

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
May 29, 2015, 2:30 pm  
BY RONALD R. CARPENTER  
CLERK

E CRF  
RECEIVED BY E-MAIL

NO. 90939-3

---

SUPREME COURT OF THE STATE OF WASHINGTON

---

ROMAN M. FEDOROV,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

---

BRIEF OF AMICUS CURIAE

WASHINGTON STATE PATROL &  
WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

---

ROBERT W. FERGUSON  
Attorney General

SHELLEY A. WILLIAMS  
WSBA NO. 37035  
JESSICA E. FOGEL  
WSBA NO. 36846  
Assistant Attorneys General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-6430  
OID NO. 91093



ORIGINAL

**TABLE OF CONTENTS**

I. IDENTITY AND INTEREST OF AMICUS CURIAE .....1

II. ISSUE ADDRESSED BY AMICUS .....3

III. STATEMENT OF THE CASE .....3

IV. ARGUMENT .....3

    A. An Objective Test that Considers the Totality of the Factual Circumstances Should Evaluate Whether an Officer’s Presence in the Room During a Suspect’s Call with an Attorney Denies the Suspect Reasonable Access to Counsel. ....4

        1. Washington courts apply CrR 3.1’s term “feasible” by considering the totality of the factual circumstances. ....5

        2. Washington precedent supports an objective test that balances the interests at play during an impaired driving investigation. ....6

        3. Persuasive authority supports a totality of the circumstances test that objectively balances the interests at play. ....12

        4. An objective, totality of the circumstances test provides certainty for courts, officers, and attorneys providing legal counsel to suspects. ....14

    B. An Officer has No Incentive to Surreptitiously Listen to a Conversation Between a Suspect and an Attorney Because of a Trial Court’s Discretion to Impose Prophylactic Remedies.....16

V. CONCLUSION .....18

## TABLE OF AUTHORITIES

### Cases

<i>Arizona v. Holland</i> , 147 Ariz. 453, 711 P.2d 592 (1985) .....	13, 14
<i>City of Airway Heights v. Dilley</i> , 45 Wn. App. 87, 724 P.2d 407 (1986) .....	5
<i>City of Bellevue v. Ohlson</i> , 60 Wn. App. 485, 803 P.2d 1346 (1991) .....	8
<i>City of Grand Forks v. Soli</i> , 479 N.W.2d 872 (N. D. 1992) .....	13, 16
<i>City of Seattle v. Koch</i> , 53 Wn. App. 352, 767 P.2d 143, <i>review denied</i> , 112 Wn.2d 1022 (1989) .....	9, 15
<i>City of Seattle v. Sandholm</i> , 65 Wn. App. 747, 829 P.2d 1133 (1992) .....	5
<i>City of Spokane v Kruger</i> , 116 Wn.2d 135, 803 P.2d 305 (1991) .....	17
<i>City of Tacoma v. Heater</i> , 67 Wn.2d 733, 409 P.2d 867 (1966) .....	7, 11
<i>Comm'r Of Pub. Safety v. Campbell</i> , 494 N.W.2d 268 (Minn. 1992) .....	12
<i>Dep't of Pub. Safety v. Kneisl</i> , 312 Minn. 281, 251 N.W.2d 645 (Minn. 1977) .....	15, 17
<i>Farrell v. Mun. of Anchorage</i> , 682 P.2d 1128 (Alaska Ct. App. 1984) .....	12
<i>Heinemann v. Whitman Cnty. of Wash. Dist. Ct.</i> , 105 Wn.2d 796, 718 P.2d 789 (1986) .....	7

<i>People v. Gursev</i> , 22 N.Y.2d 224, 239 N.E.2d 351 (App. Div. 1968).....	7
<i>Pfeil v. Rutland Dist. Ct.</i> , 147 Vt. 305, 515 A.2d 1052 (Vt. 1986).....	14
<i>State v. Cory</i> , 62 Wn.2d 371, 382 P.2d 1019 (1963).....	16
<i>State v. Fedorov</i> , 183 Wn. App. 736, 335 P.3d 971 (2014), <i>review granted</i> , 182 Wn.2d 1021, 345 P.3d 785 (2015).....	3, 9, 16
<i>State v. Fuentes</i> , 179 Wn.2d 808, 318 P.3d 257 (2014).....	16, 17
<i>State v. Glessner</i> , 50 Wn. App. 397, 748 P.2d 280 (1988), <i>review denied</i> 110 Wn.2d 1031 (1988).....	6, 15
<i>State v. Staeheli</i> , 102 Wn.2d 305, 685 P.2d 591 (1984).....	8
<i>Vermont v. Lombard</i> , 146 Vt. 411, 505 A.2d 1182 (1985).....	8, 16
<i>Vermont v. West</i> , 151 Vt. 140, 557 A.2d 873 (Vt. 1988).....	14, 15

**Statutes**

RCW 46.61.502(1)(a) .....	1
RCW 46.61.502(4)(a) .....	1
RCW 46.61.506(4)(a)(ii)-(iii) .....	2, 8

**Rules and Regulations**

WAC 448-16-020..... 2

CrR 3.1 ..... passim

CrR 3.1(b)(1)..... 5

CrR 3.1(c)(1)..... 5

## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Patrol (Patrol) is the largest law enforcement agency in the State of Washington. The Patrol's primary responsibilities are enforcing traffic laws and keeping our roadways safe. The Patrol's officers conduct scores of impaired driving investigations every day. The Washington Department of Fish and Wildlife (WDFW) officers have general law enforcement authority and specific responsibility to enforce fishing and hunting laws. They enforce impaired driving, boating, and hunting laws, often in remote regions of this state.

The Patrol and WDFW have an interest in this case because the bright-line rule that Petitioner Roman Fedorov seeks could substantially undermine their ability to investigate impaired drivers. Time is of the essence in such investigations, and facilities that afford individuals with the complete privacy Mr. Fedorov seeks are not always available. Under Washington law, a breath test for alcohol concentration should occur within two hours of driving. *See* RCW 46.61.502(1)(a).<sup>1</sup> Additionally, an officer must observe the suspect for fifteen minutes before taking the breath alcohol test to ensure that the suspect does not impact the test result

---

<sup>1</sup> A breath test result "obtained more than two hours after the alleged driving" has more limited evidentiary value as it "*may* be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more . . . and in any case in which the analysis shows an alcohol concentration above 0.00 *may* be used as evidence that a person was under the influence of or affected by intoxicating liquor[.]" *See* RCW 46.61.502(4)(a) (emphasis added).

by vomiting, eating, drinking, smoking, or placing foreign substances in his or her mouth. *See* RCW 46.61.506(4)(a)(ii)-(iii).

The specialized breath testing machines are specifically approved by the Washington State Toxicologist, WAC 448-16-020, and usually housed in law enforcement facilities. As a result, an officer must often transport an impaired driving or boating suspect to a particular facility to perform a breath test.

These facilities are not all uniform and, like the City of Fife jail in this case, may lack a designated space where a suspect can privately confer with an attorney while remaining under the officer's direct observation. The practicalities of location, fleeting evidence, and security concerns may prevent an officer in such facilities from providing complete privacy to a suspect speaking to an attorney over the phone.

In this case, Mr. Fedorov proposes a novel rule: an officer's presence in the same room as a suspect during a phone call with counsel is a *per se* violation of CrR 3.1 and compels suppression of the breath test results. This result is too extreme. The proposed test disregards the reality of many facilities and overlooks Washington precedent that considers the totality of the circumstances when applying CrR 3.1 to specific factual situations. Accordingly, the Patrol and WDFW respectfully request that this Court apply an objective test that considers the totality of the

circumstances to determine if a law enforcement officer honored a suspect's CrR 3.1 right to counsel. This analysis strikes the appropriate balance between a suspect's right to confer with an attorney and an officer's responsibility for the suspect's safety and collection of fleeting evidence.

## II. ISSUE ADDRESSED BY AMICUS

Should the Court apply an objective test that considers the totality of the factual circumstances to evaluate whether an officer remaining in the room when a suspect speaks with an attorney violates the CrR 3.1 right to counsel?

## III. STATEMENT OF THE CASE

The Patrol and WDFW adopt the statement of facts as set forth in the Court of Appeals opinion, *State v. Fedorov*, 183 Wn. App. 736, 335 P.3d 971 (2014), *review granted*, 182 Wn.2d 1021, 345 P.3d 785 (2015).

## IV. ARGUMENT

The Court of Appeals properly held that, under the totality of the circumstances, the officer's mere presence in the room while Mr. Fedorov spoke with an attorney did not violate the rule-based right to reasonable access to counsel. For decades, Washington courts have recognized that CrR 3.1's right to an attorney is not absolute. The rule provides for reasonable, but not unlimited, access to an attorney. Case law establishes

that reasonable access does not mean that a suspect must meet with an attorney in person, or speak with the attorney of his or her choosing. Likewise, the rule does not mandate, without the balancing of other competing considerations, that a phone call with an attorney occur without anyone else present in the room.

There are two reasons for this result: (1) Washington precedent and that of other states require *reasonable* access to an attorney, taking into account the varied factual circumstances surrounding an arrest; and (2) in the event an unscrupulous officer eavesdropped on and noted the details from an attorney-client privileged conversation, a trial court has prophylactic remedies at its disposal.

**A. An Objective Test that Considers the Totality of the Factual Circumstances Should Evaluate Whether an Officer's Presence in the Room During a Suspect's Call with an Attorney Denies the Suspect Reasonable Access to Counsel.**

CrR 3.1 does not lend itself to mechanical and absolute application. This Court's application of CrR 3.1's language recognizes a balancing of the interests at stake during an impaired driving investigation and subsequent request for a breath test. An objective, totality-of-the-circumstances test satisfies the letter and spirit of the rule. This Court should affirm.

1. **Washington courts apply CrR 3.1's term "feasible" by considering the totality of the factual circumstances.**

The fundamental flaw with Mr. Fedorov's argument is that he overlooks the term "feasible" in CrR 3.1. The language of this rule shows that the right to counsel depends on the situation's specific circumstances.

CrR 3.1(b)(1) provides:

The right to a lawyer shall accrue as soon as *feasible* after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

(emphasis added). This language stands in contrast to CrR 3.1(c)(1) that requires "[w]hen a person is taken into custody that person *shall immediately* be advised of the right to a lawyer." (emphasis added).

Consistent with this language, Washington courts have interpreted the scope of the suspect's rule-based right to counsel as what is reasonable considering the factual circumstances. CrR 3.1 "require[s] more an opportunity, rather than actual communication with an attorney." *City of Airway Heights v. Dilley*, 45 Wn. App. 87, 93, 724 P.2d 407 (1986) (holding that repeated and unsuccessful attempts to reach an attorney satisfied CrR 3.1.). By the same token, "nothing in the rule provides for access to counsel of [the suspect's] choice." *City of Seattle v. Sandholm*, 65 Wn. App. 747, 751, 829 P.2d 1133 (1992).

The feasibility of providing an attorney to a suspect depends on the circumstances accompanying the arrest and subsequent request for breath or blood testing. For example, a failure to advise a badly injured suspect of his right to counsel did not violate CrR 3.1 because “it was not feasible” to do so. *State v. Glessner*, 50 Wn. App. 397, 401, 748 P.2d 280, *review denied*, 110 Wn.2d 1031 (1988). By the same reasoning, CrR 3.1’s language does not absolutely bar an officer from remaining in the room with a suspect during a phone call with an attorney.

Rather, the rule’s language asks whether the circumstances made it feasible for the officer to leave the room. In some facilities, the officer can observe the suspect through a window while the suspect speaks with an attorney. Other facilities do not have such rooms and it is not feasible to provide complete privacy. The rule’s language allows for these various possibilities. Accordingly, CrR 3.1 requires a consideration of the factual circumstances to determine whether or not a suspect was denied the right to counsel by an officer remaining in the room.

**2. Washington precedent supports an objective test that balances the interests at play during an impaired driving investigation.**

An objective test that evaluates the factual feasibility of an officer leaving a suspect alone in a room to speak with an attorney is consistent with Washington precedent and the changing circumstances that

accompany impaired driving investigations. This Court is “constantly attendant to the particularities of the in-field environment [and seeks] to protect the officer, the public, and the suspect driver[.]” *Heinemann v. Whitman Cnty. of Wash. Dist. Ct.*, 105 Wn.2d 796, 799, 718 P.2d 789 (1986). An objective test that considers the factual circumstances strikes the balance between preserving a suspect’s right to legal counsel and an officer’s duty to collect evidence and preserve public safety.

“[A] balancing of values . . . is traditional, in fact inherent, in our Anglo-American common-law, constitutional system of jurisprudence.” *City of Tacoma v. Heater*, 67 Wn.2d 733, 759, 409 P.2d 867 (1966) (Finley, J. dissenting). As such, an objective test that considers all of the factual circumstances appropriately balances the interests of the suspect, the officer, and our society.

The interests at issue during an impaired driving arrest include the suspect’s right to consult with legal counsel and the officer’s obligation to collect fleeting evidence. In an impaired driving or boating investigation “[i]t is common knowledge that the human body dissipates alcohol rapidly[.]” *People v. Gursev*, 22 N.Y.2d 224, 229, 239 N.E.2d 351 (App. Div. 1968). “If an accused has been allowed reasonable access and has made no contact with counsel, but the test can no longer be delayed, the driver must decide on his own whether he will submit to the test.” *State v.*

*Staheli*, 102 Wn.2d 305, 310, 685 P.2d 591 (1984). “The law does not require that the police discontinue their investigation because a criminal defendant is unable to contact an attorney.” *City of Bellevue v. Ohlson*, 60 Wn. App. 485, 491, 803 P.2d 1346 (1991) (citation omitted). By the same token, CrR 3.1 should not be construed to require an officer to cease observing an impaired driving suspect based solely on an attorney’s request for the officer to leave the room.

There is a short two-hour window for an officer to obtain a sample of a suspect’s breath or blood. Significant time can be expended transporting suspects to facilities with approved breath testing machines. In the case of a breath test, the officer must observe the suspect for fifteen minutes before the test. *See* RCW 46.61.506(4)(a)(ii)-(iii). Consequently, in the event the investigation is nearing the two-hour mark and the officer must observe the suspect for fifteen minutes, or there are security concerns with leaving the suspect unmonitored, the balance tips in favor of the officer remaining in the room while the suspect speaks with an attorney.<sup>2</sup>

---

<sup>2</sup> Apart from the observation requirement, there are scores of circumstances that require an officer to keep an eye on a suspect even when the suspect speaks with an attorney. For example, the officer may need to observe an aggressive or unstable suspect for security purposes. *See Vermont v. Lombard*, 146 Vt. 411, 415, 505 A.2d 1182 (1985) (“the officer’s continued presence was clearly justified by a legitimate security risk as the defendant . . . had recently left the scene of an accident and he was calling from an outdoor public phone.”). These security concerns support an objective test that considers the totality of the circumstances.

Mr. Fedorov mistakenly relies on *City of Seattle v. Koch*, 53 Wn. App. 352, 767 P.2d 143, *review denied*, 112 Wn.2d 1022 (1989), as authority that an attorney requesting an officer to leave the room requires the officer to do so. Pet. for Review at 13-14. The Court of Appeals in *Koch* applied an objective, totality-of-the-circumstances test that does not rely on any single factor, and specifically rejected the notion that such a request must always be granted:

It does not necessarily follow, however, and we do not mean to imply, that in every case where such a request *is* made, the police must grant increased privacy. This may depend on a number of factors such as the unique security and safety problems presented by a particularly uncooperative, intoxicated defendant.

53 Wn. App. at 358 n. 7 (emphasis in original). Likewise, the Court of Appeals applying a totality-of-the-circumstances test in this case does not “eviscerate” a suspect’s rule-based right to counsel. *See Fedorov*, 183 Wn. App. at 745. In some circumstances, an attorney asking for privacy may be entitled to it when an officer has no factual justification to remain in the room. But, in this case, the officer could not leave the room without losing sight of Mr. Fedorov, and the Court of Appeals observed the arresting officer’s testimony that he could “not hear [the] conversation with counsel.” *Id.* at 739-40, 745.

But, this is not to suggest that every decision made by an officer in the field necessarily weighs in the balancing test. Mr. Fedorov suggests that the officer's choice of facility should weigh into this calculus. *See* Supp. Br. of Pet'r at 19-20. While Mr. Fedorov characterizes the arresting officer transporting the suspect to another facility as an "easy option," he does not consider all the factors at play when an officer goes to a facility with a breath test machine. One facility may have several suspects waiting to use the machine. Driving another "8 to 9 minutes" may compromise the two hour window to obtain a breath test.

Moreover, an "8 to 9 minute[]" drive translates into a much longer actual delay in administering the test, as a suspect must be brought to and from a vehicle, there may be traffic, there may be security delays at either end of the trip, or a myriad of other factors. Were courts to attempt to micromanage law enforcement decisions in this manner, law enforcement would have to document a myriad of information in order to justify its decisions, like what facilities were available at the time, or the traffic conditions at the time, or the special security situations that existed at multiple other facilities. Under Mr. Fedorov's reasoning, the City of Fife jail should never be used as a breath test facility because it lacks a room where the officer can leave and continue to observe the suspect through a window, and a suspect could defeat the test simply by requesting a private

conversation. As such, the totality of the circumstances test should be limited to the circumstances presented at the facility with the breath test machine (and should not delve into every decision leading up to the officer taking the suspect to a particular police station).

And this is not to say that an objective test gives an officer carte blanche to remain in the room without some objectively reasonable explanation. Undoubtedly, “the courts do have a responsibility and the authority for taking corrective action respecting over-zealous, overly aggressive police practices[.]” *Heater*, 67 Wn.2d at 742 (Finley, J. dissenting). As discussed in Section IV. A. 3., other jurisdictions have applied a totality-of-the-circumstances test to find that an officer standing next to a suspect during a phone call with an attorney, without any reasons to do so, violated a rule or statutory right to counsel. Washington courts can likewise apply a totality-of-the-circumstances rule to objective facts to determine if the situation merited the officer remaining in the room. Accordingly, an objective test enables trial courts to properly balance the interests at stake in an impaired driving investigation. Thus, as the Court of Appeals concluded, under the totality of circumstances, Mr. Fedorov’s CrR 3.1 right was not violated.

**3. Persuasive authority supports a totality of the circumstances test that objectively balances the interests at play.**

Courts in other jurisdictions examining this question have similarly concluded that there is not an absolute right to counsel, but that courts must balance the suspect and society's interests. "The degree of privacy a person should be given to communicate with counsel must be determined by balancing the individual's statutory right in consulting privately with counsel against society's strong interest in obtaining important evidence." *Farrell v. Mun. of Anchorage*, 682 P.2d 1128, 1130 (Alaska Ct. App. 1984).

Other courts have balanced the societal interest in investigating impaired driving crimes against the officer's potential chilling effect on the conversation between the suspect and the attorney. While a suspect may feel uncomfortable speaking with an attorney on the phone when an officer stands on the other side of the room, the officer's presence is necessary "to impeach any later testimony by [a suspect who claims to ingest] something at the station [that] might have affected the test results." *Comm'r Of Pub. Safety v. Campbell*, 494 N.W.2d 268, 270 (Minn. 1992); *see also Farrell*, 682 P.2d at 1130 (recognizing the "paramount importance to the breathalyzer operator's need to maintain continuous observation of the arrestee . . . prior to the administration of the

breathalyzer test.”); *City of Grand Forks v. Soli*, 479 N.W.2d 872, 874 (N. D. 1992) (“We recognize[] that the degree of privacy to be afforded an arrested driver’s consultation with an attorney must be balanced against the need for an accurate and timely chemical test.”) (citation omitted) (internal quotation marks omitted).

Moreover, courts from other jurisdictions applying a totality-of-circumstances test shows that Mr. Fedorov’s claims of eviscerated CrR 3.1 rights are unfounded. Other jurisdictions have applied this test to find that an officer’s presence in the room during a suspect’s call to an attorney *did* violate the right to counsel because of the circumstances present in those cases.

For example, the Arizona Supreme Court found that an officer standing close to a suspect while speaking with an attorney violated the suspect’s rule-based right to counsel. *Arizona v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592 (1985). That court applied a totality of the circumstances balancing test - “[t]he state may not then, without justification, prevent access between a defendant and his lawyer . . . when such access would not unduly delay the [impaired driving] investigation and arrest.” *Id.* (citation omitted). Under this test, there is “a right to confidentiality so long as it did not impair the investigation or the accuracy of a subsequent breath test.” *Id.* at 456. Since the officer did not

provide any reason to justify standing close to the suspect while speaking to an attorney, the officer violated the suspect's rule-based right to counsel. *See id.*; *see also Pfeil v. Rutland Dist. Ct.*, 147 Vt. 305, 309-10, 515 A.2d 1052 (Vt. 1986) ("two police officers, who admit to being able to overhear [a handcuffed] defendant's entire conversation with his attorney, in a small room . . . was certainly coercive or restrictive in nature."). Accordingly, the totality of the circumstances test provides adequate safeguards to protect a suspect's rule-based right to counsel.

**4. An objective, totality of the circumstances test provides certainty for courts, officers, and attorneys providing legal counsel to suspects.**

A totality of the circumstances test applied to objective facts provides a measure of certainty in the ever changing circumstances of impaired driving enforcement. To ensure certainty, courts should use "an objective test [that] focuses on whether, under the totality of the circumstances, reasonable efforts were made to afford [a] defendant an opportunity to communicate privately with counsel." *Vermont v. West*, 151 Vt. 140, 145, 557 A.2d 873 (Vt. 1988). An objective test that evaluates the specific situation's facts provides for consistent training for law enforcement and application by courts.

An objective test also assuages Mr. Fedorov's implicit concern of "whether the officer later is able to say he did not 'recall' hearing anything

during the call.” Supp. Br. of Pet’r at 17. Under an objective test, a court considers “the nature of the physical setting within which the events take place” rather than “after-the-fact, self-serving declarations of either the police or defendant[.]” *West*, 151 Vt. at 145 (citations omitted).

An objective test achieves a common sense holding and consistent guidance for impaired driving investigations:

If security permits and a private room is available, it should be provided to counsel. If such a [private] facility is unavailable or impermissible under the circumstances, counsel should be allowed to confer with his client out of the earshot of others in the room. None of this conversation between the attorney and his client can be used against the defendant, no matter how obtained, unless the defendant agrees to the introduction of such evidence. [This is] a practical solution[.]

*Dep’t of Pub. Safety v. Kneisl*, 312 Minn. 281, 286-87, 251 N.W.2d 645 (Minn. 1977).

As illustrated by the aforementioned authorities, a police officer may take an impaired driving suspect to various locations for a breath or blood test. A facility with a breath test machine may involve an officer standing “5 to 10 feet away” from a suspect with “[a]nother officer working at the booking desk . . . walking in and out.” *Koch*, 53 Wn. App. at 354. An injured suspect may be taken to a hospital for treatment and a blood draw. *See Glessner*, 50 Wn. App. at 398. An officer may have no feasible choice other than to take a suspect to a room that measures “27

feet by 19 feet.” See *Fedorov*, 183 Wn. App. at 740. In each of these situations, an objective test will guide an officer’s actions to ensure that privacy is given when feasible.

**B. An Officer has No Incentive to Surreptitiously Listen to a Conversation Between a Suspect and an Attorney Because of a Trial Court’s Discretion to Impose Prophylactic Remedies.**

Mr. Fedorov’s proposed, per-se rule is unnecessary because a trial court can impose a remedy if an officer’s objective actions violated the suspect’s right to counsel. The Patrol and WDFW recognize and respect that “[p]olice practices which unjustifiably interfere with [a suspect’s rule-based right to counsel] cannot be tolerated.” *Lombard*, 146 Vt. at 415. Under no circumstances should a law enforcement officer “seek excuses to deny confidentiality to conversations between arrested persons and their attorneys.” *Soli*, 479 N.W.2d at 874.

But a court already has remedies when a rogue officer eavesdrops on a suspect’s privileged conversation. This Court “presume[s] that such eavesdropping results in prejudice to the defendant and ha[s] vacated criminal convictions when there was no way to isolate the prejudice to the defendant from such shocking and unpardonable conduct.” *State v. Fuentes*, 179 Wn.2d 808, 811, 318 P.3d 257 (2014) (citation omitted) (internal quotation marks omitted); see accord *State v. Cory*, 62 Wn.2d 371, 378, 382 P.2d 1019 (1963) (“eavesdropping upon the private

consultations between the defendant and his attorney, and thus depriving [the defendant] of [the] right to effective counsel, vitiates the whole proceeding.”). This Court also imposes the highest standard in evaluating whether eavesdropping prejudiced the defendant - “we hold that eavesdropping is presumed to cause prejudice to the defendant unless the State can prove *beyond a reasonable doubt* that the eavesdropping did not result in any such prejudice.” *Fuentes*, 179 Wn.2d at 812 (emphasis in original).

Where the prosecution cannot meet that burden, “suppression of any evidence acquired after a violation will serve as an effective deterrent to police misconduct.” *City of Spokane v Kruger*, 116 Wn.2d 135, 145, 803 P.2d 305 (1991); *see accord Kneisl*, 312 Minn. at 286 (“We believe that the driver’s rights are sufficiently safeguarded by a rule which forbids the use in evidence of any statements made by defendant to his counsel over the telephone which are overheard by police.”) (citation omitted).

Given these remedies and the importance of an admissible breath test result, “police will want to ensure that the results of any . . . tests they administer will be admissible[.]” *Kruger*, 116 Wn.2d at 145-46. As discussed above, an officer merely standing in the same room as the suspect during a phone call with an attorney is not akin to eavesdropping. In many cases, as in this case, the officer will stand out of earshot of the

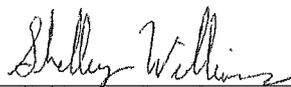
suspect in order to not hear the conversation. But, if an officer actively eavesdropped on the suspect's conversation, any statements would be suppressed. This remedy also lessens any "chilling effect" on the conversation between a suspect and an attorney because the attorney should realize that any statement made by the suspect will be inadmissible. As such, an officer remaining in the room while a suspect speaks telephonically with an attorney does not frustrate the rule-based right to counsel because the officer has no incentive to listen and take note.

#### V. CONCLUSION

For these reasons, the Patrol and WDFW respectfully request this Court to adopt an objective test that evaluates the totality of the factual circumstances, and affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of May, 2015.

ROBERT W. FERGUSON  
Attorney General



---

SHELLEY A. WILLIAMS,  
Assistant Attorney General  
WSBA #37035,  
JESSICA E. FOGEL  
Assistant Attorney General  
WSBA #36846  
OID #91093

NO. 90939-3

**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Petitioner,

v.

ROMAN MIKHAILOVICH  
FEDOROV,

Respondent.

DECLARATION OF  
SERVICE

I, Toni Kemp, declare on the 29th day of May, 2015, I sent via electronic mail a true and correct copy of Washington State Patrol and Washington Department of Fish and Wildlife's Brief of Amicus Curiae and Declaration of Service addressed as follows:

Kathryn Russell Selk: [KARSdroit@aol.com](mailto:KARSdroit@aol.com)

Chelsey Miller: [Cmille2@co.pierce.wa.us](mailto:Cmille2@co.pierce.wa.us);  
[PCpatcecf@co.pierce.wa.us](mailto:PCpatcecf@co.pierce.wa.us)

Pamela B. Loginsky: [pamloginsky@waprosecutors.org](mailto:pamloginsky@waprosecutors.org)

Cindy Arends Elsberry: [Cindy@defensenet.org](mailto:Cindy@defensenet.org)

Magda Baker: [Magda@defensenet.org](mailto:Magda@defensenet.org)

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

DATED this 29<sup>th</sup> day of May, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
TONI KEMP

## OFFICE RECEPTIONIST, CLERK

---

**To:** Kemp, Toni (ATG)  
**Cc:** Williams, Shelley (ATG)  
**Subject:** RE: Roman Fedorov WSSC 90939-3 Email Filing

Received 5-29-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Kemp, Toni (ATG) [mailto:ToniK@ATG.WA.GOV]  
**Sent:** Friday, May 29, 2015 2:29 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Williams, Shelley (ATG)  
**Subject:** Roman Fedorov WSSC 90939-3 Email Filing

Good afternoon:

Please find attached the Washington State Patrol and Washington Department of Fish and Wildlife's Brief of Amicus Curiae with Declaration of Service in the following case:

State of Washington v. Roman Fedorov  
WSSC 90939-3  
Shelley A. Williams  
206-464-6430  
WSBA #37035  
[ShelleyW1@atg.wa.gov](mailto:ShelleyW1@atg.wa.gov)

Thank you,

Toni Kemp, Legal Assistant to  
Shelley A. Williams  
Assistant Attorney General  
Criminal Justice Division  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-2765

NOTICE: This communication may contain privileged or other confidential information. If you know or believe that you have received it in error, please advise the sender by reply e-mail and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.