No. 99719-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

WESLEY YOUNG,
Petitioner.

On Appeal from the Court of Appeals, Div. 1
Court of Appeals No. 80907-5-I

BRIEF OF AMICUS CURIAE WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF GRANTING PETITION FOR REVIEW RAP 13.4(h)

WASHINGTON DEFENDER ASSOCIATION

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defender Association ("WDA") is a statewide non-profit organization. WDA has more than a thousand members and comprises public defender agencies, indigent defenders, and those who are committed to seeing improvements in indigent defense. One of the primary purposes of WDA is to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law. This Memorandum is authorized by RAP 13.4(h), to advocate that this Court grant the Petition for Review that has been filed herein by petitioner Wesley Young. The Petition is focused solely on the equitable treatment of indigent criminal defendants who, due to their impecunious situation, are unable to post bail to secure pretrial release, thus presenting issues which are at the very core of WDA's central purpose.

As amicus curiae, WDA is pledged to assure that Wash. Const. art. I, §12, guarantees that the class of relatively "indigent" criminal defendants enjoy the same legal privileges and immunities which are guaranteed to the relatively "wealthy" defendants, and that the indigent class is as equally protected by the constitutional warrant requirement as the wealthy class.

B. SUMMARY OF ISSUES PRESENTED

This brief is directed at both of the issues presented by the petitioner—in short, whether art. I, §12, of the state constitution prohibits admission of phone calls from pretrial detainees, and whether the Fourteenth Amendment of the federal constitution prohibits admission of the phone calls. Amicus urges this Court to accept review under three of the four criteria in RAP 13.4(b).

In summary, the Court of Appeals decision misstates the issues that the Mr. Young presented to it in his Brief of Appellant and his Reply Brief. When the trial court sets a monetary pretrial bail, the bail order immediately creates two similarly-situated classes: those who can afford to post the amount of bail and are released pending trial, and those who cannot afford to post the bail and remain in jail pending trial.

Without any warrant based on probable cause to suspect specific wrongdoing, all telephone calls of individuals awaiting trial in jail are recorded for the sole purpose of jail security, *e.g.*, learning of dangers to other inmates and preventing attempts to escape or to introduce contraband. The State may not intercept and record phone call of people who are awaiting trial out of jail, unless it has a search warrant based on probable cause to suspect specified criminal activity. Mr. Young has not disputed the proposition that the State has a legitimate interest in jail

security, which justifies warrantless and suspicionless interception of calls from jail, but he has also pointed out that any State interest necessarily stops at that point: there is no conceivable State interest that justifies use of the recordings as evidence against the defendant at trial to support either the pending charges or additional charges.

C. THIS COURT HAS REPEATEDLY ADDRESSED IDENTICAL EQUAL PROTECTION CLASSIFICATIONS DIFFERENTLY THAN THE COURT OF APPEALS DID IN THIS CASE

The differential treatment between one class of defendants who can afford pretrial bail and another class of defendants who cannot afford bail has been evaluated in a series of this Court's decisions applying the Equal Protection Clause of the United States Constitution's Fourteenth Amendment, all of which have resulted in judgments in favor of the pretrial detainees. *Reanier v. Smith,* 83 Wn.2d 342, 517 P.2d 949 (1974) (defendants who cannot post bail must receive credit for pretrial detention time against maximum and mandatory minimum prison sentences);[1] *In re Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982) (*Phelan I*) (same; also jail time served on probation until revoked); *State v. Phelan*, 100 Wn.2d 508,

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[1] In addition to the clear Equal Protection Clause holding, 83 Wn.2d at 349-51, the *Reanier* court reached the same result (entitlement to pretrial jail time credit) under the federal Due Process Clause and under the prohibition against multiple punishments embodied in the federal Double Jeopardy Clause. 83 Wn.2d at 346, 347.

671 P.2d 1212 (1983) (*Phelan II*) (defendants who cannot post bail must receive credit for presentencing detention time against discretionary minimum prison sentences imposed by parole board); *In re Mota*, 114 Wn.2d 465, 788 P.2d 538 (1990) (defendants who cannot post bail must receive good time credit for presentencing jail time against discretionary prison sentences imposed under the Sentencing Reform Act). The equal protection analysis is straightforward: if people who cannot bail out of jail before trial did not receive the claimed time credits, they would end up serving more time than identically sentenced defendants who had been able to afford pretrial release. The differential treatment would be imposed solely due to the difference in the wealth of the two classes of defendants.

The Court of Appeals below did not consider that the differential treatment at issue here is between the same two classes that were recognized in each of this Court's four decisions. Although Mr. Young repeatedly cited both *Reanier* and *Phelan II,* Brief of Appellant at 8, 13, 14, 15, 16, 20, the Court of Appeals did not address even one of this Court's equal protection decisions that rejected differential treatment of precisely the same two classes. Such differential treatment due to differences in wealth between the two classes cannot be justified with even under the "rational basis" test in *Reanier* and *Phelan I.* And it certainly cannot be justified under the later decisions in *Phelan II* and

Mota, where this Court ruled that differential treatment of similarly-situated classes, based solely on relative wealth, sharpens the constitutional requirements:

> A higher level of scrutiny is applied to cases involving a deprivation of liberty interest due to indigency. Mota's inability to obtain pretrial release was due to indigency. The poor, while not a suspect class, are not fully accountable for their status. Situations involving discrete classes not accountable for their status invoke intermediate scrutiny. Under intermediate scrutiny, the state must prove the law furthers a substantial interest of the state.

Mota, supra, 114 Wn.2d at 474 *(internal citations omitted; emphasis added*).

Additionally, Mr. Young's appeal has fully briefed his right to relief under the more protective Wash. Const. art. I, §12, privileges and immunities clause—constitutional issues that *Mota* did not reach due to inadequate briefing. 114 Wn.2d at 472.

D. THE "PRIVILEGES AND IMMUNITIES" PROTECTION

In *Reanier, Phelan I, Phelan II,* and *Mota* decisions, this Court applied the federal equal protection analysis to the identical two classes presented here, but this case also finally presents this Court with the opportunity to construe the separate, and more protective, guarantees of the Privileges and Immunities Clause of art. I, § 12:

> Where the Fourteenth Amendment to the United States Constitution was generally intended to prevent discrimination against disfavored individuals or groups, article I, section 12 was intended to prevent favoritism and special treatment for a few to the disadvantage of others.

Martinez-Cuevas v. DeRuyter Bros. Dairy, 196 Wn.2d 506, 518, 475 P.3d 164 (2020). The first step is to determine whether a law or practice confers a privilege or immunity:

> For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens." Although the precise confines of what constitutes a privilege remains unclear, this court has stated that for the purposes of article I, section 12, privileges are "'those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship.

Madison v. State, 161 Wn.2d 85, 95, 163 P.3d 757 (2007) (*internal citations omitted*). Under our state constitution, every person may freely speak on all subjects," Const., art. I, § 5, and may exercise that right of communication with a secure expectation of privacy, Const. art. I, § 7 ("No person shall be disturbed in his private affairs…without authority of law").

When the trial court imposes monetary bail, it creates two similarly situated classes: those who can post the bail amount and obtain pretrial release, and those who cannot and remain in jail. The former are relatively

"wealthy" enough to purchase pretrial freedom and thereby enjoy the privilege of unmonitored phone conversations and immunity from having these conversations wiretapped unless the State has sufficient evidence to establish probable cause to obtain a warrant. The latter, who are too poor to post bail, enjoy neither the same privilege nor the same immunity as the former class.

D. THE PETITION FOR REVIEW MEETS THREE OF THE FOUR CRITERIA FOR ACCEPTANCE OF REVIEW UNDER RAP 13.4(b)

Reanier, Phelan I, Phelan II, and *Mota* show that there is a significant possibility that Mr. Young's contentions will be successful. If Mr. Young prevails on the contention that allowing prosecutors to introduce recordings of telephone calls made by jailed defendants who cannot afford to pay pretrial bail violates the Privileges and Immunities provisions of Wash. Const. art. I, § 12, or the Equal Protection provisions of either art. I, §12 or the 14th Amendment to the U.S. Constitution, the resulting seismic change in longstanding Washington practice will be significant enough to meet three of the four criteria for acceptance of discretionary review set forth in RAP 13.4(b):

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3)

> If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

First, under RAP 13.4(b)(1), the Court of appeals decision is in conflict with the Supreme Court decisions in *Reanier, Phelan I, Phelan II,* and *Mota*. The Court of Appeals decision below ignored all of these decisions, which found clear equal protection violations by differential treatment of the same two classes in this case.

Second, under RAP 13.4(b)(3), this case involves several significant questions under the state and federal constitutions, including the first-impression presentation of the analysis under the state privileges and immunities clause. Other urgent constitutional questions include the following:

1. Whether the freedom from warrantless wiretapping enjoyed by defendants who are not in jail before trial is a "privilege" or "immunity" within the meaning of Wash. Const. art. I, § 12.
2. Whether equal treatment of the two classes could be constitutionally achieved by a statute that allowed warrantless interception and recording of both classes of defendants awaiting trial, regardless of custody status,
3. Whether the privileges and immunities restriction applies when the differential treatment of the two classes is imposed by a pernicious practice rather than a statute, rule, or other formal law.

Third and finally, under RAP 13.4(b)(4), the Petition for Review poses fundamental issues of urgent public interest demanding resolution

by the Supreme Court. These issues include whether a decision prohibiting admissibility of recorded jail phone would apply to both pending and past cases. There would also be questions relating to harmless error: a recording that led to new charges could never be harmless and would likely invalidate all, or nearly all, convictions of the original charges due to the extreme prejudice caused by the added charges. Even in cases like Mr. Young's, where the recordings add harmful inculpatory evidence rather than new charges, the trial judge repeatedly observed that the recorded conversation was “so probative…. It’s so probative.” RP 131.

Any decision by this Court to exclude jail phone recordings would raise the possibility that the jailer listening to recorded jail calls may be tempted to "tip" the fellow officers who are investigating the inmate's original crimes to seek a search warrant for recordings that the jailer knows to contain inculpatory statements or new criminal conduct. That problem merely calls for a procedure to guarantee that the investigators be able to demonstrate that they had sufficient information to support a warrant before the call is recorded or disseminated outside the jail.

E. CONCLUSION

For the reasons stated above, amicus curiae Washington Defender Association urges this Court to accept discretionary review of Mr. Young's Petition. It is a certainty that there will continue to be similar challenges to

the evidentiary use of jail recordings. Mr. Young's case has been well prepared and briefed, and is an appropriate vehicle for the Court to address these important issues.

Respectfully submitted this 29th day of June 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29th, 2021, I served one copy of the following documents: Brief of Amicus Curiae and Motion to Leave to File Brief of Amicus Curiae by email and via the Washington Courts E-Portal on the following:

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