

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DESMOND MODICA,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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STATE OF WASHINGTON

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A. SUMMARY OF ARGUMENT

Desmond Modica was convicted of Tampering with a Witness, based on telephone conversations he had with his grandmother, recorded by the King County Jail while he was incarcerated there. Both Mr. Modica and his grandmother were on notice that the calls were subject to government monitoring; however, notice cannot be equated with consent. Because the conversations were private and the parties did not give their consent, these recordings were made illegally, in violation of the Washington Privacy Act.

What happened to Mr. Modica is not unique. Instead, every phone call by every inmate is now being recorded and reviewed by the government. This happens whether the inmate is held prior to being charged or after being charged; whether the inmate is held on a petty or serious offense; whether the inmate is held for public safety reasons or simply because he is too poor to afford even a minimal bail. Every time an inmate makes a call from the jail the recording begins, without any prior analysis of the reason for monitoring or content of the telephone call. The prosecution may then, at its own whim, listen to the inmate's conversation with his spouse, or mother, or employer, or whoever happens to be the

recipient of the call. If the State finds the conversation useful, it may deem it "public" and seek to introduce the recording at trial. Accordingly, Mr. Modica's case is before this Court because the State believed it the conversations would be helpful to the prosecution. A man had to be convicted with this evidence before the issue could be brought before this Court. But the issue affects every man or woman who is booked into the jail, including those who ultimately never charged or convicted. When the recording begins, a privacy violation occurs.

These privacy violations do not occur because of a change in the law or a new interpretation of existing law. It happened because new technology - a telephone system capable of recording and logging every telephone call made by every inmate - became accessible to the King County Jail. This Court should not allow the existence of new technology to drastically weaken the protections of the Washington Privacy Act.

B. ISSUES PRESENTED

1. The Washington Privacy Act (WPA) protects private conversations from recording without the consent of all parties. Where the parties subjectively intended their conversation to be private and the relevant factors support a reasonable expectation

of privacy, could the government transform their private conversations into public ones merely by inserting itself into the conversations?

2. The WPA requires the consent of all parties to a private telephone conversation in order for that conversation to be lawfully recorded. Neither party expressly consented to the recordings. Although they were given notice of the recordings, implied consent cannot be found from the mere existence of warnings. Where neither party consented to the recording of telephone calls made from jail, were the recordings illegally made?

C. STATEMENT OF THE CASE

On May 23, Desmond Modica was charged with Assault in the Second Degree (Domestic Violence) and Resisting Arrest. CP 1-5. The information was later amended to add charges of Assault in the Fourth Degree (Domestic Violence) and Tampering with a Witness. CP 7, 12-13. Following a jury trial, Mr. Modica was convicted of all four charges. CP 54-60, 61-63.

At trial, Sergeant Thomas Manning testified regarding a new program for monitoring telephone calls in the King County Jail,

which had begun on April 20, 2005. 12RP 85-86.¹ Sergeant Manning described the recorded warning played at the beginning of every phone call placed from the jail, and explained the process for tracking particular numbers and documenting recorded calls. 12RP 90-91, 104-06. Ten compact discs, containing recordings of Mr. Modica's telephone conversations with his grandmother Grace Stewart, were admitted into evidence. 12RP 98-99. Several of these recordings were played to the jury. 12RP 109; 13RP 8-17, 31-33, 52-53. The prosecutor alleged that these conversations revealed a scheme by which Karen Modica (the alleged victim of the domestic violence offenses) and her nine children would leave their home and stay with Ms. Stewart in order to avoid Ms.

¹ The Verbatim Report of Proceedings("RP") consists of thirteen volumes of transcripts, which will be referred to as follows:

- 1 RP Pre-Trial Motions, June 22, 2005
- 2RP Pre-Trial Motions, June 30, 2005
- 3RP Pre-Trial Motions, July 12, 2005
- 4RP Pre-Trial Motions, July 21, 2005
- 5RP Pre-Trial Motions, July 25, 2005 (Vol. I)
- 6RP Pre-Trial Motions, July 25, 2005 (Vol. II)
- 7RP Pre-Trial Motions, CrR 3.5 Hearing, July 26, 2005
- 8RP Pre-Trial Motions, Jury Trial, July 27, 2005
- 9RP Jury Trial, July 28, 2005 (Vol. I)
- 10RP Jury Trial, July 28, 2005 (Vol. II)
- 11RP Jury Trial, August 1, 2005 (Vol. I)
- 12RP Jury Trial, August 1, 2005 (Vol. II)
- 13RP Jury Trial, August 3, 2005
- 14RP Jury Trial, August 4, 2005
- 15RP Jury Trial, August 5, 2005
- 16RP Sentencing Hearing, September 16, 2005

Modica's obligation to testify in this trial, forming the basis for the Tampering charge. 14RP 25-30.

On appeal, Mr. Modica argued the trial court erroneously admitted the recordings in violation of the Washington Privacy Act, Article 1, § 7 of the Washington Constitution, and the Washington Administrative Code.²

The Court of Appeals ruled the recordings were admissible because the parties did not have a reasonable expectation of privacy after receiving notice that the calls would be recorded, and both parties to the conversations gave their implied consent to their recording by conversing after receiving such notice. State v. Modica, 136 Wn. App. 434, 446-50, 149 P.3d 446 (2006). The Court also ruled that the relevant provisions of the Washington Administrative Code have been decodified, and declined to address Mr. Modica's argument that the recordings violated his privacy rights under Article 1, § 7 of the Washington Constitution. *Id.* at 450, n. 9. This Court granted review.

² Unrelated arguments regarding the right to counsel are not discussed here.

D. ARGUMENT

THE RECORDINGS OF MR. MODICA'S TELEPHONE CONVERSATIONS WITH HIS GRANDMOTHER VIOLATED THE WASHINGTON PRIVACY ACT.

Almost 100 years ago, our Legislature enacted a privacy statute to criminalize the interception of private telephone conversations:

Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor.

Rem. Comp. Stat. 1922 §2656 (1909). In so doing, our State distinguished itself from nearly every other by deliberately providing greater privacy protections.³

While the code provisions have changed, the interception of private telephone calls remains illegal to this day. RCW 9.73.030(1) prohibits all interceptions, except those made with the consent of all parties to the conversation:

- (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the State of

³ Only the constitutions of nine other states have provisions that, like Washington, explicitly provide for the protection of privacy. See ALASKA CONST. Art. I, §22; ARIZ. CONST. Art. II, §8; CAL. CONST. Art. I, §1; FLA. CONST. Art. I, §23; HAW. CONST. Art. I, §6; ILL. CONST. Art. 1, §6; LA. CONST. Art. 1, §5; MONT. CONST. Art. II, §10; S.C. CONST. Art. I, §10. Of these, only four other states also require the permission of all parties to a telephone conversation before it can be legally recorded. These are California, Florida, Illinois, and Montana.

Washington, its agencies, and political subdivisions to intercept, or record any:

- a. Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the conversation.
- b. Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

This proscription remains the cornerstone of the Washington Privacy Act ("WPA"), codified in RCW 9.73.010-9.73.140.

The purpose of the WPA, as recognized by this Court is to

safeguard the private conversations of citizens from dissemination in any way. The statute reflects a desire to protect individuals from the disclosure of any secret illegally uncovered by law enforcement.

State v. Fjermestad, 114 Wn.2d 828, 836, 791 P.2d 897 (1990);
see also Johnson v. Hawe, 388 F.3d 676 (9th Cir. 2004) (holding the WPA "deliberately places the court system between the police and private citizen to protect against this type of [electronic eavesdropping]"). Through the WPA, Washington "has recognized a strong policy of protecting the privacy of its citizens and the

introduction of evidence obtained in violation of the statutes is prohibited." State v. Baird, 83 Wn. App. 477, 483, 922 P.2d 157 (1996). This Court recently held it would require strict conformity with the WPA. Lewis v. Department of Licensing, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006).

1. The conversations between Mr. Modica and his grandmother were private. The Court of Appeals ruled that the conversations between Mr. Modica and his grandmother were not private, relying exclusively on the fact that they both had notice that inmates' calls were subject to recording and monitoring. Thus, the Court - essentially conflating notice with consent, and consent with lack of privacy - held that neither of their expectations of privacy could have been reasonable. However, as discussed below, announcing the intent to illegally record another's telephone calls does not cure the illegality. The existence of a recorded warning cannot substitute for a subjective, case-by-case inquiry. Therefore, the relevant inquiry is whether the parties had a reasonable expectation *of privacy before they heard the recorded warning*.

Whether a communication is private is a question of fact. Kadoranian v. Bellingham Police Dept., 119 Wn.2d 178, 190, 829

P.2d 1061 (1992); Christensen, 153 Wn.2d at 193; Faford, 128 Wn.2d at 484.

To determine whether or not a telephone conversation is private, the court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case.

Kadoranian, 119 Wn.2d at 190, quoting State v. Forrester, 21 Wn. App. 855, 861, 587 P.2d 179 (1978), rev. denied, 92 Wn.2d 1006 (1979).

The primary question is whether the parties intended the conversations to be private. State v. Clark, 129 Wn.2d 211, 225, 916 P.2d 384 (1996). The secondary consideration - the parties' expectations - is analyzed by reviewing the duration and subject matter of the conversations, the location and presence of third parties, the role of the non-consenting party and the relationship between the parties. *Id.* at 225-26.

There can be no doubt that the parties here intended their conversation to be private. Furthermore, their expectations of privacy were reasonable. They conversed over the telephone, not on a public street as in Clark, 129 Wn.2d at 228, or at a meeting as in State v. Slemmer, 48 Wn. App. 48, 53, 738 P.2d 281 (1987). The parties were close family members, unlike the strangers at

issue in Clark, 129 Wn.2d at 227, and Kadoranian, 119 Wn.2d at 190. And the subject matter of the calls included discussions about the welfare and day-to-day life of the parties' family, subject matter which is generally private. Most importantly, as discussed above, neither party consented. In short, there can be little doubt that without the notice of recording, the conversations would be deemed private. Since notice is not the same as consent, the Court of Appeals' analysis is flawed, and notice cannot transform an otherwise private conversation into a public one.

2. The government did not obtain two-party consent pursuant to RCW 9.73.030.

a. Notice cannot be equated with consent. The Court of Appeals ruled that Mr. Modica and his grandmother gave implied consent to the invasion of their privacy, simply because they were put on notice that the invasion was occurring. Modica, 136 Wn. App. at 446-50. Before this opinion, no case or statute has said that a mere statement that the recording is occurring, by a non-party, is sufficient to establish consent to record telephone conversations. At most, such a statement provides notice, not consent. Our Legislature made that clear by carefully defining consent. "Two party consent," as defined in the WPA itself, exists only

... whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

RCW 9.73.030(3).

As the First Circuit and Massachusetts District Courts have recognized, equating notice with consent would "render the Fourth Amendment a dead letter simply by informing everyone in advance of its intention to disregard the Amendment's constraints." United States v. Novak, 453 F.Supp.2d 249, 257, n. 3 (Mass. 2006), citing Blackburn v. Snow, 771 F.2d 556, 563 (1st Cir. 1985); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 354 (1974). This principle is just as applicable to the WPA as it is to the Fourth Amendment. The Court of Appeals' ruling in this case means that notice abrogates a reasonable expectation to privacy. If that is true, then state actors can always override the strict requirements of the WPA simply by giving notice of the recording. This cannot be what the legislature intended.

b. Neither of the two parties consented. There were two parties to the conversations in this case: Mr. Modica and his grandmother, Ms. Stewart. Neither of them announced to the other that the call would be recorded. Neither consented.

In fact, this Court has specifically held that someone doing the same thing that the government did here was not a "party." In State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996)" \s "Fa, a private actor used a police scanner to intercept and record his neighbors' cordless telephone conversations, and then related their substance to the police. Id. at 479. This Court held that he was not a "party" to those conversations, and that "the plain language of [RCW 9.73.030] requires one intended party to the conversation to consent to interception." Id. at 487-88; see also Baird, 83 Wn. App. 477 (defendant illegally recorded a telephone conversation between his wife and another man, and so the tape was inadmissible); State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004) (mother illegally intercepted telephone conversation between her daughter and her daughter's boyfriend). The Court reversed Faford's conviction, holding in part:

Despite [the neighbor's] allegations that Defendant's conveyed threats to his family and property, the plain language of the statute requires one intended party to the conversation to consent to interception for the threat exception to apply. Because *none of the parties to Defendant's cordless telephone conversations consented to interception*, the threat exception does not apply.

128 Wn.2d at 487-88 (emphasis added).

WPA cases permit the government to listen to a telephone call when someone calls a government agency or actor, or when a

government actor makes the call him or herself, thereby making the government a party to the call.⁴ Other WPA cases permit the government to listen to telephone calls when one of the intended recipients takes an affirmative step to consent, such as tipping the receiver so that a government agent can hear it.⁵ Again, in that case an intended party to the call has consented. No WPA case permits the government to interject itself into private telephone conversations in the manner done so here.

In Faford, this Court chastised the State for defending the neighbor's actions:

⁴See State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) (use of recorded computerized messages appropriate because defendant's sent the messages to a federal agent - the agent was a "party"); State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996) (defendant spoke to undercover agent who was the consenting "party" to the conversation); State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) (recordings admitted where defendant was talking to government agent, and so government agent was a "party"); State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Williams, 94 Wn.2d 531, 617 P.2d 1012 (1980) (defendant spoke to undercover agent who consented to the recording and so the person consenting was also an intended "party"); State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980) (defendant spoke to police and so the person recording the conversation was also a "party"); State v. Higgins, 125 Wn. App. 666, 105 P.3d 1029 (2005) (defendant conversing with police officer and so the person recording was also a "party"); State v. Mazzante, 86 Wn. App. 425, 936 P.2d 1206 (1997) (defendant spoke to police officers and so the person recording the conversation was also a "party"); State v. Gelvin, 43 Wn. App. 691, 719 P.2d 580 (1986) (defendant spoke to police and so the person recording the conversation was also a "party").

⁵State v. Corliss, 123 Wn.2d 656, 870 P.2d 317 (1994) (defendant talked to a party who consented to have the call intercepted by tipping the receiver so that an officer could hear the conversation).

[The neighbor] did not accidentally or unintentionally pick up a single cordless telephone conversation on his radio or cordless telephone, but undertook 24-hour, intentional, targeted monitoring of Defendants' telephone calls with a scanner purchased for that purpose. This type of intentional, persistent eavesdropping on another's private affairs personifies the very activity the privacy act seeks to discourage.

125 Wn.2d at 487-88. This case is no different, except that here the government was not just defending the intentional, persistent eavesdropping on another's private affairs - it was doing it. The jail administration undertook 24-hour, intentional, targeted monitoring of Mr. Modica's telephone calls. This "personifies the very activity the privacy act seeks to discourage." Id.

Although the State has attempted to distinguish Faford based on the fact that the recording in that case was surreptitious, while the recording in this case was announced to the parties, the Faford opinion is not based in that distinction at all. In fact, the Faford Court did not mention the lack of notice to the parties.⁶ Instead, the ruling turned entirely on whether the parties had a reasonable expectation to privacy in their conversations - apart

⁶ The State argued that manuals for some cordless telephones contain warnings that calls could be intercepted, but the Court noted the absence of evidence that the owners of these particular phones had received such warnings. Id. at 487. However, the Court did not suggest that such evidence of notice would have made any difference in its ruling.

form the ease with which the calls could be intercepted. Id. at 485-86. This Court rejected the State's argument that "because the technology exists to intercept cordless telephone conversations with ease, society does not reasonably expect privacy in those calls." Id. at 485. Instead, the Court found the WPA flexible enough to apply a "traditional expectation of privacy" to the new technology.

It is absurd to argue that because something is technologically feasible it is legal, even if the users of that technology are aware of the risks. This Court has warned:

We recognize as technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent. We believe our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.

State v. Young, 123 Wn.2d 173, 184, 867 P.2d 593 (1994).

However, this is precisely what happened in the instant case. The State has not asserted, and Sergeant Manning's testimony did not suggest, that the King County Jail began monitoring all inmate phone calls because of any new security concerns or the like. Instead, it appears that the recent monitoring program was instituted because the technology of easily recording

all inmate calls had become available. The unconscious altering of expectations warned of in Young and rejected in Faford cannot justify illegal government action, whether those expectations are altered by new technological developments, announcements of recording, or both.

c. Consent was not implied. This case is easily distinguished from those relied on by the Court of Appeals to find that the parties implied consent. Modica, 136 Wn. App. at 449, citing In re Marriage of Farr, 87 Wn. App. 177, 184, 940 P.2d 679 (1997); State v. Townsend, 147 Wn.2d 666, 675-78, 57 P.3d 255 (2002). In Farr, implied consent was found where a party left a message on an answering machine, "the only function of which is to record messages." Modica, 136 Wn. App. at 449. In Townsend, the defendant gave implied consent to the recording of e-mail messages and internet "chat" discussions where he knew they would be recorded on the recipient's computer. 147 Wn.2d at 676. Townsend had chosen a "chat" program which, under its default settings, automatically recorded the discussions on both parties' computers. *Id.* at 676-77. He had not chosen to disable the default settings or instructed the recipient to do so. *Id.* at 677, And, unlike a telephone call, an e-mail "must be recorded on

another computer's memory" in order for the recipient to read it. *Id.* at 676, quoting State v. Townsend, 105 Wn. App. 622, 629, 20 P.3d 1027 (2001) (emphasis added) (Cf. United States v. Long, 64 M.J. 57 (2006), holding a servicemember had an objectively reasonable expectation of privacy in e-mail messages she transmitted over a government computer network, despite the logon message advising her such messages would be subject to monitoring.)

Here, Mr. Modica was not leaving a recorded message for his grandmother, sending her an e-mail, or "chatting" with her over the internet; he was speaking to her directly. His grandmother was not recording him; the county was. And although the county notified the callers that their conversation would be recorded, the parties had no choice in the matter if they wished to communicate. The defendant in Townsend could have chosen to override default software settings, used a different software program, or chosen a different method of communication altogether, and the caller in Farr could have declined to leave a message and instead called back later. Mr. Modica and his grandmother had no such options.

d. Consent, if any, was coerced and therefore invalid.

The coercive context of the purported consent must be emphasized. While it is true that an inmate's privacy expectations are lower than those of a free citizen (State v. Rainford, 86 Wn. App. 431, 438, 936 P.2d 1210 (1997); State v. Campbell, 103 Wn.2d 1, 23, 691 P.2d 929, 1984)), inmates do have some privacy rights. If incarcerated people had no privacy rights in Washington, RCW 9.73.095 (exempting the Department of Corrections from the WPA, and discussed further below) would be superfluous.

Furthermore, the other party to this conversation, Ms. Stewart, was a free citizen with full privacy expectations. However, the only way she could have a telephone conversation with her incarcerated grandson was under government monitoring. Consent is voluntary if it is "the product of an essentially free and unconstrained choice." Schneckloth v. Bustamonte, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) (citation omitted). In considering the impact of the Court of Appeals' decision, this Court can take judicial notice of the large size of King County, and the fact that thousands of friends and family members rely on the telephone system to stay in touch with their incarcerated loved ones. *

*The King County Department of Adult and Juvenile Detention reports an

Without any consideration of the coercive circumstances or the privacy rights of the non-incarcerated party to the conversation, the Court of Appeals in this case has essentially ruled that upon being booked into a King County Jail, a Washington citizen waives all rights to a private conversation. This ruling would allow the administrative decision of one county institution to diminish the privacy rights of all Washington citizens. Instead, this Court should conduct a case-by-case inquiry, consistent with WPA caselaw, to determine whether the parties had a reasonable, subjective expectation of privacy - apart from the announcement of recording.

3. No WPA exemption exists for monitoring the calls of a county jail inmate. The Legislature specifically exempted employees of the Department of Corrections (DOC) from some of the WPA's provisions:

(1) RCW 9.73.030 through 9.73.080 and 9.73.260 shall not apply to employees of the department of corrections in the following instances: *Intercepting, recording or divulging any telephone calls from an offender or resident of a state correctional facility*; or intercepting, recording, or divulging any monitored nontelephonic conversations in offender living units, cells, rooms, dormitories, and common spaces where offenders may be present. For the purposes of this section, "state correctional facility" means a facility that is under the control and authority of the department of corrections, and used for the incarceration, treatment or rehabilitation of convicted felons.

average daily population of 2,667 in its facilities in 2006. See http://www.kingcounty.gov/courts/detention/administration/jail_stats.aspx#adp.

RCW 9.73.095(1) (emphasis added). Clearly, this exception does not apply here. Mr. Modica was confined in King County Jail, not a state correctional institution; DOC employees do not run the facility.

In State v. Wanrow, 88 Wn.2d 221, 551, P.2d 548 (1977), this Court held that a provision which limited the recording of calls to police and fire stations implied that these calls would otherwise be private under the pre-amendment WPA. "There would be no purpose in enacting this exclusion unless the legislature believed such communications were otherwise within the scope of the section." Id. at 228. The Wanrow holding was later superceded by 1977 amendments to the WPA, authorizing the recording of telephone calls to police dispatchers. Lewis, 157 Wn.2d at 464, citing Laws of 1977, 1st Ex. Sess., ch. 363, § 3. Distinguishing Wanrow, the Lewis Court found "this amendment indicates that the legislature did not intend the exemption of a particular type of communication under RCW 9.73.090 to imply that the communication is otherwise private for purposes of the privacy act." Lewis, 157 Wn.2d at 464. But here, no amendments or other legislative history suggest such a result. To the contrary, in 2006 a Bill Request, attached to Appellant's Opening Brief as Appendix B, was sent to the Code Reviser's Office for the Washington State Legislature. This description of this Bill Request was: "Regulating the interception of offender conversations by county-operated correctional facilities." The Bill would have added "employees of a

county-operated correction facility" to the list of people authorized to record pursuant to RCW 9.73.095, but was never even introduced and has not become law.

Wanrow's reasoning is still sound. Just as in Wanrow, the existence of RCW 9.73.095 shows that the Legislature saw a need for this exception, indicating that the calls would otherwise be private and, without the exception, monitoring of DOC prisoners' telephone calls could violate the WPA. And the Legislature's decision not to make a special exception for other correctional facilities indicates that the WPA must apply to the monitoring of telephone calls at county jails. The Court of Appeals' holding - that telephone calls made by King County Jail inmates can never be private and that both parties to such calls always imply consent - contradicts and undermines the clear legislative intent of the WPA.

4. The tampering conviction should be reversed and the charge dismissed. In addition to strict limitations on the ability to intercept private communications, the WPA strictly penalizes violators. RCW 9.73.080(1) provides that any person who violates RCW 9.73.030 is guilty of a gross misdemeanor. Moreover, any "information" obtained in violation of the WPA

shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose right have been violated in an action brought for damages. . . or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

RCW 9.73.050; see also Faford, 128 Wn.2d at 488 (evidence obtained in violation of the WPA is inadmissible for any purpose). Washington courts have held fast to the suppression rule, even in cases where the decision to do so had dire consequences. In Ejermestad, the Washington Supreme Court suppressed conversations recorded in violation of Washington's Privacy Act, even though its decision applied recordings made "during a 7-month investigation . . . aimed at arresting drug dealers." 114 Wn.2d 828. In doing so, the Court responded thusly to the State's protestations:

This decision does not hamstring the goals of law enforcement, but only preserves the integrity of the police and the privacy of individuals.

Id. at 836. The government illegally recorded Mr. Modica's telephone conversations, and the trial court erred in admitting that evidence at trial.

The trial court's improper admission of illegally obtained evidence was not harmless if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). These recordings were the *only* evidence offered by the prosecution to support the tampering charge. The conviction must therefore be reversed and the charge dismissed with prejudice.

E. CONCLUSION

Mr. Modica's conversations with his grandmother were private and recorded without the consent of either party. The recordings were illegally obtained and should never have been admitted at trial. Mr. Modica therefore respectfully requests this Court reverse his tampering conviction.

DATED this 7th day of January, 2008.

Respectfull submitted,

A handwritten signature in black ink, appearing to read 'Vass M. Lee', written over a horizontal line.

Vass M. Lee (SBA :11)
WASHINGTON APP LATE PROJECT-91052
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 79767-6-I

Respondent,

v.

DESMOND MODICA,

Petitioner.

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 7TH DAY OF JANUARY, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] RAN DI AUSTELL		
KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		
[X] DESMOND MODICA	(X)	U.S. MAIL
229 31 ST AVENUE E	()	HAND DELIVERY
SEATTLE, WA 98102	()	

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2008.

X _____

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