

68421-3

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No. 68421-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JORDAN PORTCH,

Appellant.

---

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

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REPLY BRIEF

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A. ARGUMENT

THE TRIAL COURT VIOLATED MR.  
PORTCH'S RIGHT TO COUNSEL WHEN IT  
ORDERED THE DEFENSE INVESTIGATOR  
TO TESTIFY FOR THE PROSECUTION.

1. The investigator's statements were protected by attorney-client privilege. Short of waiver, an attorney or counselor may not be examined "as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2). Without the attorney-client privilege, clients could not communicate freely with their attorneys, without fear of compulsory discovery. Dietz v. Doe, 131 Wn.2d 835, 842, 935 P.2d 611 (1997).

Joel Martin, the defense investigator, was an essential member of the defense team, with a constitutional and ethical mandate to investigate Mr. Portch's defense, as directed by the client's defense attorney. RP 124-25 (investigator stands in "position of a lawyer" as far as confidential communications with client). Therefore, any interference with the communications between Mr. Portch and Mr. Martin is indistinguishable from interference with communications between Mr. Portch and defense counsel. See State v. Garza, 99 Wn. App. 291, 299, 994 P.3d 868

(2000) (citing Shillinger v. Haworth, 70 F.3d 1132, 1142 (10<sup>th</sup> Cir. 1995)).

A “prosecutor’s intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant.” Garza, 99 Wn. App. at 299 (citing Shillinger, 70 F.3d at 1142). Although Garza discussed jail staff’s seizure of the legal materials of pre-trial inmates, its logic is applicable here to the intrusion upon Mr. Portch’s confidential relationship with, and materials created by, the defense investigator.

The State argues that much of Mr. Martin’s testimony was not privileged. Resp. Brief at 10. However, although the communications with Mr. Martin were, indeed, a revelation to a “third person,” as argued by the State, since Mr. Martin was a member of the defense team, the privilege remained unbroken. In addition, the State’s reliance on State v. Pawlyk, 115 Wn.2d 457, 880 P.2d 338 (1990) is misplaced. In Pawlyk, the Court held the privilege did not extend to communications between a client and a psychiatrist who evaluated him in preparation for an insanity defense. 115 Wn.2d at 465. However, this case is distinguishable from Pawlyk, as Mr. Martin’s privileged testimony was elicited on

the State's direct case, rather than on rebuttal, as was the psychiatrist's in Pawlyk. 115 Wn.2d at 468; see also State v. Hamlet, 133 Wn.2d 314, 320-21, 944 P.2d 1026 (1997). Here, Mr. Portch ultimately did not call Mr. Martin to testify concerning the alibi defense; thus, the trial court violated Mr. Portch's right to attorney-client privilege when it ordered Mr. Martin to testify against him on the State's direct case.

2. A violation of the right to counsel requires reversal.

Prejudice is presumed where there is a violation of the right to counsel. See Garza, 99 Wn. App. at 299-300; Shillinger, 70 F.3d at 1134 (finding where the State purposely intrudes into the attorney-client relationship, the "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.") (citing Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Although the State argues that Garza is limited on its facts to situations in which the state has no legitimate law enforcement purpose for its intrusion, it fails to suggest what purpose the state might have here for intruding on Mr. Portch's communications with counsel. Resp. Brief at 13.

Constitutional errors that "affect substantial rights" cannot be considered harmless. Chapman v. California, 386 U.S. 18, 23-24,

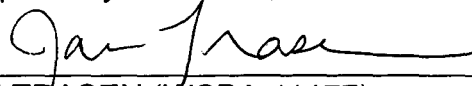
87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Because the testimony of the defense investigator violated Mr. Portch's constitutional and statutory rights, prejudice is presumed and reversal is required.

B. CONCLUSION

For the foregoing reasons, Mr. Portch respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 7<sup>th</sup> day of January, 2013.

Respectfully submitted,



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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7<sup>TH</sup> DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING THE MANNER INDICATED BELOW:

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| [X] | JORDAN PORTCH<br>728 55 <sup>TH</sup> ST. SW UNIT A<br>EVERETT, WA 98203                        | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

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**SIGNED** IN SEATTLE, WASHINGTON, THIS 7<sup>TH</sup> DAY OF JANUARY, 2013.

X \_\_\_\_\_ 