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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 27535-3-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Respondent,

YAKIMA HERALD-REPUBLIC,
Respondent/Intervenor,

v.

MARIO GILL MENDEZ,
Appellant.

RESPONDENT/INTERVENOR'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The trial court unsealed court records in Mr. Mendez's case based upon *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) and General Rule 15. This Court upheld that decision. The Supreme Court in *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 803, 246 P.3d 768 (2011) determined that where the public is seeking access to court-appointed defense costs GR 15 governs and remanded this case for reconsideration. The application of *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011) does not change the result in this case. The trial court correctly applied GR 15 and found that there were compelling reasons to unseal the court records. The trial court's finding was not an abuse of discretion and should be upheld.

II. DISCUSSION

A. The Trial Court Properly Unsealed the Records Under GR 15

GR 15 establishes a uniform procedure for destroying, sealing, or redacting court records. GR 15; *Indigo Real Estate Servs. v. Rousey*, 151 Wn. App. 941, 946, 215 P.3d 977 (2009). Under GR 15(c)(2), when sealing or redacting a record, the trial court must make and enter "written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record" (emphasis in original).

To unseal a criminal record under GR 15(e), the requesting party must show proof of compelling circumstances. GR 15(e)(2). The trial court found that the “public’s right to open justice particularly where the use of public funds are involved” were compelling circumstances justifying unsealing the records.

The legal standard for sealing or unsealing court records is a question of law reviewed *de novo*. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). When the proper standard has been applied, we review a decision to seal or unseal records for abuse of discretion. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). A court’s discretion in deciding whether to seal or unseal records is broad. *See In re Marriage of R.E.*, 144 Wn. App. 393, 404, 183 P.3d 339 (2008). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

The trial court in this case did not properly seal the records under GR 15 and did not make written findings under GR 15. *In re Marriage of R.E.*, 144 Wn. App. 393, 403, 183 P.3d 339 (2008) the court found “when a party moves to unseal records that were sealed under the former rule and the original sealing order does not conform to the current rule, it is not appropriate to apply the current standard for the unsealing.” The same

logic applies to this instance. It is not appropriate to apply the standards of GR 15 for unsealing the records, if the standards of GR 15 were not used to seal the records in the first place.

However, even if the trial court did not apply the correct legal procedure to seal the records, it did apply the correct legal standard to unseal them. The trial court found compelling reasons to unseal the records. The sole issue for review is whether the trial court's decision was an abuse of discretion.

B. The Trial Court Properly Determined That There Were Compelling Reasons to Unseal the File

Neither GR 15 nor cases interpreting GR 15 have identified any parameters for defining a “compelling interest.” But at this point, it matters little whether the analysis proceeds under GR 15 or under *Ishikawa*; the result is the same. The trial court determined that there was a compelling interest supporting the unsealing of the court records by weighing the competing interests at stake.

C. Mr. Mendez's Right to a Fair Trial Was Preserved

The right to a fair trial is guaranteed. Const. art. I, § 22. In order to have a fair trial, defendants have the right to assistance of counsel. *State v. Roberts*, 142 Wn.2d 471, 515, 14 P.3d 713 (2000) (citing *Wheat v. United States*, 486 U.S. 153, 158–59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)). Indigent defendants are given the “basic tools of an adequate

defense” which may include the appointment of counsel, the assistance of experts or other professionals and associated costs. *State v. Cuthbert*, 154 Wn. App. 318, 330, 225 P.3d 407 (2010) (citing *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971)).

Neither GR 15 nor any other law provides that the records associated with an indigent defendant’s application for assistance remains secret for all time. For example, in *In re Gentry*, 137 Wn.2d 378, 389, 972 P.2d 1250 (1999) the Court unsealed an indigent defendant’s motions for authorization of expenses under GR 15. Mr. Gentry’s conviction and sentence were final. *Id.* The Court found that unsealing these records did not implicate Mr. Gentry’s right to a fair trial because the State was already “aware of Gentry’s defense to the charge and his theory of the case.” *Id.*

It is undisputed that Mr. Mendez’s right to a fair trial were preserved and his trial and appeal rights have ended. His records may be unsealed under GR 15 without implicating his right to a fair trial.

D. The Public Had a Compelling Interest

One of the compelling interests identified by the trial court was the public’s interest in open justice. “[O]perations of the courts and the judicial conduct of judges are matters of utmost public concern.”

Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 839, 98 S. Ct. 1535,

56 L. Ed. 2d 1 (1978). “For centuries publicity has been a check on the misuse of both political and judicial power.” *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Washington’s laws and constitution contain strong mandates which protect the public’s right of open access to both governmental and judicial activities. See Const. art. I, § 10; RCW 42.56.001, *et seq.*

“This openness is a vital part of our constitution and our history.” *Dreiling*, 151 Wn.2d at 903-04, 93 P.3d 861. Our state constitution is more protective of press freedoms and more protective of individual rights than the parallel provision of the United States Constitution. *State v. Rinaldo*, 36 Wn. App. 86, 95, 673 P.2d 614 (1983); *Alderwood Assocs. v. Wash. Env’tl. Council*, 96 Wn.2d 230, 238, 635 P.2d 108 (1981).

The trial court found that there was also a compelling interest in unsealing the records due to the use of public funds. The public has an interest in how public funds are spent, including expenditures of public resources on private legal counsel or consultants. *West v. Thurston County*, 144 Wn. App. 573, 583, 183 P.3d 346 (2008). In this case, the public’s understanding of how these funds are spent serves several functions. First, the public has a right to know how funds were spent as a check on judicial power and discretion. See *Dreiling v. Jain*, 151 Wn.2d at 908, 93 P.3d 861. The application for fees and costs occurs *ex parte* and

is not an adversarial process. A review of this process, even long after the fact increases the public's understanding of the way in which the judicial process addresses indigent defense costs and will increase the public's perception of fairness.

The public also has a right to know how public funds are used to provide assistance to indigent defendants so that the public may make informed political judgments. Prosecutors are elected officials. The prosecutor makes both a legal and a political decision in determining whether and how to file a criminal charge. The costs of prosecuting and providing defense counsel is "an intrinsic part of the prosecution of every criminal case filed against an indigent defendant." *State v. Howard*, 106 Wn.2d 39, 44, 722 P.2d 783 (1985) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963)). "The expenses of providing for an indigent's defense are a necessary expense of charging a crime." *Howard*, 106 Wash. at 44, 722 P.2d 783. Where the death penalty is considered or sought the expense of defense is necessarily higher.

The issue of whether a death penalty is appropriate is a legal issue, but it is also a political issue. The fact that the death penalty was considered in this case is an important factor in determining whether to unseal Mr. Mendez's records. Part of the information that was to be

provided to the public was how much of the total defense costs were devoted to the preparation of the mitigation package. CR 31. The costs associated with the death penalty has been a consideration to states who have considered restricting or abandoning the death penalty altogether. Steiker, Carol, CAPITAL PUNISHMENT: A CENTURY OF DISCONTINUOUS DEBATE, 100 J. Crim. L. & Criminology 643, 672 (2010).

Whether the public should have access to court proceedings and records requires a case specific inquiry. *In re Detention of D.F.F.*, 144 Wn. App. 214, 220, 183 P.3d 302 (2008). The public does not have a right to access indigent defense cost records in every instance. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 803, 246 P.3d 768(2011). However, in this instance, under these circumstances, there are compelling reasons to make this information available to the public.

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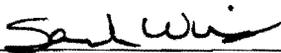
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III. CONCLUSION

The trial court found that there were compelling reasons to unseal the cost. The trial court's order was sufficiently specific, based upon the proper standards and was not abuse of discretion. The Yakima Herald-Republic respectfully requests that the court reaffirm the ruling of the trial court.

RESPECTFULLY SUBMITTED this 4th day of October, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 4th day of October, 2011, I caused a true and correct copy of the foregoing document, "Respondent/Intervenor's Supplemental Brief," to be served by e-mail and U. S. mail, postage prepaid, upon/to the following counsel of record:

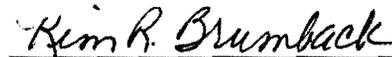
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