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No. 88422-6

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JORGE PENA-FUENTES,

Petitioner.

MEMORANDUM OF AMICUS CURIAE WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN
SUPPORT OF PETITION FOR REVIEW

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Washington Association of Criminal Defense Lawyers (WACDL) comprises over 1,080 attorneys practicing criminal defense law in Washington State. The association's objectives include improving the quality and administration of justice, protecting and insuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and resisting all efforts made to curtail such rights.

II. INTRODUCTION

WACDL is deeply disturbed by the Court of Appeals' decision, which has broad policy implications and very real ramifications on law enforcement organizations throughout the State. The consequences are enormous, striking at the core of the critical right to counsel recognized fifty years ago by the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). It undermines legions of cases requiring full disclosure of exculpatory evidence to the defense, creating instead a cloak of secrecy and tacit approval. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963); *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, 514 U.S. 419, 432-433, 115 S. Ct. 1555 (1995); *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763 (1972); *Milke v. Ryan*, --- F.3d ----, No. 07-99001, 2013 WL 979127, *19-20 (9th Cir. Mar. 13, 2013) (copy attached as App. A); *cf. Benn v. Lambert*,

283 F.3d 1040, 1053-54 (9th Cir. 2002).

Quoting Justice Traynor's decision in *People v. Cahan*, 44 Cal.2d 434, 445-46, 282 P.2d 905 (1955), this Court aptly concluded:

Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.' ... It is morally incongruous for the State to flout constitutional rights and at the same time demand that its citizens observe the law.

State v. Cory, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963).

The misconduct here was as contemptible as that in *Cory*.¹ The detective engaged in conduct the Court of Appeals found "egregious," "odious," "astonishing," "inexcusable," "offensive and unscrupulous." *State v. Fuentes*, --- Wn. App. ----, 295 P.3d 252, 253, 256, 257 (Jan. 14, 2013). Yet, the court "had a hand in such 'dirty business,'" by implicitly *endorsing* it, affirming the defendant's convictions and adding an additional count.

The Court of Appeals approved the trial court's refusal to order basic discovery of the fruits of the detective's misconduct. It ignored the disturbing policy implications of the Sheriff's Department's conclusion that, after investigation, there was "insufficient evidence" of misconduct by

¹ Cory, unable to make bail, met with his attorney in a private jail interview room in which the sheriff had secretly installed a microphone. *Cory*, 62 Wn.2d at 372. When Cory discovered this, he moved for a new trial, alleging that the sheriff's act of eavesdropping to gain confidential case information had deprived him of effective assistance of counsel. *Id.*

Detective Johnson—despite the Court of Appeals’ characterization of those same acts as “egregious,” “odious,” “astonishing,” “inexcusable,” “offensive and unscrupulous.” *Id.* The Court of Appeals did not recognize that it compromised “its own dignity as an agency of justice and custodian of liberty,” in the words of Justice Traynor (quoted in *Cory*). Nor did the Court of Appeals consider, or even mention, the deterrent function of dismissal central to the rationale of *Cory* and more recent decisions, such as *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010):

If the investigating officers and the prosecution know that the most severe consequences which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant’s trial strategy.

Cory, 62 Wn.2d at 377. The Court of Appeals’ decision, coupled with the refusal of the Sheriff’s Office to find any fault with the detective listening to six attorney-client conversations while working on the case, sends a clear message to law enforcement that police can engage in egregious constitutional violations with impunity, and without remedy.

III. STATEMENT OF THE CASE

Defense counsel established that his conversations with his client pertained to “my attempts to win a new trial for him based, in large part, on the videotaped interview of L.P.” and “[w]e discussed Detective

Johnson and ... strategy concerning our attempts to utilize the videotaped interview of L.P. to obtain a new trial.” CP 275-278. The detective admitted that these calls he eavesdropped on included discussion of the very piece of defense evidence that the prosecutor was working to discredit. CP 218. The prosecutor and detective had a telephone call, and at least one other communication, about the eavesdropping. CP 220. The State made affirmative representations to the trial court trying to show that the eavesdropping was harmless, asserting that the prosecutor did not learn or use the content of the calls in any way in its motion for a new trial. CP 188-89; 220. The State makes the same representations to this Court. State’s Answer to Petition for Review at 4, 9.

IV. ARGUMENT

A. Purposeful Law Enforcement Eavesdropping on Attorney-Client Conversations Requires Dismissal

The Court of Appeals correctly recognized that Washington law presumes that a deliberate intrusion into attorney-client communications causes prejudice.² Forcing the State to accept accountability for its actions

² “Even under CrR 8.3(b), the burden is on the State to prove beyond a reasonable doubt that there was no prejudice to the defendant.” *State v. Granacki*, 90 Wash. App. 598, 602 n.3, 959 P.2d 667 (1998) (citation omitted); cf. *People v. Jordan*, 217 Cal. App. 3d 640, 645-46, 266 Cal. Rptr. 86 (1990) (burden of clear and convincing evidence on State to establish it had not eavesdropped on attorney-client communications after defendant made *prima facie* showing of electronic monitoring equipment in prison conference rooms). Neither the trial court nor the Court of Appeals suggests that it applied a reasonable doubt standard in finding no prejudice in the instant case. While it would be a rare case where lack of prejudice could be shown beyond a reasonable doubt,

is the only way to deter similar future misconduct.

The fact that a law enforcement officer has not shared wrongfully obtained information with a prosecutor—such as the State alleges here—is *not* sufficient to rebut the presumption of prejudice. In *State v. Granacki*, 90 Wn. App. 598, 603-04, 959 P.2d 667 (1998), the Court held that even though the detective did not communicate any information to the prosecutor, his knowledge might indirectly help the State by affecting the way that he participated in, thought about, and talked about the case. *See also Cory*, 62 Wn.2d at 376 (1963) (“The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”), quoting *Glasser v. United States*, 315 U.S. 60, 76, 62 S. Ct. 457 (1942).

Judge Becker, dissenting in the instant case, recognized that *Cory* requires dismissal here:

We are instructed by *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), that the right to have the assistance of counsel is so fundamental and absolute that we should not indulge in nice calculations as to the amount of prejudice resulting from its denial. Here, it is too nice a calculation to say that the conviction itself was not tainted. In my view, this case is controlled by *Cory* and should have the same result, dismissal of all charges with prejudice.

Only dismissal will protect the defendant and deter the misconduct.

that is as it should be. There is no excuse for deliberate eavesdropping by the police on privileged attorney-client conversations and only dismissal will deter that misconduct.

B. The Court's Decision Guts the Presumption of Prejudice

The Court of Appeals held that Detective Johnson's egregious misconduct gave rise to a presumption of prejudice. *Fuentes*, 295 P.3d at 253. Washington courts have held that this presumption supports dismissal even without a showing of prejudice. *Id.* at 255-56, citing, e.g., *Granacki*, 90 Wn. App. at 600). But the court rendered this presumption meaningless by holding that (1) the prosecutor's mere assertion of no prejudice was enough to rebut the presumption, and (2) Mr. Fuentes could not test the prosecutor's representations through discovery.

1. There Can be No Ruling on Whether any Presumption of Prejudice is Rebutted Without Discovery

The trial court's finding that the eavesdropping did not prejudice Mr. Fuentes was based on a record fashioned by the State: (1) its selective production of a privileged email from the detective, and (2) the prosecutor's affirmative statements (a) regarding communications with the detective and (b) regarding his own actions and knowledge. Yet, the State was allowed to shield what the detective learned and how he used that information to assist with the State's opposition to the new trial motion.

The Court of Appeals held that the prosecution's efforts to rebut the videotape were irrelevant because the trial court found that the videotape was not credible and disregarded the declaration obtained by the prosecution recanting it. *Id.* at 257. But that reasoning is circular. The

declaration likely affected the judge's assessment of the witness' credibility in the videotape—the declaration procured from L.P. said “that what she stated on the videotape were lies.” State's Answer at 5.

If inquiry is to be made into actual prejudice, the defense must be permitted to probe the State's assertions and explore whether the information and defense strategy the detective gleaned from the calls enhanced his strategy and work product to the State's benefit, such as by assisting him in framing questions for L.P., preparing her declaration, and persuading her to sign it. The Court of Appeals discounted the defendant's right to this discovery, saying it did not fit squarely within discovery rules and that Mr. Fuentes failed to establish materiality—characterizing his efforts as seeking a “mere possibility” that helpful information might be disclosed. *Fuentes*, Slip Op. at 10-11. This hyper-technical reasoning is erroneous and misses the purpose of the presumption of prejudice. The prosecution's conduct was egregious; this discovery request was not made in the course of a normal criminal proceeding. If the courts permit the prosecution to attempt to rebut the presumption of prejudice, the defense must have access to the same evidence as the prosecution to make his case that the presumption has *not* been rebutted—especially when the prosecutor's burden to disprove the presumption is by a reasonable doubt standard. *See* footnote 2 *supra*.

Where an element of proof is at issue, discovery that may help a party establish the proof is essential. The defendant's discovery request encompassed all information within the knowledge, possession or control of every member of the prosecutor's staff, *see* CrR 4.7(a)(4), as well as all information known to the prosecution team, including law enforcement agencies. *See United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985). And, a prosecutor's failure to turn over favorable evidence on issues of guilt or punishment violates due process "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The obligation to disclose exists whether that evidence is known to the prosecutor or merely the police. *Kyles*, 514 U.S. at 437-38; *Milke*, 2013 WL 979127, *20. The Court of Appeals ignored this, effectively creating an exception to normal discovery rules for cases involving police misconduct.

2. The State's Affirmative Representations Compel Disclosure of Other Evidence on the Same Subject

Washington courts have long recognized that a party subjects itself to disclosure of related materials when it selectively discloses privileged or protected documents or information, especially when the disclosure is made to gain a tactical advantage. *See e.g., Martin v. Shaen*, 22 Wn.2d

505, 513, 156 P.2d 681 (1945) (when executor waived attorney-client privilege and “testified to a specific fact for the sole purpose of creating the presumption vital to the establishment of his case” he was compelled to provide all other privileged evidence regarding the same issue); *Kammerer v. Western Gear Corporation*, 96 Wn.2d 416, 635 P.2d 708 (1981) (privileged documents held discoverable when defendants indicated intent to call its attorneys as witnesses); *Seattle Northwest Securities Corp. v. SDH Holding Co.*, 61 Wn. App. 725, 739, 812 P.2d 488 (1991). Further, a party is required to disclose work product *even absent waiver* if the other party can show substantial need. As here, “[t]he clearest case for ordering production is when crucial information is in the exclusive control of the opposing party.” *Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30, 38 (1990).

The prosecutor submitted to the court a confidential email from the detective to support his claim that he had not directed the misconduct and did not know the contents of the calls. CP 220. He made affirmative representations that he had not used fruits of the eavesdropping. CP 188-89; 220. The court’s refusal to permit discovery thus allowed the prosecutor to use privileged information as both a sword and a shield.

C. Only a Real Remedy Will Deter Police Misconduct

Police misconduct is rampant as shown by the Sheriff’s Office’s

denial of wrongdoing in this very case (CP 466), the court-implemented plan to reform the Seattle Police Department initiated by the Department of Justice, and recent audits of the King County Sheriff's Office documenting serious flaws in oversight.³ The courts are duty-bound to hold the government accountable when it violates individual rights. A right without a remedy is meaningless. *See State v. Stenson*, 174 Wn.2d 474, 493-94, 276 P.3d 286 (2012) (evidence wrongfully withheld from defense required reversal of conviction and death sentence); *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d at 558 (2011) (reversal required because appeals by a prosecutor to racial bias "fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial its very existence demands that appellate courts set appropriate standards to deter such conduct"); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) (under article I, section 7, "whenever the right is unreasonably violated, the remedy must follow"); *Milke*, 2013 WL 979127 (reversal required for prosecutorial suppression of evidence).

V. CONCLUSION

The egregious invasion of the defendant's Sixth Amendment right requires dismissal. The reprehensible invasion by the police on privileged communications demands a remedy to deter future misconduct.

³ (http://www.parc.info/client_files/KCSO%20Report%20for%20OLEO%209-6-12.pdf; <http://www.kingcounty.gov/operations/auditor/Reports/Dept/Sheriff.aspx>).

DATED: March 20, 2013

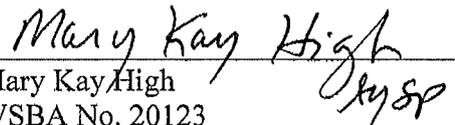
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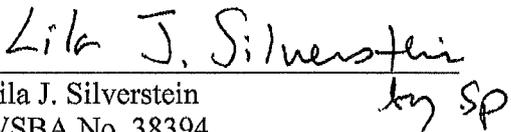
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Tabitha Moe swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 21st day of March, 2013, I caused to be sent by U.S. mail one true copy of Petitioner's *Amicus Curiae* Brief and Appendix in Support directed to attorney for Respondent:

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DATED at Seattle, Washington this 21st day of March, 2013.



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Good Afternoon,

Please file the attached Motion for Permission to File Amicus Curiae Brief, the Memorandum of Amicus Curiae and Appendix in Support.

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