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COURT OF APPEALS

Court of Appeals
Division III
State of Washington

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

YAKIMA HERALD-REPUBLIC, RESPONDENT/INTERVENOR

v.

MARIO MENDEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. ANALYSIS

Mario Mendez appealed a trial court ruling granting Yakima's Herald's motion to unseal records pertaining to the compensation of appointed counsel and defense experts following his guilty plea. The court had concluded that this decision was required by, and consistent with, the requirements of Const Art. I, § 10, which mandates that courts shall be open to the public.

This court affirmed, holding the decision in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) set forth the relevant standards and that the trial court's findings met the *Ishikawa* requirements. *State v. Mendez*, 157 Wn. App. 565, 238 P. 3d 517 (2010).

Mr. Mendez sought review in the Supreme Court. While his petition for review was pending, the court decided *Yakima v. Yakima Herald Republic*, 170 Wn.2d 775, 794, 246 P.3d 768 (2011) (*Yakima Herald*), which addressed issues of public access to compensation records. The court concluded that access to records held by the judiciary is governed by the records sealing provisions of GR 15 and that such records are not subject to the open courts and public trial considerations. 170 Wn. 2d at 798, 803. The court expressly disapproved reliance on the *Ishikawa* factors as a basis for applying the provisions of

GR 15 to documents relating to compensation for court-appointed counsel. *Id.* at 803.

More recently, the Supreme Court granted Mr. Mendez's petition for review and remanded his case to this court for reconsideration in light of *Yakima Herald. State v. Mendez*, 157 Wn. App. *supra*. This court has requested additional briefing.

The question of whether, and to what extent, the public should have access to the itemized billing records of counsel appointed to represent indigent criminal defendants arose relatively recently. The right of indigent criminal defendants to legal representation is constitutionally mandated. *Yakima v. Yakima Herald Republic*, 170 Wn.2d at 794; *see Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). But *Gideon* did not address the issues of whether and how such representation was to be paid for.

In Washington, appointed counsel may be compensated in either of two ways. In response to the *Gideon* decision, Washington State's legislature authorized local governing authorities to create offices of public defense. RCW 36.26.020, Laws of 1969, ch 94, § 2. The legislature delegated to the public defender's office the duty to represent every indigent person entitled to appointed counsel and to maintain records of expenditures. RCW 36.26.050, .070. Under this legislation, the

courts retained the power to appoint and to compensate counsel for an accused in exceptional cases. RCW 36.26.090.

Twenty years later the legislature recognized the need for establishing a statewide system for ensuring that all indigent defendants are afforded their constitutional right to counsel. RCW 10.101.010. The statute delegates to each county the duty to adopt standards for delivering public defense services. RCW 10.101.030.

RCW 10.101.030 evidences the legislature's recognition that documents relevant to the costs of defending the accused contain sensitive information that should not be disclosed to the public. Standards endorsed by the Washington State Bar Association "should serve as guidelines to local legislative authorities." *Id.* Those guidelines contemplate minimal record-keeping with respect to compensation of appointed counsel, to include the "number and type of cases, attorney hours and disposition." WSBA Standards for Indigent Defense Services, Standard Eight: Reports of Attorney Activity (2007) available at <http://www.wsba.org/lawyers/groups/wsbastandards408.doc>. The record-keeping system is to be "maintained independently from client files so as to disclose no privileged information." *Id.*

Although perhaps the vast majority of indigent defendants are represented by offices of public defense, trial courts also continue to appoint counsel for the accused under the authority of RCW 36.26.090:

[T]he court may, upon its own motion or upon application of either the public defender or of the indigent accused, appoint an attorney other than the public defender to represent the accused The court shall award, and the county in which the offense is alleged to have been committed shall pay, such attorney reasonable compensation and reimbursement for any expenses reasonably and necessarily incurred in the presentation of the accused's defense

RCW 36.26.090.

No statute or rule requires counsel appointed pursuant to RCW 36.26.090 to submit requests for compensation in any particular form, nor does there appear to be a prescribed procedure for determining the amount of such compensation. CrR 3.1(f) does specifically provide that a request for other services associated with the defense of the accused shall be by motion, which may be heard *ex parte*, and the moving papers may be sealed. The Washington Supreme Court appears to assume that CrR 3.1(f) procedures are equally applicable to appointed counsel's requests for compensation. 170 Wn. 2d at 782, 794.

The minimal record-keeping provisions of Standard Eight are inapposite when counsel must submit documents in sufficient detail to

apprise the court of the necessity and appropriateness of authorizing and paying for the varied aspects of the defense.

Yakima Herald states that documents filed with, and maintained by, the court in connection with defense costs are not subject to the provisions of the Public Records Act. 170 Wn.2d at 798. Access to these judicial records is also not subject to the open courts or public right of access provisions of Const. Art. I, § 10 articulated in *Seattle Times Co. v. Ishikawa*. 170 Wn. 2d at 802-03. Public access to these judicial records is governed by the “standards of GR 15.” 170 Wn. 2d at 803.

No Washington case has identified the factors a court must consider in ruling on motions to seal or unseal motions for compensation of appointed counsel and the attendant documentation of how those funds have been, or will be, spent. The *Yakima Herald* decision provides minimal guidance as to how the “standards of GR 15” are to be applied in cases involving the sealing of documents related to indigent defense funding.

The court averted to, but did not address, the public policy and federal constitutional implications of making the billing records of some appointed counsel available to the public. The court twice noted that protection of the defendant’s constitutional rights provides rationale for

sealing such documents, and for hearing motions for funding *ex parte*.
170 Wn. 2d at 801-02, n.12 and n.13.

Subjecting the billing records of defense attorneys appointed by a judge, but not those of other criminal defense attorneys, violates equal protection. *See U.S. v. Abreu*, 202 F.3d 386 (1st Cir. 2000). Thus, an indigent defendant's application for funding for a defense expert is properly heard *ex parte* so that the need for such an expert need not be disclosed to the government because a defendant who is able to pay for his own defense need not make such a disclosure:

There is another principle at stake: fair treatment of indigents. Defendants who are able to fund their own defenses need not reveal to the government the grounds for seeking a psychiatrist who might potentially testify at sentencing. To require indigent defendants to do so would penalize them for their poverty. The words of Judge Aldrich in an opinion of this court more than thirty years ago still hold true:

[W]e would regard the purpose of the ... rule as apparent on its face to be in recognition of the principle that *defendants are not to be avoidably discriminated against because of their indigency*.

Holden v. United States, 393 F.2d 276, 278 (1st Cir.1968)(construing the requirement in Rule 17(b) that subpoenas issue on an *ex parte* application of a defendant).

202 F.3d at 391 (*emphasis added*).

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., amend. XIV; Wash. Const., Art. I, § 12; *Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000); *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). At a minimum, a statute is constitutional if “(1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation.” *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The legislature has created three classes of criminal defendants: those whose attorneys are required to provide the court with detailed documentation to justify their requests for compensation; those who are provided with counsel by an office of public defenders pursuant to RCW 36.26.020 or RCW 10.101.030; and those who can afford private counsel or who are provided with counsel by an office of public defenders pursuant to RCW 36.26.020 or RCW 10.101.030. Only members of the first class are subjected to public disclosure of the details of how their defense was prepared, what legal theories were pursued, what experts were consulted, what potential defenses were discarded, etc.

The legislature has determined that funding for indigent defense must be “consistent with the constitutional requirements of fairness, equal protection, and due process” RCW 10.101.005. The creation of an exceptional class of criminal defendants whose attorneys’ billing records are subject to public disclosure, while defendants who can afford private counsel or who are provided with counsel by an office of public defenders need not make such information public, does not serve any purpose contemplated by the legislature.

Considerations of due process and effective assistance of counsel also weigh heavily against providing public access to the billing records of appointed counsel.

The public has an interest not only in the way its funds are used but also in seeing that judicial processes are efficient and that defendants are given the “basic tools” and “raw materials integral to” the presentation of an adequate defense so as to ensure a fair trial. *See U.S. v. Kennedy*, 64 F.3d 1465, 1473 (1995) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)); *United States v. Gonzales*, 150 F.3d 1246, 1261 (1998), *cert. denied*, 525 U.S. 1129, 119 S. Ct. 918, 142 L. Ed. 2d 915 (1999).

This court previously dismissed the *Gonzales* decision as irrelevant because it is grounded in First Amendment considerations rather than

provisions of Washington's constitution. But *Gonzales* is perhaps the only published opinion that addresses the due process and policy implications of releasing materials prepared by appointed counsel for the sole purpose of receiving compensation for fees and expenses. *Gonzales* is relevant, not because it is grounded in the same legal theory as the present case, but because it explores in some detail various aspects of criminal procedure that merit consideration in a decision to seal or unseal the particular type of judicial records involved in the present case.

The *Gonzales* opinion held that the public interest in such documents is outweighed by considerations of the attorney-client privilege and privileged information provided by other sources, the attorney-client relationship, protection of the privacy of attorneys and defendants, protection of defense strategies, investigative procedures, and attorney work product. *Id.* at 1265.

In preparing a defense, appointed counsel may obtain information from individuals who risk serious consequences if their identities are revealed. *See Gonzales*, at 1265. Likewise, a careful analysis of even limited information may yield clues as to the procedures and strategies employed by defense counsel, to the benefit of prosecutors and to the detriment of future defendants. 150 F. 3d at 1266 n. 25. This is

particularly acute in cases, like the present one, in which the death penalty is implicated.

While the budget judge in Mr. Mendoza's case recognized that matters relating to the attorney-client privilege and attorney work product should be protected, this limitation does not address the other considerations mentioned in *Gonzales*. No guidelines exist to assist counsel in preparing billing information sufficient to meet the expectations and requirements of a budget judge without revealing information that could prove potentially embarrassing to the client or attorney. The risk that such information may be disclosed to the press impairs the attorney-client relationship and implicates privacy and personal safety.

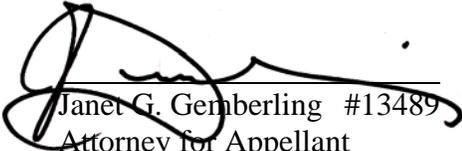
The trial court's written findings sought to balance Mr. Mendez's presumably limited or non-existent continuing interest in the content of his defense funding records against the public rights under Art. 1, § 10. The *Yakima Herald* decision rejects the open courts provision as a relevant consideration; the matter must be remanded for further proceedings in light of that fact. But because of the constitutional and public policy implications of applying GR 15 to defense funding documents, this court should provide the lower court with guidance as to what factors the court should properly consider.

B. CONCLUSION

Releasing appointed counsel's detailed billing records violates indigent defendants' rights to equal protection and due process under the Fourteenth Amendment and the effective assistance of counsel guaranteed under the Sixth Amendment.

Dated this 19th day of September, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 27535-3-III
)	
YAKIMA HERALD-REPUBLIC,)	
)	
Respondent/Intervenor)	
)	
vs.)	CERTIFICATE
)	OF MAILING
MARIO MENDEZ,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on September 19, 2011, I served copies of Appellant's Supplemental Brief in this matter by email upon the following parties, receipt confirmed, pursuant to the parties' agreement:

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