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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
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No. 45933-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondant,

V.

JOHNNIE COOLEY
APPELLATE

Appeal from the Pierce County Superior Court
CAUSE No. 13-1-00268-1
The Honorable THOMAS LARKIN, Judge

STATEMENT OF ADDITIONAL GROUNDS

JOHNNIE COOLEY
APPELLANT Pro-se
WASHINGTON STATE
PENITENTIARY
1313 N. 13th Avenue
Walla Walla, Washington
99362

GROUNDS.

I. MR COOLEY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAIL TO OBJECT TO THE ISSUES BELOW.

II CUSTODIAL STATEMENTS ARE PRESUMED TO HAVE BEEN OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

III. MR. COOLEY'S U.S. 6th AMENDMENT. AND WASHINGTON STATE ARTICLE 1 SECTION §22, RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ADMITTED A 911 CALL THAT WAS NEVER AUTHENTICATED.

IV. IT WAS ERROR TO INTERCEPT PRIVATE CONVERSATION WITHOUT FIRST OBTAINING CONSENT OF ALL THE PERSONS ENGAGED IN THE CONVERSATIONS IN VIOLATION OF RCW 9.73.030, AND A VIOLATION OF WASHINGTON STATE AND UNITED STATES CONSTITUTION,

VI. EVIDENCE SEIZED BY THE INTERCEPTION OF THE PHONE CALL MADE BY COOLEY AND LUTTER WAS SEIZED WITHOUT A SEARCH WARRANT AND IS INADMISSIBLE IN A CRIMINAL TRIAL.

VII. COOLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS LAWYER FAILED TO MOVE FOR A MISTRIAL OR OBJECT TO USE OF PRIVATE COMMUNICATIONS TO VIOLATE HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT ALL STATES OF PROCEEDINGS WHEN CALLS WAS USED AS A INVESTIGATIVE TOOL, TO UNDERCOVER THE CHARGED CRIMES AGAINST COOLEY.

VIII. MR. COOLEY'S CONSTITUTIONAL DUE PROCESS RIGHTS AND SIXTH AMENDMENT RIGHT TO A JURY TRIAL WERE VIOLATED AND "SIGNIFICANT", INTERVENING CHANGE IN LAW WARRANTS REVIEW FOR THE FIRST TIME ON APPEAL.

IX. SIGNIFICANT ERRORS IN MR. COOLEY'S CAUSE REQUIRE REVERSAL.

RULES

RAP 2.5(a)

RCW 9.73.030
RCW 9.73.050
RCW 5.45.020

State Supreme Court

In re Pers. Restraint of Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998)
State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)
State V. Christensen, 153 Wn.2d 186, 201, 102 P.3d 789 (2004)
State v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)

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I. STATEMENT OF FACTS

REPORT OF PROCEEDINGS (RP)

The following report of proceedings support my issues that the phone conversation was violatave of the Washington State Constitution and U.S. Constitution. I was not represented at a critical stage of proceeding (Interrogation on phone at police station), by use of the private phone communications. Further, the Police officials already had enough to detain me or arrest me and thus I was afforded the right to My **Miranda** rights to counsel while thay taylored there case around me. These facts support my issue that counsel was ineffective for not challenging or objecting to my right not to draw attention to my silence or not taking the stand and the other issues I raise. Counsel should have objected to prosecutor's improper argument.

1. (RP-Pg. 242 Lie 17-20), "Now this case has four counts. It's clear that the defendant violated this order because electronically he sent her text messages, telephonically he called her, and directly in person when he swerved towards her.."

2. (RP-Pg. 244 Line 16,17), ... Instruction No. 3 language; "It is ordered that defendant is prohibited from causing or attempting to cause harm...comming near or have any contact whatsoever in person or through others by mail, phone ....."

3. (RP-pg. 246 Line 5-10) "...So let's talk a little bit about the facts and the credibility of witnesses. Well, at the beginning of this case I was reading the defendant's cell phone to you. And you've probably seen it more times. Some of you might even have it memorized by not (253)906-7459. And where does this number appear again and again and again?

4. (RP-Pg. 248 Line Now, moving then back to Count I and Count II, the text messages sent on January 13th. And you have those in Plaintiff's No. 11. And what you're going to see is, again, the defendant's cell phone number popping up time and time again. And what I'm going to do is I'm just briefly going to place them on the overhead projector."

Prosecutor goes on tot track the time and text messages sent on the phone and raises the suprise spoofing testimony comming from the prosecutor himself in opening arguements. (RP 248-49)

5. (RP-RP Pg. 250-251 Line 20-25, RP 251 Line 1-21) "...She knows his voice in person. And so when she continues to get those calls again, calls at the police station that are witnessed by Officer Yglesias, independent officer with no personal bias, from the defendant's cell phone number, they finally get that one were they put it on speakerphone, she recognizes his voice. And what is said

on that phone call that's overheard by Officer Yglesis? "You're as good as dead, bitch. I'm going to break all the windows at your parents' house." Very consistent in terms of the kind of threats that he's been making to her in text messages days earlier and also consistent with what occurred that morning, right. She cracked his Plexiglass in the back on his truck and he's basically going to retaliate and he's going to break her windows.

6. (RP PG. 251 Line 17-21); "...Now, in terms of phone calls, again, Ms. Lutter is the only one that's telling you that her phone was ringing repeatedly while at the station. Officer Ygelasias says, yes, this number keeps coming up. It's the same number that called 911."

7. (RP-pg. 253 Line 1-9); "... Officer Yglesias is questioning him about the phone calls and threats made that morning and the defendant informed him that it was another phone when asked what phone did you use to call 911. He said it was another phone because didn't have a functioning phone. It was the phone at home. Well, which phone did you use to call 911? He said he used another phone. So he admits to calling 911, so there should be no mistake as to who was on the phone."

*. (RP-pg. 253 Line 20-25); "...And, in fact, the statements

that the defendant makes at the scene, the states that he makes in the text messages, the statements that he makes when the call that's on speakerphone that is identified by Amy as being him, they kind of tie everything together. ..."

Here the Peosecutor commented on the statements and silence of defendant. The only person that could re-but the statements the prosecutor made as comming from the defendant could only be the defendant that never took the stand. These statements was not Constitutional in light of **Miranda v. Arizona**, and **Doyle V. Ohio**,.

The Defense never objected to the statements or comment on why the defendant did not take the stand. He did make a reply to the "door that was opened" by the State's closeing.

9. (RP-pg. 266 Line 18-25); "...Remember the burden is on the State. The defense doesn't have a burden whatsoever. As a matter of fact, in Instruction No. 4, you were instructed that the defendant is not required to testify. Mr. Cooley doesn't have to testify at all. If the State does not present enough evidence to prove beyond a reasonable doubt that any any acts had occurred that Mr. Cooley had violated the law in any way, when Mr. Cooley dosen't have to put on a case at all. "You may not use the fact the defendant has not testified to infer guilt or prejudice him in any way.". (RP-pg. 266-67 Line 1-8

STATES REBUTTLE

10. (RP-pg. 272-73 Line 25; 1-2); "Yet all of his statements he makes to Officer Yglesis corroborates that."

11. (RP-pg. 276 Lines 17-25); "...And in terms of the defendant's statements, he wants you. again, to ignore the statements that he made about talking to her parents about the broken window. And then he tells you, common sense -- don't check your common sense at the door. And so he talks about when the officer's asking about calling 911, and he says, well, I used another phone, defense wants you to believe that the defendant was talking about some other 911 call some other date. Officer Yglesias was clear that were talking about.." (RP-pg. 277 Lines 1-5) "...what had occurred that morning. That defies common sense, folks, beyond a reasonable doubt, beyond a reasonable doubt. Not any doubt whatsoever, not one hundred percent. Without any doubt whatsoever, beyond a shadow of a doubt, a reasonable doubt."

3.5 HERING

12. (RP-pg. 30 Lines 1-23; 3.5 Hearig) THE COURT: Exactly. And voluntarily after he's been detained. That's all we're concerned about.

MR. BENJAMIN: And your Honor, the State elicited information

relating to the text messages themselves and if the State is stipulating that they're not going to try to admit any of the information from the text messages as admissions through this 3.5 hearing, then I will withdraw my -- but certainly the State is trying to admit text messages.

MR. SANCHEZ: Well, the State intends to use the text messages and the voice that was overheard and will satisfy the foundational requirements when appropriate.

THE COURT: Right. That's totally separate from what we're talking about here as far as the 3.5 hearing. What was said maybe before to somebody else doesn't have anything to do with what's said after he's been detained, and that's what the 3.5 hearing's all about. That's all I care about.

I. MR COOLEY WAS DENIED HIS SIXTH AN|| FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAIL TO OBJECT TO THE ISSUES BELOW.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Constitutional Amendment VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; **Gideon v. Wainwright**, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Edn2d 799 (1963). Likewise, Article I, Section §22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section §22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." **United States v. Salemo**, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel failed to object to admission of the cell phone evidence as well as argue evidence obtained in violation of the

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Counsel failed to object to admission of the cell phone evidence as well as argue evidence obtained in violation of the

privacy act was not admitted Constitutionaly at trial. Counsel did not hold the prosecutor to his burden of proof because he did not authenticate test messages or cell phone evidence.

II. CUSTODIAL STATEMENTS ARE PRESUMED TO HAVE BEEN OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

The Fifth Amendment to the U.S. Constitution provides that "No person shall...be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. The privilege against self-incrimination is applicable to the states through the due process clause of the Fourteenth Amendment. U.S. Const. Amend. XIV; **Maloy v. Hogan**, 378 U.S. 1 (1964). Similarly, Article I, Section §9 of the Washington State Constitution provides tha "No person shall be compelled in any case to give evidence against himself..." Wash. Const. Article I, Section § 9. Despite the difference in wording, both provisions have been held to provide the same level of protection. **State v. Easter**, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Failure to obtain a valid **Miranda** waiver requires exclusion of any statements obtained **Missouri v. Seibert**, 542 U.S. 600, 608 (2004); It is "clearly established" that statements taken in the absence of counsel are inadmissible unless the government meets its heavy burden of showing that the suspect made a voluntary, knowing, and intelligent waiver of her or his rights. **Hart v Attorney General of Florida**, 323 F.#f 884, 891-892 (C.A.11,

2003)(citing Miranda, at 475).

At the 3.5 hearing (RP - Pg 30 Lines 1-23) counsel inartfully objected to the state introducing text messages and voice admissions. But the Court passed over the issue in finding; "...What was said maybe before to somebody else dosen't have anything to do with what's said after he's been detained, and that's what the 3.5 hearing is all about." The privilege against self-incrimination absolutely precludes use of any involuntary statements against an accused in a criminal trial, for any purpose. Mincey v. Arizona, 437 U.S. 385 (1978).

These standards apply "whethe a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to intercepting of private conversations without obtaining consent of all persons engaged in the conversation violative of RCW 9.73.030. Townsend v. Sain, 372 U.S. 293, 307 (1963).

MR. COOLEY'S U.S. 6th AMENDMENT. AND WASHINGTON STATE ARTICLE 1 SECTION §22, RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ADMITTED A 911 CALL THAT WAS NEVER AUTHENTICATED.

Ms. Lutter showed Officer Yglesias several threatening text messages that she claimed to have received from Cooley on January 13, 2013. (12/17/13 RP 85, 86-87, 88, 91-93, 132-33). The State presented photographs of incoming calls and several threatening text messages sent to Lutter's phone from telephone number 253-906-7459. (Exh. P8-P11, P25,; 12/18/13 RP 206-07).

The state sought to get the text statements introduced for identifying purposes without ever laying the proper foundation requirement.

The State played an audiotape of the 911 call. (12/18/13 RP 182). On the recording, the 911 operator can be heard asking the male caller if he placed the call from telephone number 254-906-7459. (EXhibit 1) Lutter testified that the voice of the male 911 caller belonged to Cooley. (12/ 17/13 RP 93-94). Cooley denied calling or texting Lutter. (RP 137).

This is a violation of Mr. Cooley's Constitutional rights as afforded under Washington State Constitution Article I, Section §22, U.S.C.A. 6 and RCW Section 10.52.

"Testimony about a telephone conversation will normally be irrelevant unless the person at the other end is identified." **United States V. Pool**, 660 F.2d 547 (5th Cir. 1981). "Recording must be authentic in the sense that it is a recording of the conversation in question and the speaker voices are identifed." **United States V. Albert**, 595 F.2d 283 (5th Cir. 1979). For a 911 call, ER 901 requires that the recording be authenticated or identified before it is admitted into evidence." **State v. Hurtado**, 173 Wa. App. 592, 294 P.3d 838 (2013) Quoting **State v. Williams**, 136 Wa. App. 486, 150 P.3d 111 (2007). Cooley's position is that he never admitted or was identified in light of the 911 tape. Mr. Cooley's Sixth Amendment right to Confrontation was violated not from being able to rebut the 911 caller, but rather the authenticator of the 911 tape itself. The

state used Unconstitutional alleged statement Officer Yglesias attributed as comming from Cooley. (RP 169).

When evidence is admitted at trial and later held to violate the confrontation clause, the proper remedy is to remand for Retrial. State v. Rainey, 319 P.3d 85 (2014).

This is abuse of discretion for the trial court to not make the State prove authentication. Also, because Mr. Cooley as the supposed declarant of the statements never authenticated the 911 call. The statements should not have been allowed under the 801(d)(1) rule. The statements was attributed to the wrong person, not Mr. Cooley. These statements are unsubstantiated hearsay and the trial abused it's discretion in admitting them.

The State sneaked in the evidence unauthenticated statements of the 911 call so it could present such prejudicial and unsubstantiated statements as truth of the "prosecutions theory".

This was a Constitutional error and a violation of RCW 5.45.020. "Must be verified by the custodian of record or another qualified witness who can attest to the records identity and mode of preparation." Lodis v. Corbis Holdings Inc., 172 Wn.App. 835, 292 P.3d 779 (2013). "Courts need to be certain that it is the witness, not the police (or prosecutor), who made the identification." State v. McDonald, 140 Wn.App. 743, 746, 700 P.2d 327 (1985). The state did not meet its burden and violated Mr. Cooley's Due Process rights. Rita v. United States, 551 U.S. 338 (2007).

The court should remand for new trial.

IV. IT WAS ERROR TO INTERCEPT PRIVATE CONVERSATION WITHOUT FIRST OBTAINING CONSENT OF ALL THE PERSONS ENGAGED IN THE CONVERSATIONS IN VIOLATION OF RCW 9.73.030, AND A VIOLATION OF WASHINGTON STATE AND UNITED STATES CONSTITUTION,

Any information obtained in violation of RCW 9.73.030 is admissible in any criminal case without the permission of the persons whose rights were violated, except those cases in which would jeopardize national security. RCW 9A.73.050. Also violative of the Fourth Amendment to the United States Constitution. **State v. Gunwall**, 106 Wn.2d 54, 63, 720 P.2d 808 (1986); also, when the conversations was intercepted for the purpose of getting statements from private conversations for proof of a crime has been committed is error; **State v. Haq**, 166 Wn.App. 221, 250 (jan 2012).

In this case officer Christopher Yglesias escorted Lutter to a nearby police Sub-Station. (12/17/13 RP 83, 129), while there were there, Lutter's received multiple calls from telephone number 253-906-7459, which Lutter said was Cooley's number. (12/17/13 RP 84-85, 129). Officer Yglesias told Lutter to answer one of the calls and to turn on the speaker. (12/17/13 RP 88-89, 131). Officer Yglesias testified that he hears a male caller make threatening statements to Lutter. (12/17/13 131). Lutter Testified the male caller was Cooley. (12/17/13 RP 88-89).

Since the information provided by the state in a sense that it was Cooley's voice he has a legitimate expectation of privacy in the invalded place. Article I, §7, of the Washington State Constitution, has greater protection than it's Federal counter-part.

A person in a private home may rely upon the protections of the Fourth Amendment. This Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, over-heard without "technical trespass under local property law." **Silverman v. United States**, 365 U.S. 505, 511 (1961). **see also**, **Katz v. United States**, 389 U.S. 347, 353 (1967).

The problem with this is that the intercepted private conversations on the phone was turned on the "Speaker Phone" for the purposes of soliciting a statement of a confession of a crime. **State v. Haq**, 166 Wn. App 221, 250 (Jan. 2012), And in this case as the facts applied is a U.S. Constitutional Violation of **Missia v. United States**, ___ U.S.___ ( ). In **HAQ**, the Jail Phone was not used to solicit statements from defendants. The difference in Cooley's case is that when the police officials asked to have the speaker phone to be turned on for the purposes of intercepting conversations of guilt.

Lutter also showed Officer Yglesias several threatening text messages that she claimed to have received from Cooley

on January 13, 2013. (12/17/13 RP 85, 86-87, 88, 91-93; 1431-33). The State presented photographs of incoming calls and several threatening text messages sent to Lutter's phone from telephone number 353-906-7459. (Exh. P8-P11. P25; 12/17/13 RP 206-07).

A sound recording need not be authenticated by a witness with personal knowledge of the events recorded. **State v. Williams**, 136 Wn. App. 486, 500, 150 P.3d 111 (2007), Rather, the trial court may consider any information sufficient to support a prima facie showing that the evidence is authentic, **Williams**, 136 Wn. App. at 500. Where the recording is of a telephone call, generally the proponent of the evidence must establish the identity of each party to call with either direct or circumstantial evidence. **State v. Rodriguez**, 103 Wn. App 693, 701, 14 P.3d 157 (2000), **aff'd on other grounds**, 146 Wn.2d 260 (2002).

In light of the Unites State's Constitutional Error and also, under **State v. Haq**, 166 Wn. App 221, 250 (Jan. 2012)

Mr. Cooley did not waive his expectation of privacy in the phone conversation under the Washington Constitution, Artical I, §7 provides; "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Because Mr. Cooley did not know his conversation was being recorded.

The Trial Court Violated Mr. Coolely's Rights Under The Privacy Act By Admitting Illegally Recorded Conversations That Did Not Fit Within The Act's Exceptions.

A. Questions of statutory interpretation are reviewed **de novo**. **In re Detention of Martin**, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). The Court of Appeals has discretion to accept review of any issue for the first time on appeal. **RAP 2.5(a)**;

B. An accused person has standing to object to the admission of any illegally recorded conversation.

Washington's Privacy Act "puts a high value on the privacy of communications." **State v. Christensen** 153 Wn.2d 186, 201, 102 P.3d 789 (2004). By enacting the Privacy Act, the legislature "intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements." **State v. Williams** 94 Wn.2d 531, 548, 617 P.2d 1012 (1980).

Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. An accused person has standing to object to the admission of any illegally recorded conversation, even if his or her privacy rights were not personally violated. **Willams**, at 544-546. The

admission of evidence obtained in violation of the Privacy Act requires reversal unless "within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." **State v. Porter**, 98 Wn. App. 631, 638. 990 P.2d 460 (1999).

The Act must be strictly construed in favor of the privacy. **Williams**, at 548; see also **Christensen**, at 201.

C. The recorded conversation did not comply with the Privacy Act's consent provisions.

The Privacy Act prohibits the recording of a private conversation "without first obtaining the consent of all the participants in the communication." RCW 9.73.030(1). Explicit consent is not required if the certain conditions are met:

> Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained 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).

The recorded conversation admitted in this case did not comply with the Act's consent provisions because

Officer Yglesias did not, at the police station, obtain consent prior to turning on the "speaker phone" for purposes of obtaining incriminating statements from Mr. Cooley. The Speaker Phone was turned on and "Transmitted" to officers in turn recorded it on reports & testimony used to discover other evidence and convict Cooley. This was done illegally because officers did not announce when the speaker started transmitting that the call was being monitored and recorded in a police transmittal.

Next, the Privacy Act creates a presumption of consent "whenever one party had announced to all other parties...that such communication or conversation is about to be recorded..." nRCW 9.73.030(3) When the act is strictly interpreted in favor of the right to privacy, the two parties to the conversation were Cooley & Lutter.

Finally, the Act requires that a party make an announcement "in any reasonably effective manner, that such communication or conversation is about to be recorded..."

For all these reasons, the recordings violated the Privacy Act, and should not have been admitted at Mr. Cooley's trial. His convictions should all be overturned because of the evidence gathered was tainted under the Poisonous tree.

V. EVIDENCE SEIZED BY THE INTERCEPTION OF THE PHONE CALL MADE BY COOLEY AND LUTTER WAS SEIZED WITHOUT A SEARCH WARRANT AND IS INADMISSIBLE IN A CRIMINAL

TRIAL.

> Under the Forth Amendment to the U.S. Constitution. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. The 14th Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Consr. Amend. XIV; **Mapp v. Ohio**, 367 U.S. 643, 81 S.Ct.1684, 6 L.Ed.ed 1081 (1961).

Similarly, Artical I, §7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wasah. Const. Article I, Section 7. It is "axiomatic" that Artical I, Section 7 provides stronger protection to and individual's right to privacy than that guaranteed by the Forth Amendment to the U.S. Constitution.

Evidence derived from an unconstitutional search or seizure must be suppresses as fruit of the poisonous tree. **United States v. Williams** 615 F.3d 657, 6680669 (6th Cir. 2010)(Citing **Wong Sun v. United States**, 371 U.S. 471,

487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Exclusion is required unless the connection between illegal police conduct and the evidence is so attenuated as to dissipate the taint. Id. The test whether the evidence was discovered by exploitation of the illegality, or instead by means sufficiently distinguishable to be purged of the primary taint. Id. A reviewing court must consider temporal proximity (between the illegality and discovery of the evidence), the presence of the intervening circumstances, and the purpose and flagrancy of the official misconduct. Id. (quoting **Brown v. Illinois**, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)). The prosecution bears the burden of proving that tainted evidence is admissible. **Taylor v. Alabama**, 457 U.S. 687, 690, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982).

Here, any evidence gained by police officials when police officials told Lutter to turn on the "Speaker Phone" and then gain evidence that was used at trial against Mr. Cooley. The reason Officials told Lutter to turn on the Speaker Phone so the police officials could intercept and gather illegal statements and evidence of a crime without any **Marinda v. Arizona** warnings or Privicy Act laws.

Accordingly, the admission of the unconstitutional evidence warrants reversal and dissmissal of the charges.

VI. COOLEY RECIEVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS LAWYER FAILED TO MOVE FOR A MISTRIAL OR OBJECTTO USE OF PRIVATE COMMUNICATIONS TO VIOLATE HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT ALL STAGES OF PROCEEDINGS WHEN CALLS WAS USED AS A INVESTIGATIVE TOOL, TO UNDERCOVER THE CHARGED CRIMES AGAINST COOLEY.

The Sixth Amendment guaranty of assistance of counsel attaches when the State initiates adversarial proceedings against a defendant. **Brewer v. Williams**, 430 U.S. 387, 401 (1977). After the right has attached, a government agent may not interrogate a defendant and use incriminating statements the defendant made in the absence of or without waiver of counsel. The accused need no make and affirmative request for assistance of counsel. Id at 404.

The state action violated equal protection under Washington Constitutional Art 1, §12. The right to counsel attached at the time the police asked Ms. Lutter at the Police Station when officer Yglesias asked Ms. Lutter to place cell phone call on speaker phone because it attached to an interrogation.

Courts apply the "deliberately elicited' standard in determining whether a government agent has violated a defendant's Sixth Amendment right to assistance of counsel. **Fellers v. United States**, 540 U.S. 436, 459 (1986); **In re Pers.**

restraint of Benn, 134 Wn.2d 868, 911, 952 P.2d 116 (1998))). The Sixth Amendment "Deliberately Elicited" Standard. **Fellers**, 540 U.S. 524.

"'[T]he Sixth Amendment provides a right to counsel... even when there is no interrogation and no Fifth Amendment applicability.'" **Id**. (alterations in original)(quoting **Michigan v. Jackson**, 475 U.S. 625, 632n.5, (1986)). "[T]he Sixth Amendment is not violated wherever-by luck or happenstance-the State obtains incriminating statements from the accused after the right to counsel has attached." **Maine v. Moulton**, 474 U.S. 159, 176 (1985). The Sixth Amendment is also not violated if the government agent "made 'no effort to stimulate conversations about the crime charged.'" **Kuhlmann v. Wilson** 477 U.S. 436, 442 (1980)).

Here the police had enough information to detain and arrest Mr. Cooley yet police officials used Ms. Lutter as a agent to taylor the case against Cooley: (RP-RP Pg. 250-251 Line 20-25, RP 251 Line 1-21) "...She knows his voice in person. And so when she continues to get those calls again, calls at the police station that are witnessed by Officer Yglesias, independent office with no personal bias, from the defendant's cell phone number, they finally get that one were they put it on speakerphone, she recognizes his voice. And what is said on that phone call that's overheard by Officer Yglesis? "You're as good as dead, bitch. I'm going to break all the windows at your parents' house." Very consistent in

451 U.S. 454, 4677 (1981)(quoting **Miranda v. Arizona**, 384 U.S. 436, 469, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). The accused is guaranteed that he need not stand alone against the State at any stage of the prosecution."' 451 U.S. at 470.

(RP-pg. 272-73 Line 25; 1-2); "Yet all of his statements he makes to officer Yglesis corrobreates that."

This issue intwines with the drawing attention that Mr. Cooley did not testify. Mr. Cooley's right to private communications and right to counsel at all stages of proceedings all of these violations warrant review & reversal.

VII. MR. COOLEY'S CONSTITUTIONAL DUE PROCESS RIGHTS AND SIXTH AMENDMENT RIGHT TO A JURY TRIAL WERE VIOLATED AND "SIGNIFICANT", INTERVENING CHANGE IN LAW WARRANTS REVIEW FOR THE FIRST TIME ON APPEAL.

The jury instruction for the special verdicts were incomplete as they requires the jury to deliberate until they found unanimously **"not guilty" or "no"**. They did not include the now famous **Brett** **"out"** allowing them to be instructed to leave it blank if they could not come to a unanimous decision.

terms of the kind of threats that he's been making to her in text messages days earlier and also consistent with what occurred that morning, right. She cracked his Plexiglass in the back on his truck and he's basically going to retaliate and he's going to break her windows.

To show that Cooley's Sixth Amendment rights were violated, the State must show that Amy Lutter made "some effort to 'stimulate conversations abut the crime charged.'" **Randolph v. California**, 380 F.3d 1133, 1144 ((TH cir. 2004).

(RP-pg. 253 Line 20-25); "...And, in fact, the statements that the defendant makes at the scene, the states that he makes in the text messages, the statements that he makes when the call that's on speakerphone that is identified by Amy as being him, they kind of tie everything together. ..."

The state's case was based on Ms. Lutter being a agent and the stimulated conversation at he police station. Thus, the court must take Cooley's postition that his rights were violated first, that the Police officals already had a complaint and enough evidence to detaine Mr. Cooley and thus the time of the telephone call constituted a "critical stage of the proceedings." Second, whether Ms. Lutter & police officials "deliberately elicited" Mr. Cooley's statements.

Moreover, at the time the officers asked the cell phone call be placed on speaker phone, Cooley was "'faced with a phase of the advesary system' and was 'not in the presence of [a] perso[n] acting soley in his interest.'" **Estelle. v. Smith**,

The Supreme Court held that **Goldberg** was incorrect because of the **Brett** "out." **Guzman Nunez**, 174 Wn. 2d at 714. This would be unnecessary if the "out" words were included in Appellant's jury instructions, like they were in Brett, but they were not. **Clerk's Papers sub #136 inst. #31) (1/18/13 RP 981).**

Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Blakely v. Washington**, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); **Guzman Nunez**, 174 wn. 2d at 712. These United States Supreme Court mainstay cases do not say, "The jury must unanimously find beyond a reasonable doubt no" on any aggravating circumstance, as that does violate due process.

The Appellant's jury instructions, as they stand, forcing a jury to go all the way till they conclude a finding of unanimously "no," taints and dilutes the reasonable doubt standard of proof. **Cage v. Louisiana**, 498 U.S. 39 (1990); **Victor v. Nebraska**, 511 U.S. 127 (1994).

What we have here is plain and simple illegal coercion. The trial court judge, by allowing this incomplete (no **Brett** "out") jury instruction, coerced the jury into a forced verdict. **Allen v. United States**, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896); **Smith v. Curry**, 580 F. 3d 1071, 1073, (9th cir.2009). and is what happened here by allowing Appellant's jury to be given the unanimous "no," without a **Brett**-worded "out" jury instruction.

On 7 June 2012, The Supreme Court overruled its own precedent in Goldberg and Bashaw because of the Brett "or leave it blank," legal way out. State v. Guzman Nunez, 174 wn. 2d 707,714 (2012). This holding does not conflict with the holding in Goldberg because the words, "Do not fill in the blank for that alternative," do not exist as a way out for a juror to take. There was error in this case because the jurors had to agree unanimously "no," or unanimously "yes".

Richardson v. United States, 526 U.S. 813, 143 L. Ed. 2d 985, 119 S. Ct. 1707 (1999). The Supreme Court made a ruling to clarify common law that at the time served policy considerations of judicial economy and finality, rather than constitutional grounds.

State v. Nunez, 174 wn.2d 707,713, 285 P.3d 21 (2012). In overturning The Supreme Courts past two precedent cases on unanimity and the non-unanimity rule, The Supreme Court justified this landmark decision because of their previous holding in State v. Brett, 126 wn. 2d 126, 172-73, 892 p.2d 29 (1995), and the "out" found in the majority of these particular jury instructions;

> "If, after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any one of the aggravating circumstances, do not fill in the blank for that alternative...."

Unanimity is not required to find the absence of such a special finding. Appellant's instructions stated that unanimity was required for either determination. As a whole, the instruction failed to make the applicable legal standard apparent. **State v. Borsheim**, 140 wn. app. 357,366, 165 P. 3d 417 (2007). That was error, also violating the defendant's right to have charges resolved by a particular tribunal. **State v. Wright**, 165 wn. 2d 783, 792-93, 203 P. 3d 1027 (2009); **Arizona v. Washington**, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978).

Regarding having jurors pressured into having to be unanimous on a "no" verdict, The Supreme Court has previously made a clear showing that it is prejudicial.

"When unanimity is required jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. Therefore, we cannot conclude beyond a reasonable doubt that the jury instruction was harmless." **Keller v. City Of Spokane**, 146 wn. 2d 237, 249, 44 P. 3d 845 (2002).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. **Martinez v. Borg**, 937 F. 2d 422, 423 (9th cir. 1991).

In **Neder v. United States**, 527 U.S. 1 (1999), it says

that when there is constitutional error involving a jury instruction, the court "must" reverse. The Supreme Court's holding in Guzman Nunez should not be errorless in Appellant's case due to the absence of the Brett "or leave it blank" fix.

Importantly, the Court applied the constitutional harmless error test to determine whether the trial court's error was harmless. The Court determined that in order to hold that the jury instruction was harmless, "We must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), which quoted Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The Court reversed the sentence enhancements, concluding that the error was not harmless:

> [W]hen unanimity is required, juror with reservations might not hold to their positions or may not rise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id at 147-48.

IX. SIGNIFICANT ERRORS IN MR. COOLEY'S CAUSE REQUIRE REVERSAL.

Constitutional errors are reviewed de novo. **Bellevue School District V. E.S.**, 171 Wn. 2d 695, 702, 257 P.3d 570 (2011). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Constitution: a court necessarily abuses its discretion by denying an accused person his or her Constitutional Rights; See, e.g., **State v. Inguez**, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009); See also, **United States v. Lankford**, 955 F.2d 1545, 1548 (11th Cir. 1992).

Where the petitioner makes a Constitutional argument regarding the evidence, review is de novo. Id.

The Constitutional Errors in this case include:

I. MR COOLEY WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE COUNSEL FAIL TO OBJECT TO THE ISSUES BELOW.

II CUSTODIAL STATEMENTS ARE PRESUMED TO HAVE BEEN OBTAINED IN VIOLATION OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

III. MR. COOLEY'S U.S. 6th AMENDMENT. AND WASHINGTON STATE ARTICLE 1 SECTION §22, RIGHTS WERE VIOLATED WHEN THE TRIAL COURT ADMITTED A 911 CALL THAT WAS NEVER AUTHENTICATED.

IV. IT WAS ERROR TO INTERCEPT PRIVATE CONVERSATION WITHOUT FIRST OBTAINING CONSENT OF ALL THE PERSONS ENGAGED IN THE CONVERSATIONS IN VIOLATION OF RCW 9.73.030, AND A VIOLATION OF WASHINGTON STATE AND UNITED STATES CONSTITUTION,

VI. EVIDENCE SEIZED BY THE INTERCEPTION OF THE PHONE CALL MADE BY COOLEY AND LUTTER WAS SEIZED WITHOUT A SEARCH WARRANT AND IS INADMISSIBLE IN A CRIMINAL TRIAL.

VII. COOLEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS LAWYER FAILED TO MOVE FOR A MISTRIAL OR OBJECT TO USE OF PRIVATE COMMUNICATIONS TO VIOLATE HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT ALL STATES OF PROCEEDINGS WHEN CALLS WAS USED AS A INVESTIGATIVE TOOL, TO UNDERCOVER THE CHARGED CRIMES AGAINST COOLEY.

VIII. MR. COOLEY'S CONSTITUTIONAL DUE PROCESS RIGHTS AND SIXTH AMENDMENT RIGHT TO A JURY TRIAL WERE VIOLATED AND "SIGNIFICANT", INTERVENING CHANGE IN LAW WARRANTS REVIEW FOR THE FIRST TIME ON APPEAL.

Constitutional errors are presumed prejudicial, and the prosecution bears the burden of establishing harmlessness beyond a reasonable doubt. **State v. Watt**, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

III. CONCLUSION

For the reasons above and Further, Mr. Cooley asks this Court to accept review on the **Brett** instruction ("Unamimity") and he submits that he has asked the Clerk of Pierce County to Supplement the CLERKS PAPERS with the instructions in his cause. In light of the Constitutional issues additional briefing is warranted.

IV. RELIEF REQUESTED

Mr. Cooley asks this court to reverse his conviction and remand back to trial court for further instruction by this Court.

RESPECTFULLY SUBMITTED: OCTOBER 9, 2014.

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