

No. 88422-6

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JORGE PEÑA-FUENTES,

Petitioner.

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Washington Association of Criminal Defense Lawyers (WACDL) comprises over 1,030 attorneys practicing criminal defense law in Washington State. The association's objectives include improving the quality and administration of justice, protecting and ensuring by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, and resisting all efforts to curtail such rights.

A violation of one such right, the right to counsel, is at the heart of this appeal. By deliberately eavesdropping on communications between the defendant and his attorney, the State invaded the attorney-client relationship and ignored the constitutional protections provided to attorney-client communications. The sanctity of attorney-client communications is essential to effective representation and, on a larger scale, to the functioning of the American criminal justice system. WACDL, its members, and their clients have a vital interest in protecting criminal defendants from similar misconduct. The right to counsel is precisely the kind of constitutional right that WACDL's organizational mission aims to protect.

## **II. INTRODUCTION**

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

not tainted. In my view, this case is controlled by *Cory* and should have the same result, dismissal of all charges with prejudice.

*State v. Peña-Fuentes*, 172 Wn. App. 755, 755-56, 295 P.3d 252, 257 (2013) (Becker, J., dissenting). WACDL urges this Court to adopt Judge Becker's analysis, reverse the Court of Appeals and dismiss the charges in this case.

The effects of the Court of Appeals' decision are enormous, striking at the core of the critical right to counsel recognized fifty years ago by the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court of Appeals' decision also undermines legions of cases requiring full disclosure of exculpatory evidence to the defense. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194 (1963); *United States v. Bagley*, 473 U.S. 667, 676-77, 105 S. Ct. 3375 (1985); *Kyles v. Whitley*, 514 U.S. 419, 432-433, 115 S. Ct. 1555 (1995); *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763 (1972); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013); *cf. Benn v. Lambert*, 283 F.3d 1040, 1053-54 (9th Cir. 2002).

The decision will have broad policy implications and very real ramifications on law enforcement agencies throughout the State. Recent investigations of the Seattle Police Department and other law enforcement agencies by the Department of Justice have underscored the importance of oversight and transparency in preventing law enforcement misconduct. But the Court of Appeals' decision allows law enforcement agencies to

cloak misconduct in secrecy, and tacitly approves investigative tactics that violate defendants' constitutional rights.

This outcome is at odds with decades of Washington jurisprudence. As this Court aptly concluded in *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963), quoting Justice Traynor's decision in *People v. Cahan*, 44 Cal. 2d 434, 445-46, 282 P.2d 905 (1955), the courts should not support misconduct by law enforcement:

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.

*Cory*, 62 Wn.2d at 378.

This Court, and the Court of Appeals, until now, have repeatedly and correctly resisted attempts by the State to erode constitutional protections for the right to counsel. In *Cory*, for example, the defendant met with his attorney in a room that had been wired with a microphone by law enforcement officials. *Cory* moved for a new trial, alleging that the eavesdropping deprived him of effective assistance of counsel. The trial court denied the motion, but this Court reversed, set aside the judgment and sentence, and dismissed the charges, holding that the law enforcement misconduct was so egregious that "[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this." *Id.* at 377.

The misconduct in this case was equally as contemptible as that in *Cory*. The prosecutor, the trial court, and the Court of Appeals all agree that the detective's conduct was wrongful. *See* CP 590, 593; *Peña-Fuentes*, 295 P.3d at 253, 256, 257. The Court of Appeals described the detective's misconduct as "plainly egregious," "odious," "astonishing," "inexcusable," "offensive and unscrupulous." *Id.* Yet, the Court of Appeals "had a hand in such 'dirty business,'" and implicitly *endorsed* it by affirming the defendant's convictions and adding an additional count.

This result is devastating for the constitutional rights of criminal defendants, and for the criminal justice system more broadly. The Court of Appeals' decision, coupled with the refusal of the Sheriff's Office to find *any* fault with this detective listening to six attorney-client conversations while working on the case, sends a clear message to law enforcement that police can freely trample criminal defendants' constitutional protections with impunity.

### III. STATEMENT OF THE CASE

The defendant was tried on child molestation charges and was convicted on two counts. The conviction hinged largely on extensive testimony by the alleged victim, J.B., and testimony by her sister, L.P.

On December 12, 2010, the defendant's wife and her brother conducted a videotaped interview of L.P. with her consent. L.P. stated in

the interview that her accusations against her father were not true, that her sister and mother had fabricated the sexual assault allegations, and that she wanted to testify to this in court. CP 53-56; 146-148. The defense filed a motion for new trial based on that information. CP 59-68.

To oppose the motion, the prosecutor, Sean O'Donnell, and his investigator, Detective Casey Johnson, contacted L.P. and obtained a declaration describing the interview as intimidating. CP 150-151. The prosecutor also instructed Detective Johnson to listen to the defendant's jail-recorded conversations to gather information regarding the circumstances surrounding the interview of L.P. CP 220. Detective Johnson assisted in other ways with the prosecutor's attempts to discredit the tape, including preparing search warrants for the defendant's wife and brother, obtaining their camera, threatening to arrest them, and insisting upon meeting with them. CP 275-277.

Detective Johnson listened to the jail's recordings of the defendants' calls as directed. Some involved friends or relatives, but the detective also listened to five or six calls between defendant and his attorney, each lasting about fifteen minutes. CP 220; RP 581.

Detective Johnson admitted that the attorney-client calls included discussion of the contested videotape at issue in the then-pending post-trial motion. CP 218. These calls were directly related to the video interview,

which the prosecutor and Detective Johnson were working together to discredit, and to the defendant's motion for a new trial. As defense counsel described:

[A]ll of my conversations with the Defendant in jail during this time period, pertained to his case, and my attempts to win a new trial for him based, in large part, on the videotaped interview of L.P....

In my conversations with the defendant, which detective Johnson has now reviewed, I have discussed detective Johnson and his actions and have discussed strategy concerning our attempts to utilize the videotaped interview of L.P. to obtain a new trial.

CP 275-278.

After listening to these calls, the detective notified the prosecutor by email that he had listened to the attorney-client calls. *After* receiving the email, the prosecutor had a telephone call, and at least one further communication, with the detective about the eavesdropping. CP 220. The prosecutor and Detective Johnson continued to work together on the case for eleven days after the detective listened to the calls. The record is silent as to the content of their communications apart from the little the prosecutor chose to reveal in his declaration.

The prosecutor waited to report the violation to defense counsel until January 11, 2011, almost a week after learning about the eavesdropping and just a few days before the January 14 hearing on the post-trial motions. CP 220. The defense requested police reports and other

discovery pertaining to the detective's investigation of the L.P. interview, but the prosecutor refused to respond to these requests. CP 277.

At the hearing, the prosecutor described the detective's conduct as "egregious." CP 590. The trial court concurred, and even recognized that similar misconduct is an all-too-common phenomenon: "[C]ertainly there was police misconduct. There was, well, everybody's agreed it was egregious and it was sadly what too many police officers do with respect to the right to counsel." CP 593.

Even though the trial court recognized the seriousness of the misconduct and agreed that law enforcement officers frequently abridge the constitutional right to counsel, the court denied the defense motions, rationalizing that the misconduct had not affected the outcome of the motion for a new trial. RP 593-594.

The defense renewed its motion to dismiss and sought to compel discovery regarding Detective Johnson's involvement in the investigation of the L.P. interview and in preparing the State's response to the motion for new trial. CP 295-296.

Without submitting any factual evidence in support, the State repeatedly represented to the trial court that the prosecutor did not rely on information gleaned from the calls:

“None of the information contained in the phone calls have been relied on by the Prosecutor’s Office for any purpose with respect to the defendant’s current motion to dismiss or his motion for a new trial.” CP 188

The “contents [of the calls were] neither known nor relied upon by the State in any prosecution or, for that matter, post trial motion.” CP 189

“The defendant has not pointed to any prejudice flowing from the calls....” CP 189

“[T]he State does not know the contents of the call and has not relied upon them for any matter, current or past. For these reasons, the defense motion for new trial should be denied.” CP 189

The trial court denied the motions, CP 372, and the defendant appealed.

Before the Court of Appeals, the State made similar representations, again offering no evidence to support its assertions. Respondent’s Br. at 2, 13, 22, 27-28 (excerpts attached as App’x A hereto); State’s Answer to WACDL’s Amicus Curiae Brief at 5-7 (excerpts attached as App’x B hereto).

The majority agreed that Detective Johnson’s intrusion upon the defendant’s right to counsel was “plainly egregious,” “astonishing,” “inexcusable,” “odious,” and “offensive and unscrupulous.” *Peña-Fuentes*, 172 Wn. App. at 757, 765. Nonetheless, it affirmed the trial court’s denial of the defendant’s motion because it believed that the “odious conduct had no effect on the fairness of the trial itself.” *Id.* at 764. The majority also affirmed the denial of the defendant’s motion to compel discovery, taking a narrow view of defendant’s discovery rights and

completely ignoring that the discovery requested is necessary if prejudice is an element of proof. *Id.* at 765.

Judge Becker dissented, reasoning that the charges against the defendant should have been dismissed because the prejudice arising from Detective Johnson's misconduct cannot be isolated. Judge Becker noted that the motion for a new trial "had a reasonable chance of securing a new trial for the defendant, depending on how the trial court evaluated the new evidence obtained from the videotaped interview." *Id.* (Becker, J., dissenting). She concluded that dismissal was the only proper remedy:

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

*Id.* at 765-66.

#### IV. ARGUMENT

##### A. The State's Eavesdropping on Attorney-Client Conversations Mandates Dismissal

As the Court of Appeals correctly recognized, Washington law presumes that a deliberate intrusion into attorney-client communications causes prejudice. The Court of Appeals properly characterized the central issue in this appeal:

The purposeful and unjustified invasion of attorney-client communication by law enforcement is inexcusable. In this case,

a detective listened to several recorded telephone calls between the defendant and his attorney. This is plainly egregious misconduct, and gives rise to a presumption of prejudice.

*Fuentes*, 295 P.3d at 253. Incomprehensibly, however, the majority's opinion requires the defendant to prove prejudice, even though the Court denied the defendant access to information necessary for such proof. This Court should hold that dismissal is automatically required when the State eavesdrops on attorney-client communications. In the alternative, if dismissal is not automatic in all such cases, it should be required unless the State proves beyond a reasonable doubt that the invasion of the attorney-client privilege did not prejudice the defendant.

**1. The protection of attorney-client communications is essential to effective representation**

The protection of client confidences is a fundamental component of the right to counsel recognized by the Fifth and Sixth Amendments to the United States Constitution and Amendment 10 to Article 1, Section 22, of the Washington State Constitution. Effective representation includes the right to communicate in private. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). Accordingly, the attorney-client privilege protects communications and advice between an attorney and client, including telephone calls. *Cory*, 62 Wn.2d at 375; *State v. Perrow*, 156 Wn. App. 322, 328, 231 P.3d 853 (2010).

The purpose of the privilege is "to allow the client to communicate

freely with an attorney without fear of compulsory discovery.” *Perrow*, 156 Wn. App at 328 (citing *Dietz v. Doe*, 131 Wn.2d 835, 842, 843, 935 P.2d 611 (1997)). The privilege encourages a client to make a full disclosure to his or her attorney, enabling the attorney to render effective legal assistance. *Cory*, 62 Wn.2d at 374, *Perrow*, 156 Wn. App at 328, citing *R.A. Hanson Co. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1993), *rev. denied*, 129 Wn.2d 1010, 917 P.2d 130 (1996).

Intentional interception by law enforcement of these privileged communications violates the right to counsel because it may result in the prosecutor’s use of confidential defense strategy to prepare the State’s case, the use of tainted evidence against the defendant at trial, and in the destruction of the defendant’s confidence in his or her attorney. *Cory*, 62 Wn.2d at 374; *Weatherford v. Bursey*, 429 U.S. 545, 558, 9 S. Ct. 837, 51 L.Ed.2d 30 (1977); *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir.1980). This threatens the ability of a defendant to adequately prepare to face charges:

The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself.

*United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978).

The six separate fifteen-minute phone calls between attorney Hansen and his client were protected by the attorney-client privilege. Law enforcement eavesdropping on these calls violated this privilege and the defendant's right to counsel. As in *Cory*, "not only was the conduct... in violation of the constitutional provisions assuring the right to counsel, but also of the statutory law, RCW 5.60.060(2), which establishes that communication between an attorney and his client shall be privileged and confidential." *Cory*, 62 Wn.2d at 377.

**2. Eavesdropping on attorney-client communications is presumptively prejudicial, requiring automatic dismissal**

Because the sanctity of attorney-client communications is so central to the constitutional right to counsel, courts need to address intrusions by the State into the attorney-client relationship not only to remedy the prejudice to the defendant, but also to prevent future misconduct.

Washington courts have recognized that the *only* way to effectively deter future misconduct is through dismissal:

We do not think, however, that the granting of a new trial is an adequate remedy for the deprivation of the right to counsel where eavesdropping has occurred.

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

*Cory*, 62 Wn.2d at 376-77. *See also Perrow*, 156 Wn. App. at 328. In the case at bar, the trial court did not even grant a new trial, and the Court of Appeals affirmed the conviction. This sanctioning of police misconduct invites, rather than deters, government misconduct, contrary to the teaching of *Cory*.

Washington courts presume that intrusions by the State into the attorney-client relationship result in prejudice. *Cory*, 62 Wn.2d at 376-77; *State v. Granacki*, 90 Wn. App. 598, 603-04, 959 P.2d 667 (1998). In *Cory*, this Court held that the intrusion required dismissal of the charges, because “[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this.” 62 Wn.2d at 376-77; *see also Granacki*, 90 Wn. App. at 604. Likewise, in *State v. Garza*, 99 Wn. App. 291, 300-01, 994 P.2d 868 (2000), the Court of Appeals held that jail officers’ search for, confiscation of, and perusal of legal documents from inmates gave rise to a presumption of prejudice. Even the Court of Appeals in this case recognized the presumption, and that it was triggered by the facts of this case:

In this case, a detective listened to several recorded telephone calls between the defendant and his attorney. This is plainly egregious misconduct, and *gives rise to a presumption of prejudice*.

*Peña-Fuentes*, 172 Wn. App. at 757 (emphasis added).

It is questionable whether, under Washington law, the

“presumption” of prejudice can be rebutted in any case. In *Cory*, this Court counseled courts to avoid “indulg[ing] in nice calculations as to the amount of prejudice” that arises from denial of the right to counsel. 62 Wn.2d at 376 (quoting *Glasser v. United States*, 315 U.S. 60 (1942)). *Cory* held that the fact of eavesdropping “vitiates the whole proceeding” and required the judgment and sentence to be set aside and the charges dismissed. The Court’s analysis did not include any discussion of whether or how much prejudice actually resulted from the State’s misconduct in that case.

The Court of Appeals in *Perrow*, 156 Wn. App. 322, reached the same result. There, the police seized and reviewed notes made by the defendant at the direction of counsel, even though the defendant told the police that the notes were privileged. The Court of Appeals held that the writings were privileged and that the review of the documents “is by definition so egregious that *prejudice is presumed* and dismissal warranted.” *Perrow*, 156 Wn. App. at 327-28 (emphasis added). *See also Osborn v. Shillinger*, 861 F.2d 612, 626 (10th Cir. 1988).

In this case, Judge Becker criticized the Court of Appeals for engaging in the same “nice calculations as to the amount of prejudice” that *Cory* warned against. 172 Wn. App. at 765-66 (Becker, J., dissenting). As in *Cory* and *Perrow*, she focused on the egregiousness of the misconduct rather than trying to calculate the actual impact of that misconduct—an

impact that in any case is unknowable. Judge Becker's approach is correct, and should be adopted by this Court. If the State eavesdrops on attorney-client communications, prejudice should be presumed and automatic dismissal should be required.

**B. If the Court Finds that the Presumption of Prejudice Is Rebuttable, the Defendant Should Be Entitled to Discovery and the State Should Have the Burden to Establish Lack of Prejudice Beyond a Reasonable Doubt**

If the Court determines that the presumption of prejudice is rebuttable, two threshold issues need be addressed: First, who bears the burden of proving the presence or absence of prejudice? Second, what is the standard of proof?

**1. The State should be required to prove the absence of prejudice beyond a reasonable doubt**

Given the gravity of the constitutional right at issue, the State should be required to prove beyond a reasonable doubt that its misconduct did not prejudice the defendant. *See, e.g., Granacki*, 90 Wn. App. at 602 n.3 (“Even under CrR 8.3(b), the burden is on the State to prove beyond a reasonable doubt that there was no prejudice to the defendant); *see also People v. Jordan*, 217 Cal. App. 3d 640, 645-46, 266 Cal. Rptr. 86 (1990) (burden of clear and convincing evidence on State to establish that it had not eavesdropped on attorney-client communications after defendant made *prima facie* showing that prison conference rooms were wired with electronic monitoring equipment).

In *Granacki*, the Court of Appeals affirmed the trial court's dismissal of charges against the defendant after a police officer assisting the prosecutor read defense counsel's notes that were left on the counsel table during a trial recess. The notes contained a distillation of conversations between the attorney and the defendant.

The trial court did not say what standard of proof it was applying, but its dismissal of the charges suggests either that the court believed dismissal should be automatic, or at a minimum, that it was requiring the prosecution to prove lack of prejudice beyond a reasonable doubt. The Court of Appeals recognized that the prejudicial impact of the State's misconduct was uncertain because the officer had not communicated the privileged information to the prosecutor, but affirmed dismissal because the information might have affected the officer's testimony or his comments to the prosecutor. 90 Wn. App. at 602-04. The Court held that even though the detective did not communicate any information to the prosecutor, his knowledge might indirectly help the State by affecting the way that he participated in, thought about, and talked about the case. *Id.*<sup>1</sup>

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<sup>1</sup> The Court of Appeals also noted in *dicta* in *Granacki* that the trial court would not have abused its discretion by barring the officer from the courtroom instead of dismissing the charges. In the instant case, however, the detective continued working on the case for eleven days after listening to the recorded conversations, providing ample time for his knowledge to be filtered through to the prosecutor. Further, the prosecutor used the detective's work product prepared after the eavesdropping. By the time the trial court was apprised of the misconduct, it was too late to isolate the prejudice.

**2. The defendant should be allowed discovery**

If this Court determines that the presumption of prejudice can ever be rebutted, the defendant must be allowed discovery to permit him access to information relevant to the presence or absence of prejudice. In this case, the determination of the lower court that no prejudice occurred was based solely on a record fashioned by the State. The State produced two pieces of evidence: an otherwise privileged email from the detective to the prosecutor, and a declaration from the prosecutor stating that he did not rely on any information about the calls that he received from the defendant. The State was allowed to shield all communications and documents relevant to what the detective learned from the eavesdropping and how that information may have been used in the State's successful opposition to the defendant's post-trial motions.

The defendant should be permitted to probe the veracity of the State's assertion that the detective's misconduct did not affect the outcome of the post-trial motions. Even if he did not share the contents of the calls with the prosecutor directly, the information the detective gleaned from the calls likely enhanced his work product on the case to the State's benefit. For example, it might have assisted him in framing questions for L.P., in preparing her declaration, and in persuading her to sign it.

The defendant *must* be allowed discovery of the facts relevant to

prejudice in order to rebut the prosecution's attempt to show lack of prejudice. The State is the sole custodian of these facts. Without presentation of all evidence relevant to this inquiry, the trial cannot possibly have performed an adequate analysis of whether prejudice occurred. Only the detective's notes, reports, and other documents prepared by the detective and prosecutor can reveal what information was gained from eavesdropping and how it was used.

CrR 4.7(e)(1) grants the trial court broad authority to require the prosecution to disclose any relevant information on a showing of materiality and reasonableness. The information that must be disclosed should be no different from that which Washington courts have long recognized to be appropriate in civil cases where parties are entitled to discovery of facts material to an element of proof. *See, e.g., Hertog v. City of Seattle*, 88 Wn. App. 41, 51, 943 P.2d 1153 (1997) (“‘Good cause’ for discovery is present if information sought is material ... to establishment of the movant's claim or that denial of production would cause the moving party hardship or injustice.”) (citing *Black's Law Dictionary* 692 (6th ed. 1990)) (citations omitted), *aff'd* 138 Wn.2d 265, 979 P.2d 400 (1999). A similar principle is appropriate under CrR 4.7, given its objective of “meet[ing] the requirements of due process.” *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988).

As this Court has observed, “the rules of discovery are designed to enhance the search for truth in both civil and criminal litigation ... in a manner which will ensure a fair trial to all concerns, neither according to one party an unfair advantage nor placing the other at a disadvantage.” *State v. Pawlyk*, 115 Wn.2d 457, 471, 800 P.2d 338 (1990) (quoting *State v. Boehme*, 71 Wn.2d at 621, 632-33. Here, discovery must be granted to ensure that the State is not at an unfair advantage.

**3. Discovery is not shielded by the attorney-client privilege**

The information and documents requested by the defendant cannot be protected from discovery by the attorney-client privilege or the work product doctrine. A party waives the attorney-client privilege and subjects itself to discovery where, as here, it selectively discloses privileged information or documents, especially when the disclosure is made to obtain a tactical advantage.

*Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945), explained the reasons for this rule. The plaintiff, an attorney acting as executor for an estate, had to establish that the decedent had delivered a deed to him. The plaintiff testified that he had received the deed from the decedent, invoking a presumption that the decedent had proper possession of the deed. The defendant disputed this fact, but the trial court ruled for the plaintiff.

This Court reversed, finding that discovery was necessary as to all

evidence “respecting the question now under discussion,” and remanded the case. *Id.* at 514. The Court found that the plaintiff had waived the attorney-client privilege by testifying “to a specific fact for the sole purpose of creating the presumption vital to the establishment of his case.” *Id.* The plaintiff “could not be permitted to disclose so much of the transaction as he saw fit and then withhold the remainder.” *Id.* See also *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981) (applying the same rule). Waiver also applies to documents otherwise protected by the work product doctrine. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002). Here, the State has waived any otherwise-applicable privilege by selectively disclosing information and using the testimony of the prosecutor to attempt to establish lack of prejudice.<sup>2</sup>

The State cannot have it both ways— it may not use confidential attorney-client information gleaned from the defendant as a sword, but shield its own otherwise privileged communications from discovery.

## V. CONCLUSION

To protect the rights of this defendant, and all criminal defendants, the Court should reverse the trial court and Court of Appeals and dismiss the charges in this case.

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<sup>2</sup> Additionally, even absent waiver, a party may be required to disclose work product upon a showing of substantial need by the other party, especially when “crucial information is in the exclusive control of the opposing party.” *Pappas v. Holloway*, 114 Wn.2d 198, 210, 787 P.2d 30 (1990).

DATED: July 31, 2013

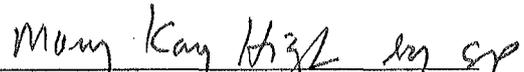
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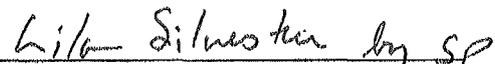
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DATED: July 31, 2013

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**PROOF OF SERVICE**

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

On the 31st day of July, 2013, I caused to be sent by messenger one true copy of Petitioner's Supplemental Brief of *Amicus Curiae* and Appendix in Support directed to attorneys for Respondent:

Daniel T. Satterberg,  
King County Prosecuting Attorney  
Brian M. McDonald,  
Senior Deputy Prosecuting Attorney  
Office of the King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104

And by messenger to counsel for Petitioner:

Richard M. Hansen  
Allen, Hansen & Maybrown, P.S.  
600 University Street, Suite 3020  
Seattle, WA 98101

DATED at Seattle, Washington this 31st day of July, 2013.

  
\_\_\_\_\_  
Tabitha Moe, Legal Secretary  
Perkins Coie LLP

No. 88422-6

---

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**JORGE PEÑA-FUENTES,**

**Petitioner.**

---

**APPENDIX IN SUPPORT OF SUPPLEMENTAL BRIEF OF  
AMICUS CURIAE WASHINGTON ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS**

---

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# APPENDIX A

66708-4

66708-4

NO. 66708-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,  
Respondent and Cross-Appellant,

v.

JORGE PENA-FUENTES,  
Appellant and Cross-Respondent.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE RONALD KESSLER

**BRIEF OF RESPONDENT AND CROSS-APPELLANT**

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King County Prosecuting Attorney

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included calls between the defendant and his attorney, which the detective then listened to. Given that these events occurred only after the jury had convicted the defendant and that the detective never communicated the substance of what he heard to the prosecutor, has Pena-Fuentes failed to establish that the trial court abused its discretion in denying his motion to dismiss the case?

2. After trial was concluded and the trial court denied his motion to dismiss, Pena-Fuentes demanded all information relating to a witness tampering investigation where he and his relatives were suspects. Has Pena-Fuentes failed to show that the trial court abused its discretion in denying this discovery request?

3. At trial, Pena-Fuentes agreed to an instruction limiting the jury's consideration of Exhibit 2 to impeachment purposes. However, in a motion for new trial, he argued that Exhibit 2 should have been admitted as substantive evidence. Given that none of the grounds for granting a new trial under CrR 7.5 apply, has Pena-Fuentes failed to show the trial court abused its discretion in denying his motion for a new trial?

4. Pena-Fuentes' assignment of error no. 4 contains no legal argument supporting it. Should this Court decline to consider it?

The record is not clear why the calls between Pena-Fuentes and attorney Hansen were recorded. The procedure at the King County jail is that "[a]ll telephone calls made by an inmate of the jail to a person other than the inmate's attorney are recorded and subject to monitoring." State v. Modica, 136 Wn. App. 434, 439, 149 P.3d 446 (2006), aff'd, 164 Wn.2d 83, 186 P.3d 1062 (2008). Attorney phone numbers are entered into the jail's computer system in order to ensure that those calls are not recorded. RP 579. When the trial court inquired, attorney Hansen represented that his phone number was registered with the jail, but that "[t]he jail somehow screwed up." Id.

On January 11, 2011, the prosecutor informed defense counsel that the detective had listened to the recorded phone calls. CP 220. The next day, Pena-Fuentes filed a motion to dismiss the convictions under CrR 8.3(b). CP 77-80. As part of the State's response to this motion, the prosecutor represented to the court that he was unaware of the substance of the calls between Hansen and Pena-Fuentes and that, "I have not relied upon the information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the defendant's motion for a new trial." CP 220.

CrR 8.3(b). This argument is without merit. The trial court has considerable discretion in determining the remedy when there is governmental misconduct. Here, the detective listened to the taped conversations only after the jury had rendered their verdicts, and the substance of any of the conversations was not communicated to the prosecutor or used in responding to the defendant's motion for a new trial. The trial court acted well within its discretion in denying the defendant's motion to dismiss the case.

The trial court's power to dismiss under CrR 8.3(b) is discretionary, and the decision is reviewable only for manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Dismissal is an extraordinary remedy, 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). To justify dismissal, the defendant must show actual prejudice; the mere possibility of prejudice is insufficient. State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010).

Pena-Fuentes has not shown that the trial court abused its discretion in this case. The United States Supreme Court has rejected a per se rule that any government intrusion into private attorney-client communications establishes a violation of the Sixth

In State v. Perrow, 156 Wn. App. 322, 325, 231 P.3d 853 (2010), before charges were filed, a detective seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered them to the prosecutor. The trial court dismissed the case, finding that the detective's conduct violated Perrow's constitutional right to counsel and his right to privileged communication with his attorney. Id. at 327. A two-judge majority for the Court of Appeals affirmed, characterizing the detective's behavior as "egregious" and holding that "[a]s in Cory, it is impossible to isolate the prejudice presumed from the attorney-client privilege violation." Id. at 331-32.

Detective Johnson's conduct cannot be placed on the same level as the conduct in Cory and Perrow. Detective Johnson did not listen to the telephone calls for the purpose of eavesdropping on attorney-client communications. He reported that he had heard such calls, and he did not communicate the information to anyone else. The behavior occurred after the jury rendered its verdict and could not have affected the trial or the jury's decision.

Pena-Fuentes attempts to link the misconduct with his motion for a new trial and insinuates that the detective was instrumental in defeating his motion for a new trial. However, the

notion that the detective gleaned information from the taped calls and that such information was used in responding to the motion for a new trial is completely unsupported by the record. The prosecutor represented under oath that he had "not relied upon the information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation of the defendant's motion for a new trial." CP 220.

The only factual information offered by the State in response to the motion for a new trial was L.P.'s declaration. CP 213-14. That declaration was submitted by the prosecutor, and, contrary to Pena-Fuentes' assertions on appeal, there was no evidence that Detective Johnson had listened to the telephone conversations at the time the declaration was signed.<sup>9</sup> The trial court did not abuse its discretion in denying the motion to dismiss.

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<sup>9</sup> In his brief on appeal, Pena-Fuentes repeatedly claims that *after* the detective listened to the taped attorney-client phone calls, he was involved in obtaining L.P.'s declaration. Appellant's Opening Brief at 17, and 23 n.3. Pena-Fuentes provides no citation to the record to support these assertions, and, in fact, there is no evidence in the record to support them. The record establishes that the jail produced the calls to the detective on December 26, 2010, and the detective did not report to the prosecutor that he actually had listened to the calls until January 5, 2011. CP 198, 218. L.P.'s declaration was signed a week earlier, on December 28, 2010. CP 214.

# APPENDIX B

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NO. 66708-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent and Cross-Appellant,

v.

JORGE PENA-FUENTES,

Appellant and Cross-Respondent.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RONALD KESSLER

---

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

---

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King County Prosecuting Attorney

BRIAN M. McDONALD  
Senior Deputy Prosecuting Attorney  
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CrR 8.3(b). The trial court's decision is reviewed for a manifest abuse of discretion. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. Id. WACDL does not argue that the trial judge's decision in this case was manifestly unreasonable.

WACDL insists that prejudice must be presumed, claiming that the intrusion into attorney-client communications was both purposeful and without legitimate justification. However, the State did not obtain the recording of the jail calls for the purpose of listening to Pena-Fuentes's calls with his attorney. Instead, at the request of the prosecutor, the detective legitimately obtained the recording of Pena-Fuentes's jail calls in order to investigate a possible witness tampering charge. CP 220. For reasons that are unclear from this record,<sup>1</sup> the disks of these recorded calls provided by the jail included calls between Pena-Fuentes and his attorney. When the prosecutor learned that some of the calls were between

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<sup>1</sup> The record does not clearly indicate why the calls between Pena-Fuentes and attorney Hansen were included on the disks. After talking to the jail, the prosecutor informed Hansen that he needed to provide his office's phone number to the jail. CP 220. Attorney Hansen insisted that his number had been registered with the jail and that the jail had made a mistake. RP 579.

Pena-Fuentes and his attorney, the prosecutor took immediate steps to avoid any possible prejudice; he told the detective not to disclose what he heard, and arranged to have the detective removed from any further involvement in the case.<sup>2</sup> CP 220. As Pena-Fuentes characterized it; "[the prosecutor] acted responsibly, refused to listen to the tapes and advised the undersigned counsel of the problem." CP 77. The State's intrusion cannot be characterized as purposeful.

Moreover, under the unique facts of this case, the State established that Pena-Fuentes suffered no actual prejudice. The intrusion into the attorney-client communications occurred several months *after* the jury found Pena-Fuentes guilty. The State did not use and could not have used any information gleaned from the conversations in the taped telephone calls in order to convict Pena-Fuentes.

WACDL suggests that the State somehow used information from the calls in responding to Pena-Fuentes's motion for a new trial and, without any support in the record, characterizes the

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<sup>2</sup> WACDL claims that the "detective admitted that the calls included discussion of the contested tape at issue." Brief of Amicus Curiae of WACDL at 3. In fact, the detective did not discuss the content of the calls, and WACDL's citation to support this assertion is a brief e-mail from a jail sergeant stating the date that he sent the disks of calls to the detective. CP 218.

detective as the "architect" of the State's opposition to the post-trial motion. Brief of Amicus Curiae of WACDL at 15. The State's opposition to Pena-Fuentes's motion for a new trial consisted of legal briefing prepared by the prosecutor and a declaration the prosecutor obtained from L.P.<sup>3</sup> CP 199-214. In a sworn declaration, the prosecutor stated that he was unaware of the substance of the calls between Pena-Fuentes and his lawyer and that he had "not relied upon the information that may be contained in the calls between Mr. Hansen and the defendant for any purpose, including trial preparation or the defendant's motion for a new trial." CP 220. The trial court was not required to presume that the prosecutor was lying, and, in fact, had the discretion to accept the truth of his remarks.

Finally, WACDL does not acknowledge that even when prejudice is presumed or found, the trial court retains considerable discretion in fashioning an appropriate remedy.<sup>4</sup> The courts have repeatedly recognized that dismissal is an extraordinary remedy,

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<sup>3</sup> WACDL claims that Detective Johnson obtained this declaration from L.P. Brief of Amicus Curiae of WACDL at 2. However, there is no support in the record for this assertion, and WACDL simply cites to the declaration itself, which was prepared on the King County Prosecuting Attorney's pleading paper. CP 150-51.

<sup>4</sup> Similarly, Pena-Fuentes argued that the trial court had no discretion but to dismiss the case. CP 273; RP 579.

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**To:** Moe, Tabitha (Perkins Coie)  
**Cc:** Peterson, Sherilyn (Perkins Coie)  
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Rec'd 7-31-13

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**Subject:** State v. Jorge Pena-Fuentes, No. 88422-6 - Amicus Curiae

Good morning,

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

Case Name: State v. Jorge Pena-Fuentes  
Case Number: 88422-6  
Attorney: Sherilyn Peterson  
Phone: (206) 359-8320  
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Thanks,

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