NO. 90939-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondents.

v.
Roman Mikhailovich Fedorov,

Petitioner

BRIEF OF *AMICUS CURIAE* WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITIONER

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I. IDENTITY AND INTERESTS OF AMICUS CURIAE

Amicus curiae is the Washington Defender Association. WDA is a statewide non-profit organization whose membership is comprised of public defender agencies, indigent defenders, and those who are committed to seeking improvements in indigent defense. WDA is a not-for-profit corporation with 501(c)(3) status. The WDA's objectives and purposes are defined in its bylaws and include: protecting and insure by rule of law those individual rights guaranteed by the Washington and Federal Constitutions, including the right to counsel, and to resist all efforts made to curtail such rights; promoting assisting and encouraging public defense systems to ensure that all accused persons receive effective assistance of counsel.

WDA representatives frequently testify before the Washington House and Senate on proposed legislation affecting indigent defense issues. WDA has been granted leave on many prior occasions to file amicus briefs in this Court. WDA represents 30 public defender agencies and has over 1200 members comprising criminal defense attorneys, investigators, social workers and paralegals throughout Washington. WDA attorneys have significant expertise on the issues presented in the instant case based on the extensive assistance we provide to defense attorneys in DUI cases and on right to counsel issues.

This Court's decision in this case has potentially far-reaching implications to criminal practice in Washington state.

II. ISSUES TO BE ADDRESSED BY *AMICUS*

1. Must the police afford an arrestee who asks to speak with counsel the opportunity to consult in private?
2. Where the government violates an arrestee's right to private consultation with counsel must the prosecution be dismissed with prejudice?

III. STATEMENT OF THE CASE

Amicus adopts the facts as stated in the Petitioner's Petition for Review.

IV. ARGUMENT

CrR 3.1 provides a right to counsel immediately upon arrest.[1] *State v. Templeton*, 148 Wn. 2d 193, 211-12, 59 P.3d 632 (2002). The rule thus goes beyond the requirements imposed by the federal constitution. *Id.* Under the rule, a person taken into custody "shall be immediately advised of the right to a lawyer," and must be provided the means and opportunity to contact a lawyer "[a]t the earliest opportunity." CrR 3.1(c).

The rule is meaningless unless the accused person is afforded the privacy necessary to consult with counsel. Where the government violates this right, any charges filed in connection with the arrest must be dismissed with prejudice. Alternatively, if the only consequence of the violation is the collection of inculpatory evidence, the evidence must be suppressed. However, in order for the case to go forward, the state should

[1] CrRLJ 3.1 protects the right in courts of limited jurisdiction. In this brief, citation to one rule is intended to refer to both.

prove beyond a reasonable doubt that there is no possibility of prejudice to the defendant.

Although the constitution also protects the right to counsel, the arguments here are based on CrR 3.1 (and CrRLJ 3.1). This is so because CrR 3.1 provides broader protection than the constitution and because Appellant/Petitioner did not raise constitutional arguments.[2]

In addition, the Supreme Court "avoid[s] deciding constitutional questions where a case may be fairly resolved on other grounds." *Cmty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Executive Admin.*, 164 Wn. 2d 35, 41, 186 P.3d 1032, 1035 (2008). This case may fairly be resolved through application of CrR 3.1; accordingly, it is unnecessary for the court to address any constitutional questions.

A. PRIVACY IS ESSENTIAL TO A MEANINGFUL CONVERSATION BETWEEN ATTORNEY AND CLIENT.

An accused person has a constitutional right to confer privately with defense counsel.[3] *State v. Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). CrR 3.1, which "goes beyond the requirements of the Constitution" necessarily incorporates this right. *Templeton*, 148 Wn. 2d at 211 (internal quotation marks and citation omitted).

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[2] The Supreme Court "does not consider arguments raised first and only by an amicus." *State v. Clarke*, 156 Wn. 2d 880, 894, 134 P.3d 188, 194 (2006).

[3] The right to confer privately stems from the state and federal constitutions. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. Although the arguments presented by *amicus* rely on CrR 3.1, the policy reasons supporting that rule also underlie the right to counsel and the associated due process interests. Given the dearth of cases addressing the rule itself, *amicus* relies on constitutional cases outlining the policy justifications.

The right to confer privately is "nearly sacrosanct." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014). An accused person must know that statements to counsel will not aid the prosecution.[4] This "encourage[s] full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2320, 180 L. Ed. 2d 187 (2011) (internal quotation marks and citations omitted) (discussing attorney-client privilege).[5]

Likewise, in order to advise an arrestee, an attorney must be able to make "a full and complete investigation of both the facts and the law." *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). This is impossible if a client is withholding information because she or he fears the information will be overheard by the arresting officer. *Id.*

Even a possibility of government eavesdropping threatens the effective assistance of counsel. Such a possibility inhibits "free exchanges between defendant and counsel because of the fear of being overheard." *Weatherford v. Bursey*, 429 U.S. 545, 554, 97 S. Ct. 837, 843, 51 L. Ed. 2d 30 (U.S.S.C. 1977).

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[4] Indeed, even the presence of a natural ally such as a juvenile's parents may undermine the attorney-client relationship. *State v. A.N.J.*, 168 Wn. 2d 91, 113, 225 P.3d 956, 967 (2010).
[5] The attorney-client privilege "is imperative to preserve the sanctity of communications between clients and attorneys." *Dietz v. Doe*, 131 Wn. 2d 835, 851, 935 P.2d 611, 619 (1997)

To effectuate such "free exchanges between defendant and counsel,"[6] the right to confer privately must be viewed from the point of view of a reasonable client and a reasonable attorney. In other words, the government complies with CrR 3.1's protections if it allows communication that is (1) private in fact, and (2) conducted under circumstances where both a reasonable attorney and a reasonable client believe that the communication is private.

Thus, for example, providing the arrestee a phone within the hearing of an officer who is not paying attention would not suffice. Nor would the government comply with the rule if it allowed the defendant to contact counsel through a recorded line, even if the police promise not to listen in. Instead, the government must ensure that the communication is private and made under circumstances where a reasonable person would believe it is private.

Public policy weighs strongly in favor of allowing confidential communication between attorneys and clients. CrR 3.1 must be interpreted to protect the constitutional right to confer privately. Otherwise, the underlying purpose of the rule – to afford arrestees immediate access to counsel—would be meaningless.

[6] *Id.*

B. FAILURE TO ALLOW AN ARRESTEE THE PRIVACY NECESSARY TO CONSULT WITH COUNSEL FRUSTRATES THE TWO PURPOSES OF CrR 3.1.

CrR 3.1 has two primary purposes. First, the rule "ensure[s] that arrested persons are aware of their right to counsel before they provide evidence which might tend to incriminate them." *State v. Templeton*, 148 Wn. 2d 193, 217, 59 P.3d 632, 644 (2002). Second, CrR 3.1 facilitates access to counsel "in time to decide whether to acquire exculpatory evidence such as disinterested witnesses," video, or alternative testing. *Id.*, at 212, 217-19.

Both purposes of the rule are frustrated by the refusal of an arresting officer to allow for the privacy necessary to effectively communicate with counsel.

1. An arrestee must be allowed to consult privately with counsel before deciding whether or not to provide evidence that may prove incriminating.

Absent an opportunity to consult privately with counsel, an arrestee cannot make an informed decision about whether or not to provide evidence that might turn out to aid the prosecution. For example, only by sharing facts with counsel will a suspect know the likelihood that a breath or blood test will show intoxication.[7] But the presence of an officer will likely discourage an arrestee from announcing how many drinks she or he consumed prior to arrest. Some might be tempted to

[7] The Supreme Court has recognized that CrRLJ 3.1 "is essential to the effective preparation of defense against the charge of DUI." *Templeton*, 148 Wn. 2d at 212.

minimize (to persuade the arresting officer), resulting in faulty advice from counsel.

Although DUI charges provide an obvious illustration of CrR 3.1's first purpose, suspects face similar pitfalls when arrested for other charges as well. The breath-test dilemma can arise in driving-related felonies such as vehicular homicide. RCW 46.61.520. An arrestee might also need legal counsel when deciding whether or not to consent to a search, to waive *Miranda* and provide a statement, or to voluntarily participate in a lineup. Such questions may arise when a person is arrested for any offense.

2. An arrestee must be allowed to consult privately with counsel in order to gather fleeting exculpatory evidence.

Some evidence is so fleeting that it will be lost within hours of an arrest. For example, a DUI arrestee must "decide whether to acquire exculpatory evidence such as disinterested witnesses or alternative blood alcohol concentration tests." *Templeton*, 148 Wn. 2d at 217. The responsibility of assisting an in-custody DUI suspect in gathering independent evidence (such as a blood draw) rests with defense counsel. *State v. McNichols,* 128 Wn.2d 242, 249, 906 P.2d 329, 333 (1995).

But counsel will not know what kind of evidence would be helpful or necessary without speaking with the arrestee. And an arrestee will be reluctant to provide details, knowing that a government agent is within earshot.

CrR 3.1 must be interpreted to allow an arrestee to confer privately with counsel. Failure to allow private communication frustrates one of the aims of the rule. *Templeton*, 148 Wn. 2d 212, 217-19.

C. DEFENSE ATTORNEYS HAVE AN ETHICAL OBLIGATION TO ENSURE PRIVACY WHEN COMMUNICATING WITH CLIENTS.

Trust is "the hallmark of the client-lawyer relationship." RPC 1.6, Comment 2. This encourages the client to

> communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively.

RPC 1.6, Comment 2. Because of this, an attorney must protect a client's confidences and secrets. RPC 1.6, Comment 19.

In addition, a lawyer "shall provide competent representation to a client." RPC 1.1. This requires not only legal knowledge and skill, it also requires "thoroughness and preparation reasonably necessary for the representation." RPC 1.1. An attorney cannot provide competent representation without learning facts relevant to a matter.

Ordinarily, communications between attorney and client are privileged. RCW 5.60.060(2)(a). However, the presence of a third person during the communication waives the privilege. *Morgan v. City of Fed. Way*, 166 Wn. 2d 747, 757, 213 P.3d 596, 601 (2009).[8] Because of this, a person who speaks with counsel in the presence of an officer cannot object if the attorney is called as a prosecution witness.

[8] The privilege is not waived if the third party is necessary for the communication or has retained the attorney on a matter of common interest. *Id.*

For all of these reasons, an attorney cannot ethically form an attorney-client relationship or speak confidentially with an arrestee if an officer remains present during the conversation. CrR 3.1 must be interpreted to protect the right to confer privately. Any other reading of the rule would frustrate its purpose and expose counsel to disciplinary sanctions.

D. WHEN THE GOVERNMENT REFUSES TO ALLOW AN ARRESTEE TO CONFER PRIVATELY WITH COUNSEL, THE APPROPRIATE REMEDY IS DISMISSAL.

When the state eavesdrops on attorney-client communication, prejudice is presumed. *Fuentes*, 179 Wn.2d at 819. In "those rare circumstances where there is no possibility of prejudice," the state bears the burden of showing "beyond a reasonable doubt that the defendant was not prejudiced." *Id.*, at 810-820. This is so even when no information is communicated to the prosecutor. *Id.*

Even where there is no eavesdropping, the presence of a government agent may impact attorney-client communication, resulting in a lack of proper legal advice. This frustrates the twin aims of CrR 3.1, and leaves the arrestee unable to decide whether to provide evidence that may prove inculpatory, and unable to obtain independent evidence such as disinterested witnesses, video evidence, or alternative testing. *Templeton*, 148 Wn.2d at 217.

Because the failure to provide an opportunity to confer privately with counsel can still disadvantage an arrestee in the absence of

eavesdropping, a court must suppress the evidence the government obtains in such circumstances, such as a breath test result or refusal, a confession, or an arrestee's consent to search. *See, e.g., City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991).[9] Where the accused person loses the opportunity to obtain potentially exculpatory evidence, the charges must be dismissed.[10]

V. CONCLUSION

Under CrR 3.1, an arrestee must be allowed to confer privately with counsel. Communication must in fact be private. It must also be arranged so that a reasonable person would believe it to be private.

Where the government eavesdrops on attorney-client communication, prejudice is presumed. Any charges must be dismissed, unless the state proves the absence of prejudice beyond a reasonable doubt.

Where the government does not eavesdrop, the failure to allow an arrestee to confer privately with counsel may still prejudice the accused person. Under such circumstances, any inculpatory evidence must be suppressed. The charges must be dismissed if the violation of CrR 3.1 results in the loss of potentially exculpatory evidence.

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[9] Of course, if suppression does not eliminate the prejudice, dismissal is the appropriate remedy. *Id.; see also City of Tacoma v. Heater*, 67 Wn. 2d 733, 741, 409 P.2d 867, 872 (1966).

[10] In the alternative, if there is no other prejudice to the accused person, the state's inculpatory evidence must be suppressed. *See, e.g., State v. Turpin*, 94 Wash. 2d 820, 620 P.2d 990 (1980).

RESPECTFULLY SUBMITTED this 29th day of May, 2015.

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