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NO. 88422-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JORGE PENA-FUENTES,

Petitioner.

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**STATE'S ANSWER TO BRIEF OF AMICUS CURIAE WACDL**

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DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIAN M. McDONALD  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

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A. **ARGUMENT**

1. **NO AUTHORITY SUPPORTS WACDL'S ARGUMENT THAT DISMISSAL IS AUTOMATICALLY REQUIRED.**

WACDL argues that “dismissal is automatically required when the State eavesdrops on attorney-client communications.” Supplemental Brief of Amicus Curiae WACDL at 10. Pena-Fuentes made this same argument before the trial court, arguing that dismissal was “mandatory” and that he was not required to show that he suffered any prejudice. CP 273; RP 578-79.

There is no authority for this extreme position. The United States Supreme Court has rejected it. Weatherford v. Bursey, 429 U.S. 545, 547-48, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). Other State courts have also rejected it. See State's Supplemental Brief at 7-8, 13-15. When addressing intrusions into attorney-client communications, Washington appellate courts have never held that dismissal is automatic or mandatory, but, considered whether the defendant suffered prejudice. See State v. Cory, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963), State v. Perrow, 156 Wn. App. 322, 231 P.3d 853 (2010); State v. Grant, 9 Wn. App. 260, 263-67, 511 P.2d 1013 (1973). There is no authority for WACDL's argument that dismissal is automatic or mandatory.

Alternatively, WACDL argues that if dismissal is not automatic, the court should dismiss the case unless the State proves a lack of prejudice beyond a reasonable doubt. That burden of proof is the standard for harmless error when there has been a constitutional error at trial. State v. Grenning, 169 Wn.2d 47, 57, 234 P.3d 169 (2010). However, the Supreme Court has recognized there is not constitutional error every time there is an intrusion into attorney-client communications. Weatherford, 429 U.S. at 558.<sup>1</sup> Instead, the defendant must suffer some prejudice. This constitutional harmless error test should not apply unless there has been constitutional error at trial.

WACDL's insistence on dismissal is inconsistent with controlling caselaw holding that even when there is prejudice, the trial court retains considerable discretion in fashioning an appropriate remedy. This Court has repeatedly recognized that

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<sup>1</sup> See also United States v. Singer, 785 F.2d 228, 234 (8th Cir. 1986) ("To establish a sixth amendment violation, a criminal defendant must show two things: first, that the government knowingly intruded into the attorney-client relationship; and second, that the intrusion demonstrably prejudiced the defendant."); United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980) ("mere government intrusion into the attorney-client relationship... is not itself violative of the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant."); Ellis v. State, 2003 ND 72, 660 N.W.2d 603, 608 (2003) ("a Sixth Amendment violation occurs if the government knowingly intrudes into the attorney-client relationship, and the intrusion demonstrably prejudices the defendant, or creates a substantial threat of prejudice.").

dismissal of criminal charges is an extraordinary remedy, and one that the trial court should use only as a last resort. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). When addressing intrusions into attorney-client communications, numerous courts have held that the trial court should consider less drastic remedies, such as whether suppression of any tainted evidence can remedy the error. See State's Supplemental Brief at 12-18.

Pena-Fuentes and WACDL take these extreme positions because they cannot identify any prejudice that Pena-Fuentes suffered due to the timing of events and the quick actions taken by the prosecutor in this case. However, as argued more fully in the State's Supplemental Brief, caselaw, public policy and logic support the Court of Appeals' decision that Pena-Fuentes is not entitled to dismissal of his convictions for child rape and child molestation because they were not tainted by the detective's actions in listening to the jail calls.

**2. THE TRIAL COURT PROPERLY DENIED PENA-FUENTES'S BELATED MOTION FOR DISCOVERY.**

WACDL also argues that the trial court erred in denying Pena-Fuentes's motion for discovery, ignoring that his discovery motion was belatedly made as part of a motion for reconsideration. Pena-Fuentes never suggested that he needed any discovery when he filed and argued his motion to dismiss. His request for discovery was made after he lost his motion and he sought material that went far beyond seeking information about the detective's actions after listening to the calls. The trial court did not abuse its discretion in denying the motion under these circumstances.

Less than one day after the prosecutor informed defense counsel that the detective had listened to the calls, Pena-Fuentes filed a motion seeking dismissal with prejudice of his child rape and child molestation convictions. CP 76-80. In his written motion, he did not suggest that he needed any additional discovery. Id. Nor did he claim that he needed discovery after the prosecutor responded to the dismissal motion and attested under oath that he was unaware of the substance of the calls and had not relied upon any information in the calls. CP 220. Instead, Pena-Fuentes proceeded to argue the dismissal motion before Judge Kessler,

and, during that argument, did not claim that he needed any additional discovery. RP 577-81. It was only after the trial court denied his motion to dismiss, that Pena-Fuentes filed a 4-page motion for discovery, as part of his motion for reconsideration. CP 295-98.

As the State has noted in prior briefing, Pena-Fuentes did not limit his discovery request to information about Detective Johnson's work on the case during the relevant time period, and, instead, broadly demanded documents relating to the on-going "witness tampering investigation," and evidence collected by detectives other than Detective Johnson. CP 295-96. At the time that he made this request, Pena-Fuentes knew that the police were also investigating his wife and brother-in-law for witness tampering; his attorney had also represented them in dealing with the police. CP 275-76.

This Court reviews a trial court's denial of a motion to compel discovery for abuse of discretion. State v. Norby, 122 Wn.2d 258, 268, 858 P.2d 210 (1993). Pena-Fuentes's 4-page motion provided little argument or authority for his broad request, other than generally cite to CrR 4.7 and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Given the

lateness of Pena-Fuentes's discovery demand and its obvious overbreadth, the trial court did not abuse its discretion in denying the discovery motion.

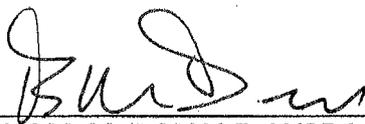
**B. CONCLUSION**

For all the foregoing reasons, the Court should affirm the Court of Appeals' opinion and affirm Pena-Fuentes's convictions.

DATED this 28<sup>th</sup> day of August, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIAN M. McDONALD, WSBA #19986  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to

Richard Hansen, the attorney for the appellant, at 600 University Street, Suite 3020, Seattle, WA 98101 and

Sherilyn Peterson, the attorney of Amicus Curiae WACDL, at Perkins Coie LLP, 1201 3rd Avenue, Suite 4800, Seattle, WA 98101

containing a copy of the State's Answer to Brief of Amicus Curiae WACDL, in STATE V. JORGE PENA FUENTES, Cause No. 88422-6, in the Washington Supreme Court.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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Name  
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Dear Supreme Court Clerk:

Attached for filing in the above-subject case, is the State's Answer to Brief of Amicus Curiae WACDL.

Please let me know if you have problems opening the attachment.

Thank you,

Bora Ly  
Paralegal  
Criminal Division, Appellate Unit  
King County Prosecutor's Office  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
Phone: 206-296-9489  
Fax: 206-205-0924  
E-Mail: [bora.ly@kingcounty.gov](mailto:bora.ly@kingcounty.gov)

For

Brian McDonald  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent