.73.090(3)(a). Therefore his interest in receiving a fair trial completely disappeared upon that day.

In the case at hand the trial court properly balanced these competing rights using the five factors set forth in *Ishikawa.* (CP 31). The trial court permitted redaction of certain documents to protect Mr. Mendez's attorney-client privilege and work product. Since the initial concerns for the defendant's right to a fair trial were no longer present, the court was required to unseal the record by both the Washington State Constitution Art 1, § 10 under the *Ishikawa* analysis, and under GR 15.

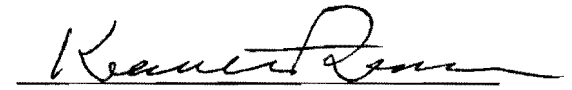
2. The Appellant's equal protection arguments should rejected as beyond the scope of the Supreme Court's remand order.

The Supreme Court remanded this matter to this court for reconsideration in light of *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P .3d 768 (2011) filed August 9, 2011. That decision did not address equal protection. In light of that fact, it is apparent that the scope of review was limited and this court should disregard the appellant's equal protection argument. (When an issue was not included within the grant of the discretionary review it will not be considered. *Marquardt v. Fein*, 25 Wn. App. 651, 653-654, 612 P.2d 378 (1980)).

IV. CONCLUSION

Based upon the foregoing argument, this Court should again affirm the trial court's order unsealing the record.

Respectfully submitted this 22nd day of October, 2011.



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Certificate of Service

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