

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
May 26, 2015, 8:53 am
BY RONALD R. CARPENTER
CLERK

No. 90939-3

E CRF
RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROMAN FEDOROV,

Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO, No. 43937-9-II
AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
12-1-00053-2

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

 ORIGINAL

TABLE OF CONTENTS

A. ISSUES PRESENTED..... 1

B. STATEMENT OF THE CASE. 1

 1. Procedural facts. 1

 2. Overview of facts regarding offense. 2

C. ARGUMENT..... 3

 THE RIGHT TO COUNSEL UNDER CRIMINAL RULE
 3.1(b)(1) GRANTED IN ORDER TO ASSIST A SUSPECT IN
 RELATION TO THE IMPLIED CONSENT STATUTE IS
 MEANINGLESS UNLESS IT ALLOWS PRIVATE ATTORNEY-
 CLIENT COMMUNICATION 3

 a. Relevant facts..... 5

 b. The CrR 3.1 right to counsel is rendered
 meaningless by failing to give sufficient privacy
 to allow attorney-client privileged communication
 to occur..... 11

D. CONCLUSION. 20

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Connolly v. Dept. of Motor Vehicles, 79 Wn.2d 500, 487 P.2d 1050 (1971)..... 11, 12

Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)..... 17

In re the Personal Restraint of Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993)..... 3

Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991). 4

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996)..... 4

State v. Cory, 62 Wn.2d 371, 382 P.2d 1018 (1963)..... 5, 15, 16

State v. Fitzsimmons, 93 Wn.2d 435, 610 P.2d 893. 18 A.L.R.3th 690, vacated, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, affirmed on remand, 94 Wn.2d 858, 620 P.2d 999 (1980)..... 18

State v. Fuentes, 179 Wn.2d 808, 831 P.3d 257 (2014). 19

State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989)..... 12

State v. Robinson, 153 Wn.2d 689, 107 P.2d 90 (2005)..... 3

State v. Staeheli, 102 Wn.2d 305, 685 P.2d 591 (1984). 19

State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002)..... 13-15

State v. Turpin, 94 Wn.2d 820, 620 P.2d 990 (1980). 12

State v. Whitman County Dist. Ct., 105 Wn.2d 278, 714 P.2d 1183 (1986)..... 12

WASHINGTON COURT OF APPEALS

City of Seattle v. Koch, 53 Wn. App. 352, 767 P.2d 143, review denied, 112 Wn.2d 1022 (1989).. 18

Seattle v. Box, 29 Wn. App. 109, 627 P.2d 584 (1981). 18

<u>State v. Anderson</u> , 80 Wn. App. 384, 909 P.2d 945 (1996).	12
<u>State v. Fedorov</u> , 183 Wn. App. 736, 335 P.3d 971 (2014), <u>review granted</u> , __ Wn.2d __ (2015).	1, 15, 16
<u>State v. Krieg</u> , 7 Wn. App. 20, 497 P.2d 621 (1971).	12
<u>State v. Perrow</u> , 156 Wn. App. 322, 231 P.3d 853 (2010).	16
<u>State v. Pierce</u> , 169 Wn. App. 533, 388 P.3d 158, <u>review denied</u> , 175 Wn.2d 1025 (2012).	4

FEDERAL AND OTHER STATE CASELAW

<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).	3
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).	14
<u>South Dakota v. Neville</u> , 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1982).	12

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

CrR 3.1.	1, 3, 4, 15
CrR 3.1(b)(1).	13, 14, 18-20
CrR 3.1(c)(1).	4
CrR 3.1(c)(2).	4
CrR 3.5.	5, 7
CrR 3.6.	5, 7
CrRLJ 3.1.	13
R.P.C. 1.6.	17
R.P.C. 2.1.	17
RCW 46.20.308(1).	11

RCW 46.20.308(2)(a).	12
RCW 46.20.308(2)(b).	12
RCW 46.61.5055(1)(b).	13
RCW 46.61.5055(2)(b).	13
RCW 46.61.5055(3)(b).	13
RCW 46.61.5055(4)(b).	13
RCW 46.61.506.	12
RCW 5.60.060(2)(a).	15, 17

A. ISSUES PRESENTED ON REVIEW

1. Does the CrR 3.1 right to counsel include the right to confer privately with counsel in an attorney-client phone call without having an officer standing within earshot in the same very small room?
2. Is the CrR 3.1 right to counsel violated by an officer's repeated refusal to provide further privacy for attorney-client communication where the officer stays within earshot in the same small room in which the communication is occurring by phone, both counsel and the defendant asked for further privacy and there is evidence that the officer's actions prevented counsel and his client from sufficient communication about the legal decisions counsel was supposed to help his client, Petitioner Roman Fedorov, make?

Further, should the officer's claim of serious safety concerns about allowing sufficient privacy because of the facility "setup" be viewed through the lens of the officer's choice of taking Mr. Fedorov to that facility, even though the officer knew there was a "BAC" room which would have allowed sufficient privacy less than 10 minutes further down the road?

B. STATEMENT OF THE CASE

1. Procedural facts

Petitioner Roman Fedorov was charged with and convicted after jury trial in 2012 of driving while under the influence of intoxicants and attempting to elude a pursuing police vehicle, with an "endangerment" enhancement for the eluding charge. CP 1-2, 93-98, 114-19. He was ordered to serve a standard-range sentence and appealed. See 4RP 334-35; CP 120.¹ On July 29, 2014, Division Two affirmed in an unpublished opinion. The prosecution and a state association of prosecutors moved for publication, which was granted September 23, 2014. See State v. Fedorov,

¹Explanation of the citation to the verbatim report of proceedings is contained in Appellant's Opening Brief on Appeal ("AOB") at 3 n.1.

183 Wn. App. 736, 335 P.3d 971 (2014), review granted, ___ Wn.2d ___ (2015). Fedorov filed a Petition for Review which this Court granted in full. This pleading follows.

2. Overview of facts regarding offense

On January 2, 2012, Washington State Patrol (WSP) Trooper Ryan Durbin arrested Roman Fedorov on suspicion of being the driver of a car Durbin had stopped after observing it driving at a high rate of speed and changing lanes quickly on the highway. 4RP 164-77. Fedorov and another, man, Benjamin Gaidaichuk, got out of the stopped car, with the latter coming out the passenger side. 4RP 167. While the officer felt the two men were “slow to respond” to his demand that they get onto the ground, the trooper admitted that the men were speaking another language and may not have understood him, but that also made him nervous about safety. 4RP 217, 232.

The trooper smelled “the odor of intoxicants” from both men, and described Fedorov as having a “flush” face, “watery, blood-shot eyes,” “fair” speech and poor coordination. 4RP 170, 215, 237, 6RP 10. Durbin questioned Fedorov, who claimed to he had nothing to drink that day and had not seen the officer’s car behind him. 4RP 172-73, 229. The officer conceded that the stopped car was fast, loud, and had tinted windows which can reduce visibility. 4RP 220.

Durbin did not conduct field sobriety tests because he did not feel it was safe. 4RP 175. Instead, leaving the other man with other officers, Trooper Durbin then took to the Fife Police Department to use their “BAC” or breath test machine. 4RP 175. Fedorov’s first sample was .096

and his second, .095. 4RP 311-320. At trial, Gaidaichuk and Fedorov both testified that it was Gaidaichuk, not Fedorov, who drove the car that night, and that they had changed places with Fedorov climbing out the driver's side because Fedorov, who knew Gaidaichuk's family, was trying to keep the younger man out of trouble. 6RP 12-13, 48, 52. Fedorov had maintained the fiction to police because he thought he would not be over the legal limit and did not expect to get into so much trouble. 6RP 54-55.

C. ARGUMENT

THE RIGHT TO COUNSEL UNDER CRIMINAL RULE 3.1(b)(1) GRANTED IN ORDER TO ASSIST A SUSPECT IN RELATION TO THE IMPLIED CONSENT STATUTE IS MEANINGLESS UNLESS IT ALLOWS PRIVATE ATTORNEY-CLIENT COMMUNICATION

At a certain point in every criminal case, the state and federal rights of the accused to counsel's assistance is guaranteed. See Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Robinson, 153 Wn.2d 689, 107 P.2d 90 (2005). But even where such rights have not attached or do not exist, a suspect may still have the right to assistance of counsel under statute or rule. See, e.g., In re the Personal Restraint of Runyan, 121 Wn.2d 432, 452, 853 P.2d 424 (1993).

In this case, the right to counsel is grounded in CrR 3.1, which provides, in relevant part:

**RULE CrR 3.1 RIGHT TO AND ASSIGNMENT OF
LAWYER**

(a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

(b) Stage of Proceedings.

(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody[.]

This rule-based right to counsel applies when a person arrested on suspicion of driving while intoxicated faces the decision of whether to submit to a breath test. See Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991). Further, under the rules, a person taken into custody must be “immediately” advised of their right to counsel (and appointment at public defense, if necessary), in plain words. CrR 3.1(c)(1). The rule also sets forth requirements for honoring a request for counsel, providing:

[a]t the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

CrR 3.1(c)(2).

Police are thus “obliged” under the rule to make “all reasonable efforts to put that person in contact with a lawyer at the earliest opportunity.” See State v. Pierce, 169 Wn. App. 533, 537, 388 P.3d 158, review denied, 175 Wn.2d 1025 (2012). A violation of the rule-based right to counsel compels suppression of any evidence tainted by that error. See State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996).

In this case, this Court is faced with the question of whether the CrR 3.1 right to counsel includes the right to privacy for attorney-client communication. A discussion of the facts in this case illustrates that this Court should reaffirm its conclusion from more than 50 years ago, that

“effective representation cannot be had with such privacy.” See State v. Cory, 62 Wn.2d 371, 374, 382 P.2d 1018 (1963).

a. Relevant facts

At the CrR 3.5 and CrR 3.6 hearings, Trooper Durbin described the process of taking Fedorov to Fife Police Department (FPD) for a breath test. The trooper explained that, at FPD, the police department is also a jail, all “one large room,” entered “via a sallyport” after pushing a buzzer and having a guard come out and pat down the suspect. 4RP 22. The guard at the “sallyport” controls who enters or leaves. 4RP 22.

When they arrived at FPD and went inside, Durbin took Fedorov to a small room and handcuffed him to a clip on a metal chair next to an officer’s desk. 4RP 20-15. Also in the room was a little “work space,” a washing machine and a rack of clothing for inmates. 4RP 26. The trooper thought the entire room was only “29 paces by. . .17 paces” in size. 4RP 27. He admitted, however, that he was guessing as to size and that it was “a pretty small room.” 4RP 27.

Trooper Durbin had used the FPD room before. 2RP 27, 30-31. As a result, he admitted knowing that, if he took a suspect to FPD to conduct BAC testing, he would need to keep them in his “control” and would thus not be willing to leave the small room in order for the attorney-client phone call to occur in private. 2RP 27, 30-31. Instead, what the trooper would do at FPD was, if someone asked for privacy, he would walk to the other side of the room, the most privacy he felt he could give due to the setup at FPD. 4RP 29-31.

The trooper admitted knowing of other nearby facilities, including WSP and Tacoma Police Department offices with BAC devices. 2RP 31-33. Durbin was aware those facilities had “BAC rooms” with windowed doors so an officer could observe the suspect while affording privacy for the attorney-client phone call. 2RP 31-33. In fact, the trooper was aware that just such windows had been specifically added to the WSP “District 1” facility doors for that purpose, to ensure that a defendant “could have privacy while contacting an attorney or whatever may need to occur[.]” 2RP 32.

The trooper admitted that a facility with a windowed “BAC” room was only about eight or nine minutes further than FPD from where Fedorov’s arrest occurred. 2RP 33.

Durbin checked Fedorov’s mouth and began the 15-minute “observation,” asking Fedorov questions from a DUI “packet.” 4RP 27. After they finished the packet and were ready to do the breath test, Fedorov asked to speak to an attorney, so the trooper dialed the “after-hours pager” for the Department of Assigned Counsel. 4RP 28. When an attorney called back a moment later, the attorney asked the officer questions such as the name of the suspect, the alleged crime, whether any field sobriety tests were done, whether they will be booked and whether or not they are cooperative. 4RP 29.

The officer admitted that, at this point in attorney-client phone calls when he was at FPD, he would then either give the phone to the handcuffed, arrested person at the desk or put the phone call on speaker

phone if the circumstances required. 4RP 29. Trooper Durbin did not elaborate when speakerphone was the “only option” but it was not an option he felt the need to use with Fedorov, to whom he handed the phone. 4RP 29-30.

The trooper testified that he would then “give them as much privacy as I can,” which he admitted just meant he would “go to the other side of the room.” 4RP 27, 29. But Durbin speculated that Fedorov would “have to be speaking pretty loud” for Durbin to hear. 4RP 30. The officer did not “recall” hearing any of the conversation in this particular case and made no note on his report about such eavesdropping having occurred. 4RP 30. One thing the officer was fairly sure about was that, at one point during the attorney-client phone call, the trooper was standing “back over by the washing machine” and writing on paperwork things. 4RP 36.

At the CrR 3.5 hearing, Durbin admitted that, during the approximately 13 minutes of the attorney-client phone call, Fedorov “might have” asked for privacy and “could have” also asked the trooper at one point to leave the room. 2RP 33. By the later CrR 3.6 hearing, however, the trooper did not “recall” Fedorov asking for privacy or “additional privacy” during the call. 3RP 30.

Nicholas Andrews, an attorney with the county public defender’s office, had experience both with this deputy and this BAC room. 4RP 41-46. His job was to advise people in Fedorov’s situation about the risks and benefits of taking or refusing to take a breath test. 4RP 41-46.

In this case, after getting preliminary information from the trooper, because he was aware of the room setup, Andrews then specifically asked “for privacy.” 4RP 42. The trooper responded, “I can’t give you privacy, you know, because of where we’re at, generally.” 4RP 43.

Twice the attorney asked for more privacy to communicate with his client and twice the officer refused. 4RP 45. The attorney testified that, since this incident, other troopers choosing the FPD facility for testing had been willing to leave the room but that had not happened in this case. 4RP 44. As a result of not having sufficient privacy, Andrews wrote in his notes that “[t]he officer is present. Stayed in the room.” 4RP 45.

Andrews tried to gather as much information from Fedorov as he could “without having him answer in a verbal manner which could in fact incriminate himself or give the officer any information that may be detrimental for him.” 4RP 45. Anderson told his client “I don’t want you to answer anything out loud unless I specifically request” because the attorney did not want the client to accidentally give the officer any information. 4RP 46. Counsel thus had to advise Fedorov to answer questions only “yes or no” and to warn him about asking or saying anything else. 4RP 45-46.

At that point, usually, Andrews would tell his client their rights regarding testing and then discuss with them what they wanted to do. 4RP 46. Because the officer had refused to leave the small room, however, counsel could not engage in that discussion with his client. 4RP 45-60.

The attorney was clear that, because of the lack of privacy, he was

not able to ask questions which were “fairly important” to perform his role and give his client sufficient advice. 4RP 47. For example, counsel could not ask his client what kind of alcohol and how much the client had consumed and other details of “consumption.” 4RP 47-50. These facts were essential for counsel to know, because it affected the legal advice Andrews would give the client. 4RP 47-59.

Based on his experience, Andrews believed that portable breath tests “run high.” 4RP 47-60. He explained that, after gathering the relevant “consumption” information in discussion with his client, his advice would change. If he thought, based on that information, that the client was likely to “blow under the limit,” he would recommend taking the test but if he thought the person was likely to “blow over,” he would recommend refusal. 4RP 47. Andrews said, “[i]f you saw how many cases where a person blew over on a PBT and you never charged it because it was under, you would be shocked.” 4RP 59.

Due to not having sufficient privacy for the attorney-client phone call, however, the attorney could not gather all the information he needed to counsel Fedorov on the tough choices he faced. 4RP 48. Instead, Andrews said, his ability to provide advice and counsel was limited, because not having the privacy to ask the questions and not being able to get the information he needed from his client made him unable to “make a completely accurate decision” about what to advise Fedorov to do. 4RP 48.

Andrews noted that he was able to establish a few facts with the “yes/no” format, such as that Fedorov did not have a suspended license or

recent priors, did not have a commercial driver's license and was not on a "deferred prosecution." 4RP 66-67. Andrews also indicated on his "check-the-box" DUI form that he had advised his client on the consequences of refusal to take the test" and to have another test. 4RP 69-70.

On the attorney's report, however, there were a series of questions for which he put an indication, "[c]ould not ask due to no privacy." 4RP 71. He also indicated on his report, "could not discuss consumption due to privacy." 4RP 74. When quizzed by the prosecutor about why he could not have simply gone down the whole list of all possibilities asking "yes/no" questions, counsel explained that such a method would be extremely time consuming and deputies usually limit the time of calls to about 15 minutes. 4RP 79-84. In fact, counsel said, sometimes deputies will just hang the call up in the middle of an attorney-client call in these cases, presumably if they last too long. 4RP 79-84. Counsel had experience with officers then refusing to pick up the phone if counsel then tries to call back to talk further with his client. 4RP 79-84.

In addition to the time constraints, counsel also was concerned that the "eliminate all possibilities" method of trying to communicate with his client would result in things getting "blurted out that you don't want blurted out." 4RP 83. Andrews was frank in his opinion that the lack of privacy affected his ability to give full and complete legal advice to his client and that, as a result, Fedorov was "not being given attorney/client

privilege.” 4RP 48.²

Roman Fedorov testified that his attorney told him to ask the officer to give him privacy and he made that request but the officer refused. 4RP 87-89. Fedorov said the officer was at the nearby door at that point. 4RP 89. Throughout the attorney-client conversation, Fedorov felt that the officer could hear everything Fedorov was saying. 4RP 89. At the time, Fedorov remembered, the room was otherwise “very quiet.” 4RP 89. Fedorov did not feel free to ask questions of his attorney and would perhaps have done so with sufficient privacy. 4RP 89-89.

- b. The CrR 3.1 right to counsel is rendered meaningless by failing to give sufficient privacy to allow attorney-client privileged communication to occur

Under the “implied consent” statute, anyone who operate a motor vehicle within the state is “deemed to have given consent . . . to a test or tests of his or her breath” for the purpose of determining if he is under the influence of intoxicants. RCW 46.20.308(1). As a result, an arresting officer who has “reasonable grounds” to believe that a person was in physical control of a vehicle while impaired may administer a breath test. RCW 46.20.308(1).

Even from the start (in 1968), the implied consent statute contained protections for the arrested person. See, e.g., State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971); Connolly v. Dept. of Motor Vehicles, 79 Wn.2d

²At the CrR 3.6 hearing, counsel invoked attorney-client privilege when asked about what answers Fedorov gave to some of his questions, but the court ruled that the privilege had been waived and forced counsel to describe what was in counsel’s notations. 4RP 64-65.

500, 502, 487 P.2d 1050 (1971). The version of the statute applicable to this case, RCW 46.20.308(2),³ requires that “[t]he officer shall inform the person” being asked to take a breathalyzer test of a number of statutorily guaranteed rights: the right to refuse the breath test and the right to have additional tests administered by a qualified person. Further, the officer is required to advise the suspected driver that they will lose their driving privileges if they refuse, among other consequences. See RCW 46.61.506; see State v. Krieg, 7 Wn. App. 20, 23, 497 P.2d 621 (1971). “Substantial compliance” in reading the warnings is not enough. See State v. Anderson, 80 Wn. App. 384, 389-90, 909 P.2d 945 (1996), citing, State v. Turpin, 94 Wn.2d 820, 824-25, 620 P.2d 990 (1980). Where a defendant is not properly advised of his statutory rights, the resulting evidence is suppressed. See Connolly, 79 Wn.2d at 503; see Krieg, 7 Wn. App. at 23.

Under the implied consent statute, the defendant has a “right. . . to be afforded an opportunity to make a knowing and intelligent decision whether to submit” to the breath test. State v. Whitman County Dist. Ct., 105 Wn.2d 278, 282, 714 P.2d 1183 (1986). This is important because of the potential effect. Refusal to take a breath test automatically results in loss of the privilege to drive a car in this state for at least one year. RCW 46.20.308(2)(a). Further, refusal is admissible as evidence of guilt in any later trial. RCW 46.20.308(2)(b); South Dakota v. Neville, 459 U.S. 553, 554-55, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1982); State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989). Refusal is thus akin to an admission of

³The crime was committed in January of 2012 but subsequent amendments to the statute have not changed the language of this section.

guilt by a suspect, at least in the eyes of the law.

And punishment falls accordingly. A person who refuses to take a breath test automatically receives the higher punishment normally reserved for those whose levels of intoxication are especially high. See RCW 46.61.5055(1)(b) (for someone with no prior offenses in seven years); RCW 46.61.5055(2)(b) (with one prior in seven years); RCW 46.61.5055(3)(b); (two or three priors in seven years); RCW 46.61.5055(4)(b)(four or more priors).⁴

A person facing these crucial decisions is not required in this state to stand alone. Instead, she has a rule-based right to counsel under CrR 3.1(b)(1). See State v. Templeton, 148 Wn.2d 193, 59 P.3d 632 (2002) (referring to CrRLJ 3.1, the same rule for the limited jurisdiction courts). In Templeton, a 5-4 decision, both the majority and dissent found that CrR 3.1(b)(1) had been enacted as a proper exercise of the Court's rulemaking authority, because the rule "affects and regulates the process of 'taking and obtaining evidence'" and "the fleeting nature of intoxication evidence" in the context of providing counsel to a defendant asked to take a breath test. 148 Wn.2d at 217. The majority also noted the reasons for right itself:

One purpose is to ensure that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them. The other purpose is to ensure that persons arrested know of their right to counsel in time to decide whether to acquire exculpatory evidence such as disinterested witnesses or alternative blood alcohol concentration tests.

⁴For example, for a driver with two or three prior offenses who refuses to give a breath test automatically has minimum imprisonment of not less than 120 days in custody and a minimum fine of not less than \$1,500. RCW 46.61.5055(3)(b). This is compared to a driver with the same record for whom the lack of a breath test result is not based on their refusal, whose minimum time in custody is 90 days and whose minimum fine is \$1000. RCW 46.61.5055(3)(b).

Templeton, 148 Wn.2d at 218.

Thus, counsel is granted under CrR 3.1(b)(1) in this situation “in order that the suspect may determine whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence.” 148 Wn.2d at 212. Further, the Templeton majority and dissent both found the right to counsel in this situation highly important, with the majority declaring counsel at this point “**essential** to the effective preparation of defense against the charge of DUI.” 148 Wn.2d at 212 (emphasis added).

In Templeton, detectives used a defective implied-consent form which mistakenly stated that the right to counsel only accrued when the arrestee was questioned or judicial proceedings instituted, “whichever is earlier,” even though the CrR 3.1(b)(1) right to counsel “goes beyond the constitutional requirements” and exists upon arrest. Templeton, 148 Wn.2d at 219-20. The majority and dissent parted ways only on whether the error was harmless, with the majority relying on a belief that the previous reading of Miranda⁵ rights was sufficient, given the failure of the defendants to argue they would have requested counsel “but for the improper form” and the dissent finding that the form improperly qualified the right to counsel and made it seem the defendants had not right to counsel’s assistance prior to taking the breath test, thus causing prejudicial “deprivation of possible helpful advice from their attorneys.” 148 Wn.2d at 219-22 (Alexander, C.J., Bridge, JJ, Madsen, JJ and Owens, JJ)

⁵Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

(majority); 148 Wn.2d 222-24 (Smith, J., Johnson, J., Sanders, J., and Chambers, JJ, dissenting).

In finding no violation of Fedorov's CrR 3.1 rights to counsel here, Division Two first overturned the trial court's finding that the trooper had "afforded insufficient privacy" to the attorney-client relationship.

Fedorov, 183 Wn. App. at 744-45. The court declared the sufficiency of privacy to be a wholly legal issue, then announced that, as a matter of law, the rule-based right to counsel is not violated by the investigating officer staying within earshot of the attorney-client phone call even when further privacy is sought, so long as he moves few feet away when asked for privacy and later cannot recall hearing anything. 183 Wn. App. at 745.

This holding ignores not only counsel's role in the situation but also the full, corrosive effects of the trooper's failure to honor the repeated requests for privacy. As the majority of this Court has held, the rule-based right to counsel in this context is "essential" to "the effective preparation of defense against the charge of DUI." Templeton, 148 Wn.2d at 212.

Further, this Court has already recognized that privacy for attorney-client communications is essential to counsel's ability to serve her role. See, Cory, 62 Wn.2d at 374-77. As has the Legislature, and the law. See RCW 5.60.060(2)(a).⁶

Thus, in Cory, after first finding no existing Washington case "which speaks of the right of a defendant to confer with his counsel in

⁶RCW 5.60.060(2)(a) provides the attorney-client privilege, as follows: "[a]n attorney or counsel shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."

private,” this Court nevertheless declared it “universally accepted that effective representation cannot be had with such privacy.” 62 Wn.2d at 374. The Court went on:

It is also obvious that an attorney cannot make a ‘full and complete investigation of both the facts and the law’ unless he has the full and complete confidence of his client, and such confidence cannot exist if the client cannot have the assurance that his disclosures to his counsel are strictly confidential.

Id. These declarations, made more than 50 years ago, reflect a long-standing recognition that counsel’s ability to act as counsel requires sufficient privacy for confidence to occur.

In dismissing the holdings of Cory as inapplicable here, Division Two relied on the mistaken belief that Cory had only “considered a defendant’s *constitutional* right to counsel.” Fedorov, 183 Wn. App. at 741, n. 4 (emphasis in original). But in Cory, this Court found that the lack of privacy in that case also violated the defendant’s *statutory* rights to attorney-client confidentiality and to have attorney-client communications “be privileged and confidential.” Cory, 62 Wn.2d at 377; see State v. Perrow, 156 Wn. App. 322, 330-31, 231 P.3d 853 (2010) (rejecting this same claim that Cory is limited to constitutional cases and to cases where there is purposeful interception of communications).

Further, privacy serves the same function in attorney-client communications regardless whether counsel is providing help as the result of a rule, statute or constitution. In all three situations, privacy is essential so a defendant can ask questions of his attorney with confidence that the communication and anything he says is “between them” and - even more

crucial - protected by law. See RCW 5.60.060(2)(a).⁷ Indeed, the attorney-client privilege “exists in order to allow the client to communicate freely with an attorney without fear” that his candors with counsel will be disclosed to others or used against him. See Dietz v. Doe, 131 Wn.2d 835, 842-43, 935 P.2d 611 (1997). Further, “the privilege is imperative to preserve the sanctity of communications between clients and attorneys.” 131 Wn.2d at 851.

No attorney-client privilege exists, however, and communication is not confidential by definition if it is not private. Dietz, 131 Wn.2d at 849. Indeed, any privileged communication which occurs in the presence of a third party not essential to that communication is deemed to “waive” the privilege. See, e.g., State v. Martin, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999). Counsel could not ethically have had a full conversation with his client with the officer so close, knowing the potential for incrimination and waiver of the privilege. See R.P.C. 2.1 (duty to exercise professional judgment and render candid advice); R.P.C. 1.6 (duty to keep from revealing confidences or secrets of client).

Forcing a suspect and counsel to communicate by telephone while an officer is within earshot in the same room despite requests for more privacy thus raises far more concerns than just whether the officer later is able to say he did not “recall” hearing anything during the call. The officer’s continued presence here destroyed the confidential nature of the

⁷RCW 5.60.060(2)(a) provides the attorney-client privilege, as follows: “[a]n attorney or counsel shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.”

attorney-client communication between Fedorov and counsel. That presence forced the communication into a “yes/no” session, left counsel unable to gather important information, made Fedorov feel he was being overheard, prevented Fedorov from asking questions he might have asked, and rendered counsel unable to fully perform his job.

In City of Seattle v. Koch, 53 Wn. App. 352, 767 P.2d 143, review denied, 112 Wn.2d 1022 (1989). Division One affirmed in consolidated cases where neither the defendants nor their attorneys asked for further privacy below but complained of its lack on appeal. In reaching its conclusion, the Koch court cited other limits on the CrR 3.1(b)(1) right to counsel and decided that the right was “limited,” thus implying that lack of privacy for attorney-client communication might also be a proper limit. 53 Wn. App. at 358.

But the limits placed on the rule-based right to counsel have all been reasonable restrictions on the procedures used to effect the right, not limits on whether counsel and his client can actually have sufficient privacy to confer. Thus, the right may often be satisfied by allowing telephone consultation from a police station. See, State v. Fitzsimmons, 93 Wn.2d 435, 610 P.2d 893. 18 A.L.R.3d 690, vacated, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, affirmed on remand, 94 Wn.2d 858, 620 P.2d 999 (1980). Further, officers who have allowed a defendant to speak to an attorney on the phone are not required to delay further routine processing waiting for that attorney to personally arrive. See Seattle v. Box, 29 Wn. App. 109, 115-16, 627 P.2d 584 (1981). And a suspect is not entitled to delay chemical testing until a particular attorney can be

contacted for advice. See State v. Staeheli, 102 Wn.2d 305, 309-310, 685 P.2d 591 (1984).

All of those limits balanced the right to counsel with the unusual fact that intoxication evidence is evanescent and there is thus a need for some haste in investigation. In each case, the suspect was seeking to enforce a right to counsel which would cause delay and potential destruction of evidence. In contrast to here, the limits imposed on the CrR 3.1(b)(1) right to counsel in those cases did not fundamentally interfere with the ability of counsel to assist her client and perform her role - they simply required that the role be performed in a timely fashion.

A driver is not “afforded an opportunity to make a knowing and intelligent decision whether to take” the breath test, whether to have an independent test and whether to gather other potentially disappearing evidence of defense under the implied consent statute and CrR 3.1(b)(1) if he is not given sufficient privacy within which to talk to counsel about the potential risks and benefits of those choices. And while the court of appeals was unfortunately correct and eavesdropping by officers on attorney-client privileged communications is regrettably not a thing of the past, asking the trooper whether he has engaged in such a practice after the fact does nothing to quell the effects his presence had at the time the attorney-client communication occurred. See, e.g., State v. Fuentes, 179 Wn.2d 808, 811, 831 P.3d 257 (2014) (recent eavesdropping involving constitutional right to counsel).

Most troubling, there is ample evidence suggesting that the trooper in this case had not one but multiple nearby potential facilities with BAC

machines and BAC rooms - one less than 10 minutes further away. 2RP 31-33. And the trooper was well aware that taking someone to FPD would mean he would be in the room when they spoke to their counsel on the phone. Indeed, the trooper's discussion of what he "usually" did when asked to give more privacy at FPD shows that he was well aware that the lack of privacy there for attorney-client communication was a common and serious concern. The trooper had the easy option of driving an extra 8 or 9 minutes in order to ensure Fedorov would have privacy for his phone call and there was no evidence taking such a step would have in any way impacted the officer's ability to investigate the case. Mr. Fedorov's CrR 3.1(b)(1) rights were violated and this Court should so hold.

D. CONCLUSION

For the reasons stated herein, this Court should hold that the CrR 3.1(b)(1) right to counsel includes the right to fully private consultation with counsel or, in the alternative, that the officer's actions in this case violated Mr. Fedorov's CrR 3.1(b)(1) rights in this case.

DATED this 24th day of May, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

DECLARATION OF SERVICE BY EFILING/MAILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental briefing to opposing counsel via email at pccatcecf@co.pierce.wa.us, to amicus Washington State Patrol and the Department of Fish and Wildlife through their counsel at CRJSeaEF@atg.wa.gov, to amicus Washington Defender Association through their counsel at cindy@defensenet.org, to amicus Washington Association of Prosecuting Attorneys through their counsel at pamloginsky@waprosecutors.org, and to Petitioner by depositing in the U.S. Mail, first-class postage prepaid, as follows: Mr. Roman Fedorov, 5132 S. Brighton St., Seattle, Wa. 98118.

DATED this 24th day of May, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Attorney for Petitioner Swenson
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

OFFICE RECEPTIONIST, CLERK

To: KARSdroit@aol.com; pcpatcecf@co.pierce.wa.us; cindy@defensenet.org;
magda@defensenet.org; pamloginsky@waprosecutors.org; CRJSeaEF@atg.wa.gov
Subject: RE: State v. Fedorov, No. 90939-3

Rec'd 5/26/2015

From: KARSdroit@aol.com [mailto:KARSdroit@aol.com]
Sent: Sunday, May 24, 2015 12:24 AM
To: OFFICE RECEPTIONIST, CLERK; pcpatcecf@co.pierce.wa.us; cindy@defensenet.org; magda@defensenet.org;
pamloginsky@waprosecutors.org; CRJSeaEF@atg.wa.gov
Subject: State v. Fedorov, No. 90939-3

To whom it may concern:

Attached please find the Supplemental Brief of Petitioner in this case.

Thank you in advance for your time.

Sincerely,

Kathryn Russell Selk, WSBA 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
P.O. Box 31017
Seattle, WA. 98103
206.782.3353