

NO. 82229-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

YAKIMA COUNTY,
Respondent,

v.

YAKIMA HERALD-REPUBLIC,
Appellant.

YAKIMA HERALD-REPUBLIC,
Appellant,

v.

YAKIMA COUNTY,
Respondent.

BRIEF OF RESPONDENT JOSE SANCHEZ, JR.

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A. INTRODUCTION

To protect Jose Sanchez's Fifth Amendment privilege against self-incrimination, Sixth Amendment right to counsel, and Fourteenth Amendment rights to the due process and equal protection of the law, the Yakima County Superior Court sealed declarations submitted by Mr. Sanchez's attorneys in support of their requests for expert services. Without regard to Mr. Sanchez's rights, and initially without notice to him, the Yakima Herald-Republic sued, contending the Public Records Act (PRA) requires the Yakima County Superior Court to provide the sealed documents. The trial court concluded the PRA did not require disclosure of the documents.

To date the newspaper has filed pleadings in connection with: its motion to unseal; its motion for appellate leave; its PRA action in Superior Court; its statement of grounds for direct review; and its Brief of Appellant. Not one of these pleadings gives more than brief mention to, much less meaningfully addresses, Mr. Sanchez's right not to testify against himself; his right to the effective assistance of counsel, his right to the equal protection of the law, and his right to due process. Instead, the newspaper simply insists the lower court was wrong, myopically focusing only upon what the paper perceives as a violations of its supposed right to access.

Consistent with its failure to understand and address either Mr. Sanchez's rights or, more importantly the trial court's desire to protect those rights, the arguments the newspaper makes on appeal have little to do with the facts of this case. The issue here is relatively narrow; specifically whether the PRA reaches the privileged information defense counsel was required to submit in order to provide Mr. Sanchez a constitutionally sufficient defense. Instead of confining itself to the facts of this case, the newspaper views Mr. Sanchez's case as a vehicle to pursue a much broader, and mostly unrelated, agenda to expand the reach of the PRA. This case falls squarely within this Court's holding in Nast v. Michals, 107 Wn.2d 300, 307, 730 P.3d 54 (1986), and the newspaper has not presented this Court any basis to overturn Nast.

The trial court properly refused the newspaper's effort to broaden the reach of the PRA to the privileged information at issue here.

B. ISSUES PRESENTED

1. Contrary to the newspaper's claim, this case does not concern the application of the PRA to "a 'budget' judge's records relating to the funding of public defense." Rather, the issue is whether the PRA applies to materials filed by an indigent defendant in a pending criminal proceeding in order to obtain his constitutionally protected rights to the effective assistance of counsel, a meaningful defense, due process and

equal protection, where those materials are sealed in order to protect the defendant's Fifth, Sixth and Fourteenth Amendment rights, the attorney-client privilege and the work-product privilege.

2. Because there has been no finding that the judge in this case was acting in merely an administrative capacity, and because the facts would not support such a finding in any event, this case does not present the issue of whether Nast exempts judicial records created while the judge was acting in an administrative capacity.

3. Because this case concerns only the question of whether documents provided by a criminal defendant to the court during the course of litigation are subject to the PRA, it does not present the question of whether all records in the possession of the judiciary are court case files.

C. STATEMENT OF THE CASE

The State of Washington charged Jose Sanchez with two counts of first degree aggravated murder, with a special notice of the State's consideration of seeking a death sentence. From that point forward, appointed counsel submitted numerous requests for funds to retain various experts to assist in the preparation of Mr. Sanchez's defense. CP 308-11. Pursuant to an order by the presiding judge, and in accordance with the standard of practice in Yakima County, defense counsel submitted their requests *ex parte* to a second judge, Judge James Lust. CP 308-10; Jose

Sanchez's Answer at Appendix 5-13.¹ On each occasion, defense counsel moved to seal the documents supporting their request for expert services, asserting sealing was necessary to preserve Mr. Sanchez's right to the effective assistance of counsel. CP 308-10.

Mr. Sanchez was convicted following a jury trial of two counts of aggravated first degree murder. Mr. Sanchez's appeal of his convictions is pending in the Court of Appeals. Court of Appeals 26816-1-III.

The Yakima Herald Republic subsequently filed a motion to intervene in the criminal matter seeking to unseal the record. Sanchez's Answer at Appendix 14-15.

Mr. Sanchez responded asking the court to deny the newspaper's motion because: (1) pursuant to RAP 7.2 the newspaper was required to first seek appellate leave for the trial court to act; and (2) pursuant to Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982) the public's right to access the sealed materials was far outweighed by Mr. Sanchez's constitutional right to a fair proceeding. CP 305-06; Sanchez's Answer at Appendix 14-15. Mr. Sanchez also argued the disclosures largely consisted of information that constitutes attorney work product and/or client confidences. Id.

¹ The presiding judge appointed a "budget judge" to protect the defendant's ability to receive a fair trial as well as to protect the State's ability to expect a fair trial before an impartial judge.

After a lengthy argument on April 25, 2008, Judge Lust concluded that RAP 7.2, at a minimum, required the newspaper to seek the Court of Appeals's leave for the trial court to hear the motion to unseal. CP 306-07.

The Herald Republic then filed a motion in the Court of Appeals requesting it grant permission to the trial court to decide the newspaper's motion to intervene and unseal the records. Mr. Sanchez asked the court to deny the Herald Republic's motion. The Court of Appeals scheduled the matter for consideration on June 13, 2008. On June 9, 2008, the newspaper inexplicably withdrew its motion from the Court of Appeals. CP 307.

After abandoning its efforts to have the records unsealed, the newspaper demanded, under the PRA, Yakima County release the very documents which are subject to the order sealing the record. The newspaper and County both sought declaratory relief from the Superior Court. CP 392-304; 344-49.

Although it was aware of Mr. Sanchez's interest in maintaining the documents under seal, the newspaper did not provide Mr. Sanchez notice of its litigation. CP 307.²

² Counsel for Mr. Sanchez learned of the newspaper's action only after receiving an email from the Yakima County Prosecutor's Office forwarded to counsel by Mr. Sanchez's trial attorney on June 19, 2008.

The trial court allowed Mr. Sanchez to intervene in both matters and issued an order granting the County's request for declaratory and injunctive relief. The court denied the newspaper's motion to reconsider. Appendix at 23-30.

D. ARGUMENT

1. THE TRIAL COURT'S SEALING OF PRIVILEGED INFORMATION IS NECESSARY TO PROTECT MR. SANCHEZ'S FIFTH, SIXTH AND FOURTEENTH RIGHTS.

The Sixth Amendment guarantees Mr. Sanchez the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). 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) (counsel ineffective for failing to investigate and retain experts for potential mental defense). The Fourteenth Amendment's Due Process Clause requires the court appoint of experts to assist an indigent defendant. Ake v. Oklahoma, 470 U.S. 68, 80-81, 105 S.Ct. 1087, 84 L.Ed. 2d 53(1985). Thus, counsel had a duty to retain experts to prepare Mr. Sanchez's defense and this Court had the obligation to appoint or provided funds to retain necessary experts. CrR 3.1(f) requires that requests for expert services be made to the court and permits them to be made *ex parte*. The rule expressly allows the court to seal the requests upon a showing of good cause. Id. See also, Washington State Bar Association, Standards for Indigent Defense Services, Standard Four (2007) (mandating funds for expert services be separate from compensation of defense counsel and requiring such requests be made *ex parte*).

This procedure ensures a defendant receives his Sixth and Fourteenth Amendment right by providing necessary expert services. But to obtain those services, the indigent defendant is alone in being compelled to disclose the legal theories and facts upon which he is building his defense. If that disclosure cannot be maintained under seal, the indigent defendant, unlike a defendant with means, is forced to choose

between two now-competing aspects of the effective assistance of counsel: confidential trial 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).

Further, the disclosures made by defense counsel to support their requests for funds included information provided by Mr. Sanchez himself. CP 309-11. Disclosure of that information would deprive Mr. Sanchez of his Fifth Amendment privilege against self-incrimination.

To date the newspaper has filed numerous pleading including: its motion to unseal; its motion for appellate leave; its PRA action in Superior Court; its statement of grounds for direct review; and its Brief of Appellant. Not one of these pleadings addresses in any meaningful fashion Mr. Sanchez's right not to testify against himself; his right to the effective assistance of counsel, his right to the equal protection of the law, and his right to due process. The rule the newspaper seeks is one that 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 require disclosure in this case.

2. DISCLOSURES MADE BY A CRIMINAL DEFENDANT IN ORDER TO OBTAIN A CONSTITUTIONALLY SUFFICIENT TRIAL ARE JUDICIAL RECORDS AND ARE NOT SUBJECT TO DISCLOSURE UNDER THE PUBLIC RECORDS ACT

a. The PRA does not apply to Superior Court files.

The [PRA] definitions do not specifically include either courts or case files. A reading of the entire public records section of the [PRA] indicates and we find that they are not within the realm of the [PRA].

Nast, 107 Wn.2d at 307.

Nast's 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. Indeed, that 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. 107 Wn.2d at 305. Thus, it does not matter whether the records sought in this case are in the court case file, in some other court file, or in a file held by some other county agency; their character as judicial records remains. This holding is consistent with the long-recognized principle that courts have inherent authority and control

of their records. Nixon v. Warner Communications, Inc., 435 U.S. 589, 598, 55 L.Ed.2d 570 98 S.Ct. 1306 (1978).

This point is particularly important in light of the confidential nature of the disclosure by Mr. Sanchez and his attorneys. While they must disclose otherwise confidential and constitutionally protected information to a judge, once that disclosure is made neither Mr. Sanchez nor his attorney can exercise any control over its subsequent dissemination. It is rote constitutional law that a waiver of a constitutional right must be knowingly, voluntarily and intelligently made. Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 82 L.Ed 1461 (1938).

While Mr. Sanchez may have made a limited waiver of his rights in order to obtain those services to which he is constitutionally entitled. He by no means agreed or acquiesced to the broader dissemination of that material such that he loses all constitutional protections. Nonetheless, the paper to rule that once a public employee takes that information from the court case file and places it anywhere else it is no longer exempt from disclosure. Brief of Appellant at 28. The rule advocated by the newspaper would allow the actions of the State, the very entity which is prosecuting Mr. Sanchez, to effectuate a waiver of his rights even where he has no control over or even knowledge of the public employee's actions. By definition

that would be an unknowing and involuntary waiver and thus constitutionally waiver.

The paper concedes Nast properly held that “true court case files within the judiciary” are immune from disclosure under the PRA. Brief of Appellant at 32. The information here was provided as a part of the court’s core judicial role, it is not a “public record” for purpose of the PRA, no matter which entity has physical possession of it.

b. The court files at issue were generated as part of a core judicial as opposed to administrative function. The newspaper contends Nast’s clear holding produces “absurd results” when it is applied to “the budget judge approach.” Brief of Appellant at 29. Underlying this argument is a single assumption that is neither legally nor factually correct: that a budget judge is employed merely as an administrative convenience rather than in a judicial role.

The “budget” judge does not occupy merely an administrative role but rather exists to ensure the fairness of the proceedings for both parties and the public. Creating a physical divide between budget judge and trial judge ensures both the actual impartiality of the trial judge as well as the appearance of impartiality and fairness by shielding the trial judge from defense counsel’s detailed disclosures necessary to obtain the constitutionally mandated services. Thus, the defense need not fear the

trial judge will draw adverse inferences when a particular defense theory is not presented at trial after the court authorized funds to investigate it. The prosecution can be equally assured the trial judge will be free of bias or sympathy created from *ex parte* exposure to the defense theory of the case long before the trial began. Finally, the public can be assured justice is fairly administered in the courtroom at trial rather than as a result of judicial sympathy or bias stemming from *ex parte* contacts. The use of a budget judge is therefore directly tied to the primary function of the judiciary, providing a forum for resolution of cases which is both actually impartial and appears impartial and fair. This was precisely the basis for the appointment of Judge Lust in the present case. Respondent Sanchez's Answer, at Appendix 5-13. Thus, a budget judge is at the core of the judiciary's function.

Beyond the newspaper's inability to grasp the legal foundation for the appointment of a budget judge, it is far from clear that using two judges on a single case yields any efficiencies or conveniences, or that a "budget judge" possesses administrative or accounting skills the other lacks. Taking the newspaper's argument on its face, its claims would plainly fail if these disclosures had been made to the trial judge himself, as he then would unquestionably be performing a judicial task. The artificial distinction the newspaper draws between disclosures made to the trial

judge versus to a budget judge is nothing more than a red herring. Nonetheless, the assumption underlying the newspaper's argument is that Nast has been improperly extended to administrative acts. In the end, lacking support in law or fact, the newspaper's argument never develops beyond this incorrect initial premise.

A "budget" judge, like any other judge, performs a judicial function. Thus, the records and files presented to that judge are judicial records in precisely the same way as the records at issue in Nast and are not subject to the PRA.

c. This case does not present an issue regarding a blanket exception to the PRA for the judiciary. The newspaper has persisted in claiming this case involves an improper extension of Nast to create a "blanket exception" for all matters related to the judiciary. Brief of Appellant at 35-37. But as is clear, this case presents a far more complex question than simply whether judicial files are exempt from disclosure under the PRA.

First, Mr. Sanchez has demonstrated the files at issue were generated as part of a core judicial function. Second, he has demonstrated, that regardless of how the information was handled after he made the disclosures, it must be considered a court case file in order to protect his constitutional rights. Third, this case differs significantly from those

identified by the newspaper as presenting the imagined issue of an overextension of Nast. See, SGDR at 10-11. In each of the cases identified by the newspaper the records at issue were prepared by the court or court employee. Buehler v. Small, 115 Wn.App. 914, 64 P.3d 78 (2003) (Superior Court judge's computer file); Spokane & Eastern Lawyer v. Tompkins, 136 Wn.App. 616, 150 P.3d 158 (2007), (regarding disclosure of correspondence sent by the Superior Court to the Washington State Bar Association), review denied, 175 P.3d 1092 (2007). Two PRA cases presently pending before this Court, Morgan v. City of Federal Way, 81556-9, and Koenig v. City of Federal Way, 82288-3, similarly involve records generated by court employees addressing court activities not necessarily related to litigation. These distinctions are important for the simple reason that none of those cases involve application of the PRA in a manner which undercuts the constitutional rights of a litigant before the courts.

Whatever the reach of the PRA with respect to these other cases, the documents at issue here are plainly what this Court had in mind in Nast: documents generated by a litigant before the court for purposes of that litigation. Public access of those records is properly controlled by the common law, and those records must remain outside the reach of the PRA.

in order to protect the constitutional rights of the litigants – a core judicial function.

d. Because it is the only means of balancing and protecting a defendant's rights as well as those of the prosecution and public, the use of a budget judge is the standard of practice in criminal matters. The newspaper persists in contending the process employed by Yakima County is unique. Further, the newspaper implies this process is employed to skirt the requirements of the PRA. The newspaper alleges that “[t]ypically, when the State pays for the defense of an indigent individual, a public defender agency provides counsel or handles the payment of appointed private counsel.” Brief of Appellant at 5; SGDR at 4. Thus, the newspaper speculates it would have access to the materials it seeks here pursuant to a PRA request. Brief of Appellant at 5; SGDR at 4.

The newspaper has never established that the practice of appointing a budget judge is unique to Yakima County. Instead, in support of its motion to reconsider and in support of its request for direct review, the newspaper offered the Declaration of Heather Clarke, a paralegal employed by the newspaper's attorneys. Because the Superior Court concluded the information in Ms. Clarke's declaration did not constitute “newly discovered” evidence pursuant to CR 59 and refused to

consider it in its ruling, CP 23, n3, this information is not properly before this Court and should not be considered.

In any event, the declaration fails to support the paper's claim.

Ms. Clarke states that she contacted several public defense agencies across the state and inquired as to how to make a PRA request. CP 32. Many of these entities provided information on how such requests should be made, which is information public agencies are required to provide. From these offers of assistance Ms. Clarke concluded,

[E]ach of the agencies I contacted understood they were subject to the Public Records Act. Each of the agencies I contacted appeared to understand the records I was after – specifically billing statements from appointed attorneys would be disclosable if requested.

CP 32; SGRD at 4.

Several of the firms included in Ms. Clarke's Declaration are not public agencies. For instance, the Washington Appellate Project, contacted by Ms Clarke on July 7, 2008, is a private firm which contracts with the State to provide representation to indigent appellants. Supp CP. (Declaration of David L. Donnan). Similarly, the Snohomish County Public Defender, contacted by Ms. Clarke on July 7, 2008, is a private firm which contracts with the county to provide indigent defense services. Supp. CP __ (Declaration of William Jaquette). Because both are private

agencies, neither is subject to the PRA. Supp CP. __ (Declaration of David L. Donnan); Supp. CP __ (Declaration of William Jaquette).

At most, Ms. Clarke's declaration establishes that numerous public defense agencies were contacted and that those that are government agencies implement a specific process for handling PRA requests. Aside from Ms. Clarke's own conclusions, there is no information contained in the declaration or its attachment which remotely suggests those entities would provide the requested material. To the extent the contacted entities are government agencies, it seems unlikely that a receptionist, as opposed to the prosecuting attorney or attorney general, has the authority or knowledge to speak to the agency's obligations under the PRA. See CP 33 (spoke with "Tina" at the Cowlitz County Office of Public Defense); CP 34 (spoke with receptionist at Snohomish County Public Defender's office); CP 35 (spoke with receptionist at Washington Appellate Project). The simple fact that these agencies complied with the law by directing Ms. Clarke to the process whereby such a request could be made is in no way indicative of the potential fruitfulness of such request.

Perhaps a different conclusion could be reached if Ms. Clarke had declared that she inquired of the agencies whether they would provide access via the PRA to files which include client confidences, attorney

work product, or privileged information. Short of that, the declaration does not provide material evidence but merely a fanciful conclusion.

In addition to supplying no factual support for its claim that Yakima County's use of a "budget judge" is unique, the newspaper's assumption regarding the "typical" funding mechanism in other counties is also wrong. First, in a case of aggravated first degree murder in which the State files notice that it might seek the death penalty, such as this one, the court must appoint counsel who meets the qualification in SPRC 2. If a public defense agency does not have an attorney who meets this requirement, or has a conflict of interest, the court must appoint a qualified attorney regardless of whether that attorney is employed by the local public defender. Second, because neither King or Snohomish County, among other counties, do not do not have public defender agencies, Supp. CP __ (Declaration of William Jaquette);

www.kingcounty.gov/courts/OPD.aspx (last visited March 17, 2009), a substantial number of criminal defendants in the State are represented by attorneys who are not government employees and not subject to the PRA.

Finally, the use of a second judge to approve defense funding requests, and to do so under seal, is not unique to Yakima County nor is it limited to the most serious offenses. Whatever the newspaper's belief, this is the standard of practice. CrR 3.1(f) requires that requests for expert

services be made to the court and permits them to be made *ex parte*. The rule expressly allows the court to seal the requests upon a showing of good cause. Id.

In Snohomish County the public defense office itself must petition the superior court to obtain funds for expert services in all cases. Supp. CP __ (Declaration of William Jaquette). Those funds are not a part of the Snohomish County Public Defender Association's budget, but rather come directly from the superior court. Id. Private attorneys must seek funding for investigatory and other expert services through the same process. Id.

In Kitsap County, private counsel must seek funds for expert or investigatory services from the court, rather than from the firm which holds the public defense contract. Appendix at 29-30. Those requests are made *ex parte*. Supp. CP __ (Declaration of Roger Hunko). In some instances in Kitsap County, as well as Pierce County, such requests are directed to a judge other than the trial judge. Id.

In King County, requests for expert funding in all cases are made first to the Office of Public Defense, which is to be distinguished from the four private agencies which provide indigent criminal defense services in the county. Jose Sanchez's Answer at Appendix 31-32. If the funding request is denied, the attorney may then petition the Superior Court directly for the funds. Id.

The process employed by the Yakima County Superior Court is not unique but is the standard of practice.

3. THE INFORMATION IN THIS CASE IS
EXEMPT FROM DISCLOSURE WITHOUT
REGARD TO *NAST*.

Without regard to whether Nast excludes the documents at issue from the reach of the PRA, several statutory exemptions exist that would prohibit disclosure.

a. The information is exempt from disclosure as work product. RCW 42.56.290 provides:

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 newspaper insists the documents submitted by Mr. Sanchez'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.

b. Because it is protected by the attorney-client privilege the information is exempt from disclosure. This Court has also recognized documents which contain information protected by the attorney-client privilege pursuant to RCW 5.60.060(2)(a) are exempt from disclosure. Hangartner 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. Sanchez himself. CP 308-11. Thus, the information is protected by the attorney-client privilege.

c. 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 county has candidly admitted that if this information were to be disclosed it would have grave concerns regarding its ability to prosecute Mr. Sanchez in the event that he obtained a reversal of his conviction on appeal. Further, 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. Sanchez and his attorneys is exempt from disclosure.

4. BECAUSE THE NEWSPAPER WAS AFFORDED AN OPPORTUNITY TO CHALLENGE THE SEALING OF THE COURT RECORDS BUT CHOSE TO ABANDON THAT EFFORT IT HAS WAIVED ANY ARGUMENT REGARDING THE PROPRIETY OF SEALING

The newspaper filed a motion a to unseal the records arguing the records were properly sealed under Ishikawa, 97 Wn.2d 30, and Article I, sec. 10 of the Washington Constitution. CP 193-94, 196-99, 246- Because Mr. Sanchez had filed a notice of appeal, the trial court determined RAP 7.2 required the newspaper to first seek appellate leave to permit the trial court to decide the motion to unseal.

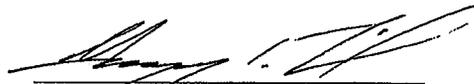
The newspaper filed a motion for appellate leave permitting the trial court to determine the claims addressing Ishikawa and Article I, . 10. CP 268-76. On the eve of argument, the newspaper withdrew its motion.

A party may waive even constitutional claims. The newspaper, represented by counsel, made a tactical decision to abandon its motion to unseal and pursue instead a PRA action. In so doing, the newspaper has waived any challenge pertaining to application of the Ishikawa factors and Article I, sec. 10.

F. CONCLUSION

The Court should affirm the trial court's order.

Respectfully submitted this 2nd of April, 2009.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

YAKIMA COUNTY,)
)
 PLAINTIFF,) NO. 08-2-02337-0
)
 v.) SUPREME COURT NO. 82229-8
)
 YAKIMA HERALD REPUBLIC,)
)
 DEFENDANT.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF APRIL, 2009, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT JOSE SANCHEZ, JR.** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] MICHELLE EARL-HUBBARD	(X)	U.S. MAIL
CHRISTOPHER ROSLANIEC	()	HAND DELIVERY
DAVID NORMAN	()	_____
ALLIED LAW GROUP, LLC		
2200 SIXTH AVENUE, STE 770		
SEATTLE, WA 98121-1855		
[X] GREG OVERSTREET	(X)	U.S. MAIL
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[X] BRENDAN MONAHAN	(X)	U.S. MAIL
STOKES LAWRENCE VELIKANJE	()	HAND DELIVERY
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[X] PAUL MCILRATH	(X)	U.S. MAIL
STEFANIE WIEGAND	()	HAND DELIVERY
YAKIMA COUNTY PROSECUTING ATTORNEY	()	_____
128 N 2ND ST RM 211		
YAKIMA WA 98901-2639		

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF APRIL, 2009.

X _____



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