Supreme Court No. 93794-0
(COA No. 72120-8-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

WILLIAM PHILLIP, JR.,

Respondent.

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

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT AND DECISION BELOW

William Phillip, Jr. asks this Court to deny the State's petition for review of the unpublished Court of Appeals decision dated August 29, 2016, for which Mr. Phillip's motion to reconsideration was denied without comment on October 3, 2016.[1] Mr. Phillip separately seeks review of the issues identified below. RAP 13.4(d).

B. ISSUES PRESENTED FOR REVIEW

1. The State seeks review of one part of the Court of Appeals decision that found a search warrant lacked probable cause for months of data revealing Mr. Phillip's in-coming and out-going cell phone communications and his location tracking. The State does not identify a valid legal conflict with precedent, but rather complains that it preferred a different result. When the Court of Appeals properly applied long-standing legal criteria to evaluate a search warrant in which the State accessed months of constitutionally protected personal information based on slim allegations the accused person had dated the victim's girlfriend but he never threatened the victim in any way, and showed no

[1] The order on motion for reconsideration is attached as Appendix A. The Slip opinion is attached to the State's petition for review.

connection between the accused's cell phone and the crime, does the case fail to meet the criteria for review under RAP 13.4?

2. The State asks this Court to grant review because the constitutionally mandated remedy of suppression deprives it of evidence it wants to use, claiming this makes review of the unpublished decision "a matter of significant interest" under RAP 13.4(b)(4). State's Petition at 11. Substantial public interest is not defined by the prosecution's desire to pursue charges and it is well-established that the remedy for violating the Fourth Amendment and article I, section 7 is unrelated to the State's desire to use the evidence. Has the State failed to demonstrate a valid reason for review?

3. Mr. Phillip separately asks this Court to review the Court of Appeals analysis of the independent source doctrine. The Court of Appeals refused to suppress the fruits of the two invalid warrants for Mr. Phillip's cell phone data, relying on a three-justice plurality opinion in *Eserjose*,[2] even though the majority of justices would have required suppression. Should this Court grant review when the Court of Appeals misconstrued a non-binding plurality ruling in *Eserjose*, its ruling

[2] *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011).

conflicts with the majority opinion in *Eserjose*, and there is substantial public interest in clarifying the application of the independent source doctrine under article I, section7?

4. The independent source doctrine is a rare exception to the exclusionary rule permitting the admission of evidence despite an illegal search, if the State proves that no information gained from the illegal search affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it. When illegally obtained information is central to the police investigation and used to convince the court to grant subsequent warrants, are these warrants not genuinely independent from the illegal search?

5. A person who legitimately exercises his right to remain silent may not be punished for it. The State used Mr. Phillip's desire to have counsel before answering police questions as evidence of his guilt in its search warrant applications. Did the adverse inferences the State drew from Mr. Phillip legitimately exercising his rights violate his state and federal constitutional right to remain silent?

6. The State's intrusion into confidential communications between attorney and client requires dismissal unless the State proves beyond a reasonable doubt there is no possibility of prejudice. Is there a

possibility of prejudice when information gleaned from the lead detective and prosecutor's deliberate review of private attorney referencing the incident shapes the State's case, including investigation and plea bargain decisions?

C. STATEMENT OF THE CASE

In May 22, 2010, Auburn police found Seth Frankel in his apartment, having died of several stab wounds. 3/11/14RP 152-53. The issues for which review is sought involve the subsequent police investigation.

1. The State's Statement of the Case misrepresents the factual information pertinent to the issue raised in the State's petition for review.

The single issue in the State's petition for review relates to the Court of Appeals ruling that a search warrant application dated March 12, 2012, lacked probable cause connecting Mr. Phillip to Mr. Frankel's murder. Its Statement of the Case includes information that was not part of that search warrant application. Because a search warrant must be justified on its face, the State's petition for review must be judged by the allegations in this warrant application alone.

This warrant application first explains that Mr. Phillip was already awaiting trial for first degree murder. CP 131. Judge Brian Gain

had already authorized a search warrant for two months of Mr. Phillip's cell phone records and the police already had these records. *Id*. They were seeking this second warrant only because the assigned prosecutor asked the detective to add information to the warrant application. CP 131-32. The detective presented this second warrant to Judge Gain, the same judge who signed the first warrant.[3]

The warrant further says that Mr. Frankel's girlfriend, Bonny Johnson, told police that "JR" was a former co-worker she previously dated. CP 132. She did not know his full name. *Id*. She last saw JR six weeks earlier, and he told her he still loved her but she advised him to move on. *Id*. Once he called Mr. Frankel old and ugly. *Id*. Mr. Phillip was the only person Ms. Johnson could think of who spoke ill of Mr. Frankel to her. *Id*. Ms. Johnson's phone revealed flirtatious, friendly text messages with JR and "Jeames," men she dated. CP 132-34.

Police interviewed Mr. Phillip on May 25, 2010. CP 134. He accurately told police he had previously dated Ms. Johnson and they remained friends who communicated mostly by text messages. *Id*.

[3] The State sought this second warrant because it feared the court might find the first warrant application inadequate. 10/17/13RP 116. After a CrR 3.6 hearing, the court ruled the first warrant lacked probable cause to authorize a search of Mr. Phillip's phone. CP 907.

When asked if he had recently traveled to Auburn, he said he would like to have an attorney present. *Id*.

The Court of Appeals ruled that this search warrant did not contain sufficient information to connect Mr. Phillip to Mr. Frankel's murder and therefore the court should not have authorized the police to search his cell phone communications and location tracking. Slip op. at 12. But the Court of Appeals also ruled that no other evidence need be suppressed despite the central role played by the illegally gathered cell phone data in the police investigation. *Id*. at 12-15.

2. Additional pertinent information for addressing the remaining issues raised in the cross-petition for review.

Immediately after the police received the fruits of the first cell phone warrant (a warrant the trial court later found invalid based on the lack of probable cause), police obtained a search warrant for Mr. Phillip's home. CP 51. The application for this subsequent warrant details the information received from the cell phone warrant over many pages, emphasizing its importance to the investigation. CP 50-53.

The police also immediately sought records from people Mr. Phillip called or received calls from, such as "all calling records," texts and cell data from 503-313-3490, because it was "the number Phillip

dialed from Auburn at 2056 hrs on the night of Frankel's murder." *Id*. This led the police to otherwise unknown witnesses who testified at trial, including a childhood friend, Michael Fowler, and Mr. Phillip's mother, Kathy Sanguino. CP 113-19; 4/3/14RP 23, 34-94.

Additional warrants predicated on the illegally obtained cell phone data include a request for DNA and to search a phone's contents seized from Mr. Phillip's home. Both relied on the same extensive discussion of the cell phone records. CP 86, 105-110, 124-25. Notably, the State's earlier request for Mr. Phillip's DNA was rejected because the warrant lacked probable cause without the illegally obtained cell phone data. CP 42-43.

Before Mr. Phillip's trial, the prosecutor and detective read and disseminated emails between Mr. Phillips and an attorney, which the court found violated attorney-client privilege. 9/9/13RP 147-49; 9/30/13RP 26, 74-76. But the court found no prejudice resulted. 2/26/14RP 3-7.

Pertinent facts are further set forth in Appellant's Opening Brief, pages 5-10, and the relevant argument sections of the Opening and Reply Briefs, and are incorporated by reference herein.

D. ARGUMENT.

1. The Court of Appeals appropriately reviewed the sparse facts contained in the State's search warrant about Mr. Phillip's potential connection to the crime, accurately applied precedent, and its ruling does not meet the criteria for review.

a. The Court of Appeals accurately applied established law to review the four corners of a search warrant application.

When reviewing a search warrant, "the trial court's assessment of probable cause is a legal conclusion" that this Court will "review de novo." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). This review is "limited to the four corners of the affidavit." *Id*. The State's insistence that this Court or the Court of Appeals owes substantial deference to the trial court misrepresents the appellate review of whether a warrant application contains probable cause. *See* State's Petition at 13. The Court of Appeals accurately set forth and applied the appropriate standard of review and the case law addressing the requirements of probable cause. Slip op. at 8-11.

The State contends that the Court of Appeals "disregarded" the "common-sense legal principles" regarding romantic discord as evidence of motive. State's Petition at 14. Yet the State concedes, as it must, that motive alone would be insufficient to supply probable cause

justifying an invasive search of private affairs. *Id.* at 16. It cites a few cases that involved romantic motives, but these cases are fundamentally different. *Id*. at 14.[4] Tellingly, none were even cited in the Court of Appeals briefing because they are not pertinent precedents.

The only case the State cites for its romance-motive contention involving a search warrant issue is *Powell,* where police were searching for a missing woman who was presumed dead. 181 Wn.App. at 719. The defendant admitted her journals were in his home and were important to investigating her appearance, which prompted the police to obtain a warrant for them. *Id*. at 724-25. The warrant application said the journals were important to investigate because the defendant said they discussed the victim's romantic relationships with potential suspects. *Id*. This concrete, conceded connection between the investigation and the journals sought in *Powell* is far afield.

Similarly off-point, the State cites three somewhat obscure cases involving the trial admissibility of jealousy or romantic disharmony. Admissibility rests on bare relevance, which is a lower threshold than probable cause justifying a search of private information. *See Senn*, 43

[4] *State v. Powell*, 181 Wn.App. 716, 326 P.3d 859 (2015); *State v. Messinger*, 8 Wn.App. 829, 509 P.2d 382 (1973); *People v. Laures*, 124 N.E.585

So.2d at 542 (divorce proceedings admissible as relevant to motive "even if weak and inconclusive in itself"); *see also State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) ("threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible").

The Court of Appeals did not deem potential romantic relationships irrelevant to probable cause but rather said the skimpy evidence in the search warrant application was insufficient. Slip op. at 9-12. There was no evidence Mr. Phillip had ever met Mr. Frankel. Mr. Phillip lived in a different state, and Mr. Frankel had recently rented a new apartment that was not even on his driver's license. CP 49; 3/11/14RP 211. A prior dating relationship and on-going interest in rekindling that relationship was not a basis to conclude likely involvement in a brutal stabbing would be in Mr. Phillip's phone data. As the Court of Appeals noted, there was no evidence Mr. Phillip had ever threatened violence, acted violently, or mentioned any interest in harming Mr. Frankel or anyone else. Slip op. at 10-11. The Court of Appeals appropriately determined that based on the facts in the search warrant application, there is no "reasonable inference that Phillip was

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(Ill. 1919); *Senn v. State*, 43 So.2d 540 (Ala. Ct.App. 1949).

involved in Frankel's death" or that his phone records would contain evidence of Frankel's death. *Id*.

The State's complaint about the Court of Appeals opinion is premised on information that is not part of the four corners of the search warrant. The Court of Appeals could not and should not have considered information that was not in the warrant application, but the State's petition for review paints the allegations in a way that is not presented in the warrant. Review should not be granted for the specious reasons in the State's petition.

b. The State illogically claims GPS tracking and phone call data are minimally intrusive, thus undeserving of protection, contrary to this Court and the United States Supreme Court precedent.

Tracking a person's movements by GPS device requires a valid warrant. *United States v. Jones*, _U.S. _, 132 S.Ct. 945, 949, 181 L.Ed.2d 911 (2012); *State v. Jackson*, 150 Wn.2d 251, 261-62, 76 P.3d 217 (2003) (GPS tracking of a vehicle requires a warrant). Tracking outgoing and incoming phone calls requires a warrant. *State v. Gunwall*, 106 Wn.2d 54, 68, 720 P.2d 808 (1986).

Inexplicably, the State's petition asserts the information the warrant sought was so "minimally intrusive" that it is "debatable"

whether he had a reasonable expectation of privacy. State's Petition at 17. *Gunwall*, *Jackson*, and *Jones* definitively establish the constitutional privacy protections for two months of data showing where a person travelled, who he called or texted, who called or texted him, and how long those calls lasted. The State's efforts to minimize established precedent recognizing a person's privacy rights in this information shows the State has no credible reason for seeking review.

c. The Court of Appeals also understood further flaws invalidated the warrant.

This March 2012 warrant had further flaws that were extensively briefed and which informed the Court of Appeals decision.

The trial court found the March 2012 warrant omitted relevant information. 10/15/13P 65-66. Any deliberate or reckless omission undermines the basis of the warrant due to the paucity of specific facts in the warrant underlying probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

The warrant omitted that while Ms. Johnson said Mr. Phillip was the only person she could name as someone who might want to harm Mr. Frankel, Ms. Johnson retracted any accusation and did not think he would be involved in "something like this." CP 232;

10/15/13RP 65. It left out her description of Mr. Phillip as "really passive, he's not a violent person." CP 233. Instead, it implied he was tough and battle-trained by saying he did a tour of duty in Iraq for the Marines, further omitting her statement Mr. Phillip was "just bored" in the military and had no battle experience. CP 233, 235.

The warrant said that Mr. Phillip was the only person who had "spoken ill" of Mr. Frankel to Ms. Johnson, but did not say he had never spoken violently or threateningly. CP 235. It also omitted the fact that Ms. Johnson did not think Mr. Phillip knew where Mr. Frankel lived and had never met him. CP 49.

These omitted facts undermine the warrant application's basis for suspecting Mr. Phillip. Had the magistrate received an accurate description of Ms. Johnson's statements about Mr. Phillip, he would not have found probable cause to issue a warrant.

This March 2012 warrant also fails because it was not independent of the first warrant for this identical information that the trial court ruled lacked probable cause. CP 907. The police got this second warrant two years later by returning to the judge who signed the first warrant, reminding him he already signed the same warrant, and assuring him they already had these records. CP 131. Moreover, had the

first warrant not been granted, the phone company would have destroyed the phone records long before this second warrant was obtained. 12/5/13RP 39; CP 523. This second warrant was obtained because of the first invalid warrant and is not genuinely independent of the illegal search, as further explained below.

2. Separately, review should be granted because the Court of Appeals opinion misapplies the independent source doctrine under article I, section 7, conflicts with this Court's precedent, and presents an issue of substantial public interest.

a. The Court of Appeals' independent source analysis is fundamentally flawed under Article I, section 7.

The independent source doctrine is a narrow exception to the near mandatory suppression of unlawfully seized evidence requied by article I, section 7. *State v. Gaines*, 154 Wn.2d 711, 722, 116 P.3d 993 (2005). It requires separate and distinct evidentiary trail. *Murray v. United States*, 487 U.S. 533, 540, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

Under this doctrine, the State bears the "onerous burden" of proving "that no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant," or the magistrate's decision to grant it. *Id*. at 540. The "ultimate question" is

whether the second search is "in fact a genuinely independent source of the information and tangible evidence at issue." *Id*. at 542. In Washington, this federal test is further constrained by article I, section 7, which prohibits exceptions premised on speculation about what police would have done in other circumstances. *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

The Court of Appeals opinion mistakenly relies on *State v. Eserjose*, 171 Wn.2d 907, 928, 259 P.3d 172 (2011) for independent source analysis. Slip op. at 13, 15. *Eserjose* involved whether suppression applies to an arrested suspect's post-*Miranda* statement when he was arrested during an illegal entry into his home.

The lead opinion focused on what triggered the confession: the police officers' improper intrusion into the suspect's home, or the suspect learning, post-*Miranda*, his accomplice confessed and implicated him. *See id*. at 922-25. Because the illegal entry was not a used to elicit the statement or what prompted the defendant's confession, the lead opinion found suppressing the statement was not required to remedy the illegal entry into the suspect's home. *Id*. at 923.

Three justices signed this lead opinion, while four justices signed a dissent authored by Justice Charles Johnson. Two justices

concurred with the lead opinion: Justice Fairhurst "in result only," without explanation, and Justice Madsen, who rejected the attenuation analysis used by the "lead" opinion. *Id*. at 929-30. The four-justice dissenting opinion would have held that any illegally seized information must be suppressed due to the illegal arrest. *Id*. at 939 (Johnson, J. dissenting). Creating an exception by surmising the reason the defendant confessed is too speculative and dilutes article I, section 7, the four dissenters explained. *Id*. at 940.

The Court of Appeals opinion conflicts with *Eserjose*. All justices called for suppression if illegal police conduct played *some* role in inducing the subsequently obtained information. *Id*. at 929. The Court of Appeals relied on a non-binding plurality in *Eserjose*, and misunderstood that opinion. The attenuation doctrine has never been applied by this Court as construed by the Court of Appeals. This Court should grant review. RAP 13.4(b)(2), (4).

b. Court speculation about possible police motivations but for illegal actions is improper under article I, section 7.

Winterstein forbids courts from speculating about what the police might have done when assessing the lawfulness of their condut. 167 Wn.2d at 631. Although *Winterstein* addressed the inevitable

discovery doctrine, its analysis of article I, section 7 was not limited to that doctrine. It cautioned that courts must apply the independent source doctrine narrowly. 167 Wn.2d at 634.

The Court of Appeals summarily concluded the police "would have sought the additional warrants even without knowledge of cell phone records." Slip op. at 16. This conclusion is based on speculation that minor additional investigation that did not shed any light on Mr. Phillip's knowledge of or access to Mr. Frankel might have motivated the police to continue investigating Mr. Phillip. *Id.* at 16 n.4. This sheer speculation does not satisfy the independent source doctrine and is contrary to this Court's precedent. The police impermissible profited from the illegally obtained cell phone tracking information to gain evidence that should not have been admitted at trial.

The illegal phone data warrant was the direct trigger for the later warrants, as proved by the *immediate* timing of the next warrants, the volume of illegally obtained information serving as the focal point of the warrant applications, and the simultaneous dropping of James Whipkey as a person worth investigating. Just as the cell phone records ruled out Mr. Whipkey, they were the reason the police sought the

warrants for Mr. Phillip's home, phone, email, and friend's phone, and were the platform for the rest of the investigation and prosecution.

The illegally obtained information was the reason the police sought further search warrants and persuaded the magistrate to sign these warrants. This direct link undermines the necessary "genuine independence" required to satisfy independent source. *Murray*, 487 U.S. at 542. Mere speculation is incompatible with article I, section 7 and contrary to the Fourth Amendment as explained in *Murray*. *Winterstein*, 167 Wn.2d at 634. The information obtained as a fruit of the illegal search must be suppressed under the Fourth Amendment and article I, section 7. This Court should grant review.

c. Using Mr. Phillip's exercise of his right to counsel and to remain silent against him undermines the warrants.

Because it is "fundamentally unfair" to simultaneously afford a suspect a constitutional right to decline to answer questions from the police and allow the implications of that silence to be used against him, it is constitutionally prohibited for the State to use that silence against an accused person. *Doyle v. Ohio,* 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). The Supreme Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level

of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). "A person cannot be punished for refusing to speak." *State v. Williams*, 171 Wn.2d 474, 484, 251 P.3d 877 (2011).

A person who asserts his right to remain silent is protected by article I, section 9 and the Fifth Amendment privilege against self-incrimination. *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008). The constitution protects a person's right to cut off questioning. *Michigan v. Mosley*, 423 U.S. 96, 100, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). Silence may not be used as substantive evidence of guilt. *Burke*, 163 Wn.2d at 206. This right implicitly assures a person asserting the silence will carry no penalty. *Id*. at 212, quoting *Doyle*, 426 U.S. at 618.

"Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right." *State v. Hancock*, 109 Wn.2d 760, 767, 748 P.2d 611 (1988); *see also Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965) (drawing an adverse inference from a defendant's failure to testify unconstitutionally infringes on Fifth Amendment rights).

Throughout the investigation, Mr. Phillip unequivocally invoked his right to cut off police questioning by asserting that he did not wish to answer further questions without his attorney's presence. CP 9-10, 134; *see* 10/16/13RP 15, 44, 53, 103, 107. The police treated it as an admission of responsibility in several search warrant applications. CP 42, 50, 104, 134.

The Court of Appeals concluded a person's desire to have counsel before answering incriminating questions indicates guilt and may be used to obtain a warrant. Slip. op. at 11 n.2. But Mr. Phillip had the right to counsel and to remain silent. Adverse inferences should not be drawn when a person is exercising a constitutional right. The improper inferences drawn from exercising a constitutional right undermines the validity of the warrants.

3. The State's intentional intrusion into privileged attorney-client communication aided the prosecution and prejudiced Mr. Phillip, requiring reversal.

a. The fundamental right to the assistance of counsel is strictly protected.

"[E]avesdropping on attorney-client conversations is an egregious violation of a defendant's constitutional rights and cannot be permitted." *State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257

(2014). The State's efforts to learn the content of private conversations with an attorney is "a blatant violation of a foundational right," and an "odious practice" that our courts "strongly condemn." *Id*. at 811.

The right to the assistance of counsel is a bedrock procedural guarantee of a particular kind of relationship with counsel. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); U.S. Const. amend. 6; Const. art. I, § 22. Its "essence" is the privacy of communication with an attorney. *United States v. Rosner*, 485 F.2d 1213, 1224 (2nd Cir. 1973); *see Patterson v. Illinois,* 487 U.S. 285, 290 n.3, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship").

Invasions of attorney-client privilege are presumed prejudicial to the accused and the prosecution must prove no possibility of prejudice beyond a reasonable doubt. *Pena Fuentes*, 179 Wn.2d at 819-20. No possibility of prejudice means the information was not communicated to anyone involved in the case. *Id*., *citing Weatherford v. Bursey,* 429 U.S. 545, 557-58, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (no possibility of prejudice where an undercover agent present during meeting between

defendant and counsel did not communicate anything about the meeting to anyone else).

b. Intruding into private attorney-client communications is prejudicial if it shapes the state's investigation or strategy.

After finding the State improperly reviewed privileged attorney-client communications on multiple occasions, the trial court merely excluded the improperly gathered evidence from being used substantively at trial. Yet the possibility of prejudice exists if privileged information is used to shape strategy. *See State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011). Eavesdropping aids the State's investigation. *Pena Fuentes*, 179 Wn.2d at 821. Gaining insight into and assurance about the defendant's trial strategy helps the prosecution select jurors, guides the investigation, and cements its theory. *Lenarz*, 22 A.3d at 551 n.16. A prosecution involves a "host of discretionary decisions," and may be both "consciously and subconsciously factored into the prosecutor's decisions before and during trial," making it impossible to parse its effect on the state's decisions. *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983).

Plea bargaining is a "central" aspect of the criminal justice system and a "critical phase of litigation" that depends on confidential

communications between attorney and client. *Missouri v. Frye*, __ U.S. _ , 132 S. Ct. 1399, 1406-07, 182 L. Ed. 2d 379 (2012). "[T]he negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. *Id.* If the State's intrusion into attorney-client communications affects the possibility of a negotiated settlement, it necessarily prejudices the accused person.

The State's intrusion could have been avoided. It knew from the outset of its investigation that Mr. Phillip had counsel. 10/16/13RP 15, 53, 103. The police investigation emphasized his calls to an attorney immediately after the incident. CP 74, 104, 110; 2/24/14RP 33. When police spoke to Mr. Phillip in person, he gave them the business card of an attorney and declined to speak further without the attorney's presence. 10/16/13RP 15-17; *see also* 2/24/14RP 31.

Yet when Detective Blake discovered from Mr. Phillip's cell phone that he emailed a lawyer shortly after the incident, the detective put the email's content into a report and gave it to the prosecutor. 2/24/14RP 20-23; CP 756.

And rather than stop the detective from discussing privileged attorney-client information, the prosecutor encouraged further intrusion. CP 740. He asked the detective to send him a copy of the

email Mr. Phillip sent to a lawyer, and after reading this privileged communication, he emailed the detective saying, "Holy crap," and the detective agreed, saying "God bless cell phones and stupid people." 2/24/13RP 40.

The prosecutor also spoke to the detective over the telephone but the defense could not get a record of that conversation. 9/30/13RP 38. The defense discovered this attorney-client privilege violation only by filing a public disclosure request and believed it was missing additional portions of the State's discussion. *Id*. at 57.

After the detective shared this email in February 2012, the State redoubled its efforts to prosecute Mr. Phillip, with the prosecutor re-writing the earlier search warrant for Mr. Phillip's cell phone data and obtaining additional evidence, and the same detective continued to lead the investigation. 9/30/13RP 30; 2/24/14RP 30, 41, 46-47.

The trial court agreed this purposeful intrusion into attorney-client communications violated Mr. Phillip's constitutional right to counsel, as well as potentially violating CrR 8.3. 9/9/13RP 147-49; 9/30/13RP 26, 74-76. It criticized the detective's failure to understand the sacrosanct nature of attorney-client communications and the

prosecutor's deliberate efforts to encourage further intrusion. 9/30/13RP 74-75, 80-81; 2/25/14RP 105; 2/26/14RP 5.

Pena Fuentes clarified that the State must prove "no possibility" of prejudice when it invades attorney-client privilege, but the court ruled the remedy would be keeping the privileged information from the jury. *See Pena Fuentes*, 179 Wn.2d at 819-20; 2/26/14RP 3-7. The only example given in *Pena Fuentes* of no possibility of prejudice is when the information was never communicated to a person involved in the prosecution. *Id*. The court's toothless remedy ignores the necessary conscious and subconscious effect of learning Mr. Phillip made inculpatory statements to a lawyer. It fails to account for the broad Sixth Amendment policies protected by the attorney-client privilege. *See Lenarz*, 22 A.3d at 548.

The State did not prove the absence of prejudice as required by *Pena Fuentes*, 179 Wn.2d at 819-20. The improperly gathered information shaped the State's investigation, its efforts to prosecute rather than negotiate, and its resolve for a rapid retrial when the first jury hung. The Court of Appeals summarily affirmed the trial court's reasoning. This Court should grant review to resolve the application of

Pena Fuentes to the State's impermissible intrusion into confidential communications.

E. CONCLUSION

Based on the foregoing, William Phillip, Jr. respectfully requests this Court deny the State's petition for review and separately grant review of the issues his raises pursuant to RAP 13.4(b).

DATED this 2nd day of December 2016.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WILLIAM PHILLIP, JR., Appellant.	)	No. 72120-8-I ORDER DENYING APPELLANT'S MOTION TO RECONSIDER

Appellant, William Phillip, Jr. filed a motion to reconsider this court's opinion filed on August 29, 2016 in the above matter. A majority of the panel has determined the motion to reconsider should be denied.

Now therefore,

IT IS HEREBY ORDERED that appellant's motion to reconsider is denied.

DATED this 3rd day of October, 2016.

FOR THE COURT:

Spearman, J.
Presiding Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 93794-0**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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