NO. 88422-6

IN THE SUPREME COURT OF WASHINGTON

(Court of Appeals No. 66708-4-I)

STATE OF WASHINGTON,

Respondent,

v.

JORGE PENA-FUENTES,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER JORGE PENA-FUENTES

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUL 9 PM 12:07

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A. ISSUES PRESENTED FOR REVIEW

1. Summary of Issues

This case involves admittedly "egregious police misconduct" that threatens the integrity of the criminal justice system throughout the State of Washington, and the transparency and integrity of the court system. There are multiple levels to the "inexcusable, astonishing, egregious, and odious" conduct of the police recognized in Judge Becker's dissent to the Court of Appeals decision below. *See State v. Pena-Fuentes,* 172 Wn.App. 755, 765, 295 P.3d 252 (2013) (Becker, J., dissenting). The majority of that court essentially endorsed this misconduct by refusing to sanction it in any way and presuming that it did not affect the Defendant's constitutional rights.

But even worse, the Court of Appeals majority (and the trial judge and prosecution) crafted an astonishing exception to the free and open discovery required by CrR 4.7 and the Due Process Clause by precluding any inquiry into the fruits and effects of this "egregious police misconduct." The Court of Appeals affirmed the trial judge's refusal to grant a defense motion for discovery of police reports and other actions of Detective Casey Johnson during the 11 day period that he eavesdropped on six, fifteen minute attorney-client discussions about pending motions for a new trial. *Id.* 172 Wn.App. at 765. During this 11 day period,

Detective Johnson met with the prosecutor and a critical witness, L.P., to persuade the witness to disavow her testimony in support of a defense new trial motion. But instead of ordering the disclosure of this evidence, the Court of Appeals majority simply chose to "assume" the misconduct was not prejudicial.

And finally, it is equally "astounding" that, when the defense filed a seven page complaint, fully documented with numerous exhibits proving that Detective Johnson had eavesdropped on at least six attorney-client conversations, the King County Sheriff's Internal Investigation Unit responded with a terse form letter stating "there is insufficient evidence to sustain the allegations" of misconduct. *See* copy attached as Exhibit 1.

2. <u>Specific Issues</u>

1. Whether the Court should dismiss all charges with prejudice where the case detective, who was actively assisting the prosecutor in the post-trial investigation of pending motions for a new trial, deliberately listened to a half dozen conversations between the Defendant and his attorney as they discussed ongoing legal strategy.

2. Whether the defense motion for discovery of police reports tainted by Detective Johnson's misconduct when he eavesdropped on at least six confidential attorney-client conversations between the Defendant and his attorney should have been granted to determine the extent to which

the detective utilized privileged attorney-client information to assist the prosecutor in defeating the defense motions for a new trial.

3. Whether the court should have admitted, as a "recorded recollection" pursuant to ER 803(a)(5), a handwritten letter from the alleged victim's sister to the Prosecuting Attorney reporting that she had witnessed her abusive mother coercing the alleged victim to falsify her claims of sexual abuse against Petitioner. *See* copy attached as Exhibit 2.

4. Whether the Court of Appeals should have allowed Petitioner's counsel to supplement the record with his complaint to the Sherriff's Department and their summary rejection, finding "insufficient evidence to sustain the allegations" of misconduct by Detective Johnson.

5. Whether Count 1 violated the prohibition against double jeopardy because it covered the same time period as the other counts, and the jury was not instructed that it must be based on a separate incident from the other charges.

B. STATEMENT OF THE CASE

1. Trial Testimony

Numerous police reports documented the fact that Mirna Corona, the mother of both J.B. (the alleged victim) and her sister, L.P., had made previous false allegations against the Defendant that involved both of her children as witnesses. *See* CP 97-180. Police reports also documented Ms.

Corona stalking Defendant's new wife, Miha Pena, at work and vandalizing Ms. Pena's car, damaging the paint and flattening all four tires, which cost $2,300 to repair. CP 160-164, Exhibit 9.

After the allegations of sexual abuse were reported, Petitioner was interviewed at length by the police and adamantly denied any sexual misconduct with J.B. He readily agreed to take a police administered polygraph examination and again denied the allegations. That report concluded:

> EXAMINATION RESULTS: NO DECEPTION INDICATED: Based on an analysis of the data collected, it is this examiner's opinion that deception was not indicated to the relevant questions asked; therefore his answers were truthful.

CP 378-387.

Nevertheless, the Defendant was charged with multiple counts of sex crimes against J.B. After charges were filed, J.B.'s sister, L.P., sent a hand-written letter to the prosecuting attorney stating she witnessed her mother coercing J.B. to fabricate the charges. *See* Exhibit 2. Yet the prosecutor was undeterred and the case proceeded to trial a year later.

At the time of their testimony, both L.P. and J.B. were living with their mother, Mirna Corona. *See* RP (10/21/10) at 280. L.P. testified that her mother was physically abusive toward her and her sister, and that she would "often" strike both of them "with a shoe or like with a belt. Or like

she would just like hit our faces with her hand." *Id.* at 290. She testified that her father was never abusive, but both she and her sister were deathly afraid of their mother. *Id.* at 284-285. They were both still "truly afraid that" her mother, who had custody of them both, would actually kill them. *Id.* at 297.

When defense counsel attempted to broach the subject of the letter and asked L.P. whether "[J.B.] told you that these things weren't true?" she answered "I don't remember." *Id.* at 294. Defense counsel then showed L.P. the letter she had written to the prosecuting attorney a full year before her testimony. She verified that both the envelope and the letter were in her handwriting, but when defense counsel offered Exhibit 3 the court sustained the prosecutor's objection for lack of foundation and "improper impeachment." *Id.* at 295. When defense counsel again asked L.P. whether J.B. ever told her "that the things that you were saying were not true?" she again answered "I don't remember." *Id.* She and her sister were both still "truly afraid that" her mother would kill them. *Id.* at 297-298.

At the conclusion of the trial, the court gave a limiting instruction prohibiting the jury from considering the content of L.P.'s letter. *See* RP (10/26/10) at 533; CP 24-50, Jury Instruction 3.

2. Newly Discovered Evidence

The Defendant's wife, Miha Pena, and her brother Corneliu approached L.P. at her church one Sunday, December 12, 2010, after trial but before sentencing, and videotaped an interview. They chose L.P.'s church because her abusive mother was not there, and because she was surrounded by friends and felt safe. In the interview, L.P. gave permission to tape her statement and said "That all the accusations I made to my dad are not true and that I heard my mom and my sister plotting to accuse my dad of sexual assault" because "They were jealous that he moved on." CP 146-148, Declaration Exhibit 4. She also stated she was willing to testify about this in court. *Id.* The defense filed a Motion for a New Trial pursuant to CrR 7.5 based on this newly discovered evidence.

3. "Egregious Police Misconduct"

While the new trial motions were pending "the prosecutor asked detective Johnson to investigate possible witness tampering charges," and: "Specifically, the prosecutor asked him to obtain the recordings of Pena-Fuentes' phone calls from the jail." *See* 172 Wn.App. at 760. Detective Johnson did so, and also listened to "calls between Pena-Fuentes and his attorney, Richard Hansen." *Id.* This eavesdropping occurred while Detective Johnson and the prosecutor were actively involved in obtaining a written declaration from L.P. discrediting the videotaped statement that

the defense was relying upon in support of the new trial motion based on newly discovered evidence. In that declaration, which was prepared by the prosecutor and orchestrated by Detective Johnson in the company of Mirna Corona, L.P. recanted the videotaped interview. *Id.* CP 150-151.[1]

Based upon this blatant misconduct, and the way it had tainted the post-trial phase of litigating the new trial motions, the defense moved to dismiss all charges for prosecutorial or police misconduct, pursuant to CrR 8.3(b). CP 76; 77-80; 293-299. The State claimed there was no taint but refused to provide the defense with copies of Detective Johnson's reports during the eleven day period following his interception of attorney-client calls, while the detective was actively working with the prosecutor to get L.P. to recant her videotaped statement. The defense filed a supplemental motion to dismiss and for discovery of these reports. CP 293-294. However, the judge denied both of these motions. CP 372.

C. ARGUMENT

1. Grounds for Dismissal

Half a century ago, in *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963), this Court was faced with a nearly identical situation where the

[1] It is somewhat ironic, to say the least, that the prosecutor considered this video, taken with L.P.'s permission at her church in the presence of friends, to be witness tampering, yet cared not the least that L.P. and J.B.'s mother Mirna Corona would regularly beat them with shoes, her hand and a belt. As already noted, both girls testified at trial that they were afraid their mother would literally kill them both. RP (10/21/10) at 111.

sheriff eavesdropped on conversations between the defendant and his attorney at the jail. *Id.* at 372. "The trial judge refused to dismiss the case but did indicate that he would exclude any evidence derived through the eavesdropping, on motion of the Defendant." *Id.* In its holding, the Court described the conduct of the sheriff as "shocking and unpardonable" and determined that this misconduct "vitiates the whole proceeding." *Id.* at 378. Accordingly, the Court held that "the judgment and sentence must be set aside and the charges dismissed." *Id.*

Division II of the Court of Appeals reached the same conclusion more recently in a child molestation case, *State v. Perrow,* 156 Wn.App. 322, 231 P.3d 853 (2010). In that case, "a detective had wrongfully seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered the writings to the state's prosecution team before charges were filed." *Id.* at 325. The trial court "concluded suppression was not an adequate remedy and dismissed the charges." *Id.* at 327. The State appealed the order of dismissal.

The Court of Appeals agreed with the trial judge, holding that "dismissal is the sole adequate remedy when, like here, the state intercepts privileged communications between an attorney and a client. It is not possible to isolate the prejudice resulting from the intrusion." *Id.* at 331 (citing *Cory*, 62 Wn.2d at 378 and 377). *Accord*: *State v. Granacki,* 90

Wn.App. 598, 603-04, 959 P.2d 667 (1998) (when the State's violation of the attorney-client privilege is egregious, the trial court does not abuse its discretion in presuming prejudice); *State v. Stephans,* 47 Wn.App. 600, 736 P.2d 302 (1987); *State v. Sulgrove*, 19 Wn.App. 860, 863, 578 P.2d 74 (1978); *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980).

In this case, a majority of the Court of Appeals did just the opposite, "presuming" an absence of prejudice while affirming the denial of the defense motion for discovery of Detective Johnson's tainted police reports in the prosecutor's file. In her dissent, Judge Becker strongly disagreed with this inverted logic:

> I do not agree it is possible to isolate the prejudice arising from this misconduct. A motion for a new trial was pending that had a reasonable chance of securing a new trial for the Defendant, depending on how the trial court evaluated the new evidence obtained in the videotaped interview. After listening to the phone calls of defense counsel discussing strategy with his client, Detective Johnson spent 11 days actively working to discredit the videotaped interview.
>
> We are instructed by *State v. Cory,* 62, Wn.2d 371, 382 P.2d 1019 (1963), that the right to have 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.

State v. Pena Fuentes, 172 Wn.App. 755, 765-66, 295 P.3d 252 (2013).

2. Policy Considerations

Moreover, there are also critical policy reasons why dismissal is the appropriate remedy regardless of actual prejudice. Quoting Justice Traynor's decision in *People v. Cahan,* 44 Cal.2d 434, 445, 282 P.2d 905, 911 (1955), the *Cory* 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.

62 Wn.2d at 378.

Deterrence of police misconduct is perhaps the most compelling policy reason for dismissal in this case, but the Court of Appeals did not recognize or even mention this in its opinion despite extensive argument in the briefs. As this Court aptly stated in *Cory*:

> 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.

62 Wn.2d at 377. This is especially important here because the King County Sherriff summarily concluded that Detective Johnson did not engage in misconduct, sending exactly the wrong message to law

enforcement. This is astounding since Detective Johnson violated a law that expressly safeguards "the sanctity of the attorney-client privilege" by prohibiting the interception of "any conversation by an offender or resident and an attorney" in correctional facilities. *See* RCW 9.73.095(4). A copy of this statute was included with the complaint filed with the Sheriff's Office, but the Sheriff chose to ignore this important law.

In *State v. Lively,* 130 Wn.2d 1, 921 P.2d 1035 (1996), this Court ordered dismissal of drug charges, even in the absence of a legal defense (such as entrapment), where a police informant induced a young mother of two children he met at an Alcoholics Anonymous meeting to deliver cocaine. This Court found the police conduct to be sufficiently shocking that "due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." 130 Wn.2d at 19 (quoting *United States v. Russell,* 41 U.S. 423, 431-32 (1973).

All these precedents compel the same result here: dismissal with prejudice.

3. Denial of the Defense Motion for Discovery of Police Reports Documenting the Full Extent and Effect of Det. Casey Johnson's Egregious Misconduct

The defense filed a discovery motion requesting all reports and any other evidence collected by Detective Johnson and others following the Defendant's conviction, and particularly pertaining to the continuing

investigation of Defendant's pending motion for a new trial. CP 293-294. However, the State refused to provide that discovery, or reveal the extent of Detective Johnson's activities during the critical, 11 day period that he continued working on the case *with the prosecutor* after he illegally eavesdropped on attorney-client conversations. CP 274-280. As already noted, in the middle of that time period, on December 28, 2010, Detective Johnson and the prosecutor, working together, obtained the critical declaration of L.P., which was used by the State to defeat the Defendant's motion for a new trial.

The State's obligation to provide discovery pursuant to CrR 4.7 does not end with a jury verdict, particularly where there are meritorious pending motions for a new trial and to dismiss all charges based on Detective Johnson's egregious misconduct. *See* Judge Becker's dissent, quoted *supra* at p. 9. As soon as evidence is "in the prosecutor's hands," our courts have held:

> At that moment the duty to disclose arose. . . . Furthermore, the discovery obligation is not limited to evidence intended for use in the State's case-in-chief. . . . The prosecutor's duty under CrR 4.7 applies to evidence "which the rules oblige it to disclose" . . . "whether it be considered for use in the State's case-in-chief, for rebuttal, for impeachment purposes, or in some other way."

State v. Dunivin, 65 Wn.App. 728, 733-34, 829 P.2d 799 (1992) (*quoting* from *State v. Falk*, 17 Wn.App. 905, 908, 567 P.2d 235 (1977)). *Accord:*

State v. Krenik, 156 Wn.App. 314, 319-320, 231 P.3d 752 (2010) ("The State has a continuing duty to promptly disclose discoverable information) (numerous citations omitted); *State v. Copeland*, 89 Wn.App. 492, 949 P.2d 458 (1998) (prosecutor guilty of misconduct in failing to disclose that the complaining witness had a felony conviction for theft, new trial ordered); *State v. Garcia*, 45 Wn.App. 132, 137, 724 P .2d 412 (1986) (prosecutor was not entitled to withhold information simply because he or the judge believe it was "a pack of lies").

More importantly, the Defendant's constitutional right to due process clearly requires the production of all potentially exculpatory information. *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S. 667 (1985); *U.S. v. Agurs*, 427 U.S. 97 (1976) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

4. <u>Admissibility of L.P.'s Letter As Substantive Evidence</u>

The defense filed a timely Motion for a New Trial based on newly discovered evidence, legal errors that occurred at trial, and other grounds pursuant to CrR 7.5 One of those errors concerned the exclusion of L.P.'s handwritten letter, which should have been admitted as substantive evidence under Evidence Rule 803(a)(5), entitled "*Recorded Recollection.*" CP 58, 90-96, 295-299. That rule provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Under this rule, the evidence contained in the written record can be considered by the jury as proof of the matters asserted.

In *State v. Alvarado,* 89 Wn.App. 543, 949 P.2d 831 (1998), a stabbing and fatal shooting was witnessed by a bystander who provided three separate tape recorded statements to the police, initially denying "any knowledge of the crime," then admitting he saw what happened. However, at trial "Lopez testified that he could not remember making some of the statements and denied making others, and didn't 'really remember being on the overpass.'" *Id, at 546-547.* The Court of Appeals held that all three statements should have been admitted as a recorded recollection pursuant to ER 803(a)(5) because:

> The content establishes that Lopez had knowledge of the events when the recordings were made. At trial, he testified that he could not remember the events. The recordings are Lopez's own words and thus were made

> and adopted by him. The first three factors therefore are easily met.

Id. at 549. *Accord: State v. White,* 152 Wn.App. 173, 215 P.3d 251 (2009); *State v. Derouin,* 116 Wn.App. 38, 41, 64 P.3d 35 (2003). These cases require the court to "examine the totality of the circumstances," which include:

> (1) Whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

State v. White, supra at 184, quoting from *State v. Alvarado, supra,* 89 Wn.App. at 551-552.

Under the rationale of these cases, the "content" of the letter clearly establishes that L.P. "had knowledge of the events when" she wrote the letter a year before she testified. In her own hand, she wrote:

- "Dear Judge: I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea and no one told me to do this." RP(10/21/10) at 19.
- "No one told me to do this, and that I was alone when I wrote this." *Id.*
- "I wanted to say that my mom and my sister are lying, *and I know this for a fact because I heard my mom and my sister talking one day, and my mom told my sister to lie and say that my dad (Jorge N. Pena) sexually abused her. So my sister [J.B.] being scared did what my mom told her to do, and lied."* *Id.* (emphasis added)
- "My sister even told me that she was scared of our mom (Mirna Corona) and doesn't want to live with her anymore like me. So please help us get out of that house because if you don't our mom will kill us, or we will end up killing ourselves." *Id.*

- With regard to writing the letter, her relatives "said if I wanted to I could, not that I should." *Id.* at 23.

The letter ends with her signature and telephone number. She also addressed the letter to the prosecutor in her own handwriting. *See* copy attached hereto as Exhibit 2. Yet the jury was specifically directed to disregard the letter in a jury instruction. *See* RP (10/26/10) at 533; CP 24-50, Jury Instruction 3.

Trial counsel had not argued that this letter was admissible as a recorded recollection, and the Court of Appeals relied upon this blunder to find that the error had not been preserved. See unpublished portion of *State v. Pena-Fuentes, supra.* This, despite the fact that this issue was raised and fully briefed by appellate counsel who had associated with trial counsel for post-trial motions for a new trial based on legal errors, pursuant to CrR 7.5. CP 57.

To the extent that trial counsel may have waived this issue by failing to argue the admissibility of the letter as a recorded recollection, this failure would clearly constitute ineffective assistance of counsel because the failure to make a proper legal argument could never be deemed a legitimate tactical decision. *State v. Dawkins,* 71 Wn.App. 902, 909-911, 863 P.2d 124 (1993). However, the Court of Appeals majority also avoided this issue in its opinion. *See State v. Pena-Fuentes, supra* (unpublished portion of opinion at

fn. 42).[2]

5. Double Jeopardy

The trial court correctly dismissed the rape charge in Count 1 because the charging period overlapped with the molestation charges in the other counts of conviction, and the offenses were defined so that a single act could easily have formed the basis for the rape conviction in Count 1 and the molestation convictions in other counts.[3] The definition of child molestation in jury instruction 16 required proof of "sexual contact with a child" (RP 530), which was defined as follows:

> Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

RP 532; CP 24-50, Instruction 20. This definition also encompassed the similar definition of "sexual intercourse," in support of Count I, the rape charge, which was defined as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."

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[2] The Court of Appeals majority correctly points out that the issue of ineffective assistance was not the subject of a separate Assignment of Error. This was a deliberate decision by appellate counsel out of deference to the trial attorney in the case, Tony Savage, who was dying of cancer during that phase of the appeal.

[3] The State could easily have prevented this problem with proper jury instructions, but failed to do so. As in *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007):

> . . . none of the preceding instructions specifically state that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count.

Id. at 365.

Id., Instruction 9. Since the Defendant was accused of licking J.B.'s vagina and of sticking his fingers in her bottom, as well as rubbing her chest and rubbing her bottom under her clothes, this conduct would have satisfied both definitions.

This violated the prohibition against double jeopardy. *See State v. Land,* 172 Wn.App. 593, 295 P.3d 782 (2013); *State v. Mutch,* 171 Wn.2d 646, 661-665, 254 P.3d 803 (2011). In *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007), the court found that similar "jury instructions were inadequate in that they exposed Borsheim to multiple punishments for the same offense, in violation of his right to be free from double jeopardy." *Id.* at 364. In that case, the defendant was "convicted of four counts of rape of a child in the first degree." *Id.* at 362. The Court held:

> We agree that the trial court's instructions allowed the jury to base each of Borsheim's four convictions on proof of a single underlying event, in violation of Borsheim's right to be free from double jeopardy. That error requires vacation of Borsheim's convictions on the second, third and fourth counts submitted to the jury.

Id.

Nevertheless, as if to add insult to injury, the majority of the Court of Appeals reinstated this count. Again, Judge Becker dissented, reasoning that:

> the trial court struck the conviction on count 1 after finding a double jeopardy violation. The majority reinstates the

> conviction, concluding that child molestation and child rape can never be the same offense. I disagree. Circumstances in which the two offenses are the same in fact and in law are discussed in *State v. Land,* 172 Wn.App. 592, 295 P.3d 782 (2013). There should have been an instruction requiring the jury to base convictions for child rape and child molestation on a separate and distinct act. *Land,* 172 Wn.App. at 603, 295 P.3d 782; *State v. Mutch,* 171 Wn.2d 646, 661-665, 254 P.3d 803 (2011); *State v. Borsheim,* 140 Wn.App. 357, 165 P.3d 417 (2007). Because no such instruction was given, and the record does not clearly demonstrate that the State was not seeking to punish Pena Fuentes twice for the same offense, I would affirm the trial court's finding of a double jeopardy violation.

172 Wn.App. at 766.

6. <u>Motion to Strike</u>

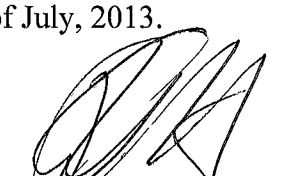
The Court of Appeals granted the State's Motion to Strike the supplemental clerk's papers filed by Petitioner, which consist of "attorney Hansen's formal complaint to the King County Sherriff's Department concerning Detective Johnson's conduct" and the Sherriff's perfunctory response finding "there is insufficient evidence to sustain the allegations you have made." *See* Exhibit 1 and *State v. Pena-Fuentes, supra* (unpublished portion of opinion). The court reasoned that the supplemental evidence was inadmissible under RAP 9.11 because "it does not appear to us that the additional evidence he submitted would likely change the decision being reviewed or that it would be inequitable to decide the case on the existing record." *Id.*

Petitioner submits that the secrecy by the prosecution in refusing to disclose the fruits of Detective Johnson's "egregious" misconduct, and the utter failure of the Sherriff's Department to even acknowledge that the misconduct occurred, provide the most compelling basis for this Court to dismiss this case with prejudice. Since the supplemental clerk's papers are an essential part of the record for this purpose, it would be "inequitable to decide the case" without this evidence, which would "likely change the decision being reviewed." *See* RAP 9.11.

D. CONCLUSION

In an age of escalating police misconduct, where the Sherriff's Department refused to recognize serious violations of fundamental constitutional rights, and the prosecution and courts collaborate to conceal the fruits of such admittedly "egregious," "astonishing," "inexcusable," "odious," "offensive and unscrupulous" misconduct, this Court must intervene. As this Court stated long ago in *Cory:* "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.'" 62 Wn.2d at 378.

DATED this 9th day of July, 2013.



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Attorney for Petitioner

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

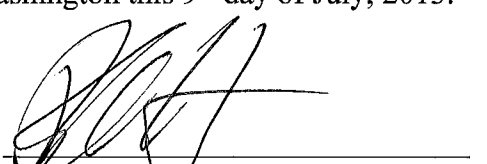
On the 9th day of July, 2013, I sent by U.S. Mail, postage prepaid, one true copy of Petitioner's Supplemental Brief directed to attorney for Respondent:

Brian McDonald
Sr. Deputy Prosecuting Attorney
516 Third Ave., W554
Seattle, WA 98104

And mailed to Petitioner:

Jorge Pena-Fuentes, DOC #344977
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

DATED at Seattle, Washington this 9th day of July, 2013.



Richard Hansen, WSBA #5650
Attorney for Petitioner

EXHIBIT 1

SHERIFF
KING COUNTY

KING COUNTY SHERIFF'S OFFICE
516 Third Avenue, W-116
Seattle, WA 98104-2312
Tel: 206-296-4155 • Fax: 206-296-0168

Susan L. Rahr
Sheriff

ALLEN, HANSEN & MAYBROWN
SEP 20 2011
COPY RECEIVED

September 19, 2011

Richard Hansen
600 University St. Apt. 3020
Seattle, WA 98101

Re: DEPARTMENT MEMBER COMPLAINT

Dear Mr. Hansen,

You provided information expressing your concerns about the conduct of a King County Sheriff's Office employee in reference to an incident that occurred on 07/19/2011.

The investigation into this matter has been completed. After conducting a thorough investigation there is insufficient evidence to sustain the allegations you have made. I sincerely hope any future contacts you may have with members of this department are of a positive nature. If you have any questions regarding this matter, please call our Internal Investigations Unit at (206) 296-4200.

Sincerely,

SUSAN RAHR, SHERIFF

Captain Tony Burtt
Internal Investigations Unit

1202M

EXHIBIT 2

L. Johnson

October 21, 2009

Dear judge,
I am writing this letter to tell you the truth. When you read this letter I want you to know that this was my idea, and no one told me to this, and that I was alon while I wrote this. I wanted to say that my mom and my sister are lying and I know this for a fact because I heard my mom and my sister talking one day and my mom told my sister to lie and say that my dad (Jorge N Peña) sexualy abused her. So my sister (Jessica E Bean) being scared did what my mom (Mirna Corona) told her to do and lie. My sister even told me that she was scared of our Mom (Mirna Corona) and doesn't want to live with her anymore like me. So please please help us get out of that house because if you don't our mom will kill us or we will end up killing ourselves. I bet you wouldn't want that to happen to us, would'nt you?

-Lesbye Vanessa Peña (Me) 206-393-2185
Dad Jorge N Peña Fuentes
Mom Mirna Corona
Sister Jessica E Bean

COPY RECEIVED
OCT 27 2009
CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

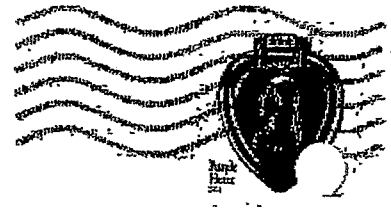
FAX 206 205 6104

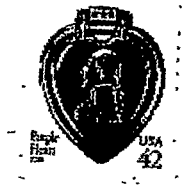
KC PROSECUTING YAU

6516 24th AVE
SW Seattle WA
98106

SEATTLE WA 981

21 OCT 2009 PM 3 T





King County Prosecuting Attorney
W 554 King County Courthouse
516-3rd Avenue Seattle
WA 98104

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