EFiled: Sep 27 2018 11:52AM EDT
Filing ID 62495693
Case Number 232,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	No. 232, 2018
Defendant Below-Appellant,	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 141101769A&B
JACQUEZ ROBINSON,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE

APPELLEE'S ANSWERING BRIEF

COLLINS & ASSOCIATES

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Dated: September 27, 2018

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NATURE OF PROCEEDINGS

Appellant Jacquez Robinson concurs with the nature of the proceedings as set forth fully in the State's Opening Brief.[1]

[1] Opening Brief (OB) at 1-2.

SUMMARY OF THE ARGUMENT

I. DENIED. THE STATE'S INTENTIONAL AND IMPROPER REVIEW OF MR. ROBINSON'S PROTECTED LEGAL DOCUMENTS VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

The State investigated a purported protective order breach, even though the defense lawyer was permitted to show certain documents to her client. Without any discussion with the defense lawyer, consultation with the trial judge, or application for a search warrant, the State seized all Mr. Robinson's protected legal documents. The seizure occurred eleven days before the scheduled murder trial. Then a member of the prosecution team conducted a second review. She was not removed from the prosecution team until two weeks later.

The Superior Court correctly applied the evidence to the law in finding that the State's egregious actions amounted to disclosure of confidential trial strategy to the prosecution and that the State intentionally intruded upon the constitutionally protected attorney-client relationship. The Superior Court's finding of a Sixth Amendment violation was legally correct and not clearly erroneous.

II. DENIED. DISMISSAL WAS THE ONLY APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES, ESPECIALLY WHEN THE STATE NEVER SUGGESTED AN ALTERNATIVE.

Dismissal is an extreme sanction but warranted in this case. Because of the degree of prejudice and the State's egregious conduct, dismissal is the only remedy available. The Superior Court correctly concluded that the affront to the rule of law

is profound in this case. The Court properly exercised its authority by protecting Mr. Robinson's rights and imposing a sanction that may deter future State misconduct. In other cases, the prosecution has admitted its misconduct, enabling judges to fashion appropriate remedies. In this case, the State has steadfastly maintained that its conduct was justified. Moreover, despite criticizing the Court for not imposing a remedy short of dismissal, the State never suggested an alternative remedy.

STATEMENT OF FACTS[2]

These facts describe the events of this case as they occurred as well as subsequent testimony at the evidentiary hearing.

The Protective Orders

Natalie Woloshin represents Jacquez Robinson in two cases: a Murder First Degree case[3] and a Gang Participation case known as the Touch Money Gang (TMG) case.[4] The Honorable John A. Parkins presides over the murder case and the Honorable William C. Carpenter, Jr. presides over the TMG case.

Both cases featured protective orders limiting disclosure of information by defense counsel. In the murder case, after a teleconference with Judge Parkins, the defense and State agreed that witness names or information would not be disclosed to Mr. Robinson from June 13, 2017, when the material was provided, until July 6, 2017.[5]

Judge Carpenter's protective order in the TMG case went into effect on August 24, 2016 and is still in effect.[6] This order prohibits defense counsel from "permitting [defendant] access" to documents and other materials containing

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[2] This brief uses actual names rather than appellations for the sake of clarity, and because the parties used names throughout the Superior Court briefing.
[3] ID Nos. 1411017691 A and B.
[4] ID Nos. 1411005401 A and B.
[5] A174-175.
[6] A177-178.

witness names, even if redacted, without leave of the Court. The order states, "however, Counsel for defendant may discuss the *content* of the above described materials in paragraph 1 with the Defendant."[7]

The alleged violations of the protective order pertain only to the TMG case. At the initial office conference with the Superior Court judge handling the motion, Joseph Grubb, Esquire stated the issue was with the TMG protective order "almost exclusively, due to the timing" of the investigation.[8] What he meant was that all the investigative activities such as seizure of prison calls and witness interviews occurred before the murder protective order was issued. The Superior Court made this finding clear in its Order Addressing Standard and Scope of Court Review on September 19, 2017[9] and the State did not dispute it.

The State's investigation began in early May 2017 with an interview of an informant inmate.[10] The State subpoenaed and reviewed Mr. Robinson's prison calls from April 1, 2017 to June 9, 2017.[11] The calls the State found problematic were all from April 2017.[12] The phone calls made to Ms. Woloshin's office using a different inmate's PIN number were from April 2017.[13] So, the information used to

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[7] *Id.*
[8] A186.
[9] *State v. Robinson*, 2017 WL 4675760 at *1 n3 (Del. Super., September 19, 2017).
[10] OB at 6.
[11] OB at 8.
[12] OB at 9; A131-153.
[13] A126.

justify the June 30, 2017 search of Mr. Robinson's cell all predated the murder protective order. John Downs, Esquire, one of the TMG prosecutors, would later testify that the alleged violation was of the TMG protective order.[14]

The State's representation that prosecutors were concerned about a violation of the murder protective order[15] is unfounded.

Ms. Woloshin seeks and receives clarification about the TMG protective order.

Ms. Woloshin sought clarification from the prosecutors about the TMG protective order. On August 4, 2017, she sent an email to Ipek Medford, Esquire, asking if it would violate the protective order if she summarized reports and left out identifying information.[16] Ms. Medford's response copied Mr. Downs. She explained that Ms. Woloshin was permitted to "discuss/provide summaries of the materials under the protective order."[17]

Three weeks later, on August 22, 2017, Ms. Woloshin followed up with another email to Mr. Downs and Ms. Medford to memorialize a further discussion she had with the prosecutors by phone. Ms. Woloshin confirmed that "the State takes the position that there is no violation of the protective order by me sending summaries of reports and transcripts of statements so long as no identifying

[14] *See*, A366-374.
[15] OB at 10-11.
[16] A40.
[17] *Id.*

information is provided in the summaries. If this is not accurate, please let me know."[18] The prosecutors did not respond.

Mr. Downs testified he did not recall the phone conversation or the emails.[19]

The State never provided TMG witness names to Ms. Woloshin

On September 2, 2016, the State sent Ms. Woloshin the first batch of 72 statements under the protective order. All were coded to remove any reference to witness names.[20] As the March 2017 trial approached, the State sent proposed redactions to witness statements to Ms. Woloshin. Again, the names were coded.[21] Mr. Downs testified that except for one potentially exculpatory witness statement, the identities of the TMG witnesses were never provided to Ms. Woloshin.[22]

The trial prosecutors investigate a potential breach of the protective order

On May 10, 2017, Mr. Downs interviewed an inmate claiming to have information about Mr. Robinson's murder case. But the information was not about the murder case; it was about discussions Mr. Robinson had with his attorney. The inmate said that Mr. Robinson did not have any paperwork, but that his lawyer "Natalie" had showed him a paper.[23] He also said Mr. Robinson called Ms.

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[18] A42.
[19] A359-362.
[20] A43-44.
[21] A48-49.
[22] A365.
[23] A325.

Woloshin's office using a different PIN number and asked for transcripts, but Ms. Woloshin explained she could not provide them.[24] A letter from Ms. Woloshin's law clerk to Mr. Robinson explaining that papers could not be sent was admitted into evidence at the hearing.[25]

Rather than insulate themselves from investigating a potential violation of the protective order, Mr. Downs and his co-counsel, Mark Denney, Esquire, decided to investigate.

Despite the State having given express consent for Ms. Woloshin to show documents to Mr. Robinson, the investigation nevertheless proceeded. They subpoenaed Mr. Robinson's prison calls and the calls of an inmate who had purportedly given his PIN number to Mr. Robinson.[26] The seized calls from April 2017 do not indicate that Mr. Robinson had any documents that violated the protective order—in fact, they indicate the opposite. The conversations demonstrate that Mr. Robinson was shown a summary and that Ms. Woloshin did not provide any of the witness names or identifying information.[27]

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[24] A126.
[25] B1.
[26] A51-52.
[27] *See, e.g.,* A145 (Mr. Robinson calling his mother: "she was showing me, ah, this little packet she said I can't tell you who they are…" Mother: "Oh, so she doesn't even know who the witnesses are?" Robinson: "Yeah she don't even know."); A146 (Mother: "Did she give you copies?" Robinson: "Na, I ain't never asked her"); A151 (Mr. Robinson calling his father: "My lawyer, she came to me and showed me a paper with this whole bunch of rats"… "but, I don't, we don't know

On June 28, 2017 Mr. Downs and Mr. Denney met with County Prosecutor Joseph Grubb, Esquire, and discussed their investigation.[28] Mr. Downs was concerned that information had been *shown* to Mr. Robinson.[29] Mr. Denney was concerned that Mr. Robinson was "s*hown* documents he was not supposed to see."[30] Mr. Grubb testified the issue was that the calls indicated Mr. Robinson had information he was not supposed to "*because his attorney showed it to him* and told him not to say anything."[31]

Mr. Grubb directs a search of Mr. Robinson's cell

Mr. Grubb did not bring his concerns to Judge Carpenter; he thought it was "premature," because "until we have reviewed the documents, I didn't think they were substantiated concerns."[32] Nor did Mr. Grubb seek a search warrant. He testified at the hearing, "you know as well as I do, you legally do not need to."[33]

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who that witness is going to be. She just brought me in a summary, a paper…"); A153 ("well, once I go to trial, my lawyer said she's going to find out everybody… Father: "any of them doing time right now?" Robinson: I don't know they don't got names on their [sic] it's blocked out. It's, it's like they use letters…and you have to play guess who. Like who it is.").

[28] A122; A120.

[29] A337 (emphasis added).

[30] A120 (emphasis added).

[31] A403 (emphasis added).

[32] A424. Mr. Grubb also alluded to a prior warrantless search of Mr. Robinson's cell which Judge Parkins upheld. DOC seized a drawing which they believed appeared to be "gang-related symbols and mottos." *State v. Robinson,* 2017 WL 1363895 at *1 (Del. Super. April 11, 2017).

[33] A424-425.

Nor did he simply ask Ms. Woloshin if she had violated the TMG protective order. He testified, "Ms. Woloshin's conduct was at the heart of the potential protective order violation. I did not think it would be fruitful in bringing it to her attention if she was, in fact, violating protective orders as Jacquez Robinson said in his calls."[34]

Instead, Mr. Grubb, based on his unilateral determination of probable cause,[35] directed Department of Justice (DOJ) Investigator John Ciritella to have Mr. Robinson's cell searched.[36] Mr. Grubb testified, "I asked him to coordinate the search of Jacquez Robinson's cell, to review the specific documents that may be violative of the protective order, and to let me know what he found."[37]

DOJ investigators seize and review Mr. Robinson's legal papers.

On June 29, 2017, Mr. Grubb and Mr. Downs met with Mr. Ciritella to explain to him what to look for in Mr. Robinson's cell.[38] Mr. Ciritella was to look for any documents that violated the protective order, but Mr. Grubb did not give him any instruction to avoid protected attorney-client communications.[39] Mr.

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[34] A423.
[35] A61; A162.
[36] Mr. Ciritella is Chief Special Investigator for the DOJ. A464. Although not assigned to the TMG case, he works with Mr. Downs and Ms. Prater on other cases. A492-A493. They all work together on the 7th Floor of the State Building. A466.
[37] *Id.*
[38] A431.
[39] A432.

Grubb told Mr. Ciritella to report his findings only to Paralegal Jaime Prater and Mr. Grubb—not Mr. Denney or Mr. Downs.[40]

On June 30, 2017, Mr. Ciritella arrived at Sussex Correctional Institution (SCI) and directed Department of Corrections (DOC) staff to remove all documents from Mr. Robinson's cell.[41] Mr. Ciritella brought another investigator with him—Keith Marvel.[42]

Mr. Ciritella has no legal training.[43] He had a general understanding of privileged attorney-client communications but did not know the term defense work product.[44] Although Mr. Ciritella testified he was not privy to everything in the protective order, Ms. Prater had emailed him the TMG protective order on June 28, 2017.[45] Mr. Ciritella instructed Mr. Marvel, "we are going to get some documents, we are going to look through them. We are going to, hopefully, look for anything that broke the protective order; transcripts, any other documents that may seem out of place with names on them."[46]

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[40] A469.
[41] A472; A48-59.
[42] A471. The State did not identify Mr. Marvel as someone having reviewed the documents, despite the Court's order to identify all persons who reviewed them. The Court at sidebar inquired why Mr. Marvel was not identified. A505-506. Ultimately, Mr. Marvel testified at a later date.
[43] A493.
[44] A494.
[45] B2-4.
[46] A503.

Mr. Marvel's brief from Mr Ciritella was that "it was a sensitive investigation involving an attorney's office up here, as well as the Attorney General's Office, that we were looking for written communication from that office that was in that cell."[47] Mr. Marvel had no legal training and did not know what privileged attorney/client materials were.[48] He did not know there was a protective order in place, and understood that he was to look "for correspondence from an attorney's office to Mr. Robinson."[49]

Corrections officers brought a large trash bag full of documents to a conference room.[50] Mr. Ciritella estimated he and Mr. Marvel reviewed thousands of documents.[51] Every document was reviewed;[52] they kept no record of the documents they reviewed.[53] He decided to bring back to the DOJ office a stack of envelopes and documents that he estimates was two to three inches high.[54] He made no listing or inventory of the documents he took back to the DOJ, but he did make handwritten notes of the number of items.[55]

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[47] A594.
[48] A603.
[49] *Id.*
[50] A472.
[51] A474. Mr. Marvel testified it was at least two trash bags and estimated over 500 documents. A595.
[52] A474.
[53] *Id.*
[54] A477.
[55] A479; the notes are at A69-71.

Mr. Ciritella took 12 manila envelopes with Ms. Woloshin's firm's name on them that had documents inside.[56] He took another larger envelope with "federal transcript" in it along with handwritten notes and letters.[57] He also took 5 separate letters from Ms. Woloshin's office in their envelopes.[58] Mr. Ciritella brought them all back to the DOJ in Wilmington for further review.[59]

The papers are further examined at the DOJ

Mr. Ciritella reported back to Mr. Grubb that he did not find anything that violated the protective order, but he was not sure about some of the documents.[60] Mr. Grubb decided to have paralegal Jaime Prater review them because "she was in the best spot to be that second layer of review."[61] Mr. Grubb did not give her any guidance about avoiding protected attorney-client communications or defense work product.[62]

Ms. Prater was a homicide paralegal for the DOJ and was assigned to Mr. Robinson's TMG and murder cases.[63] According to Mr. Downs, "she controlled the paperwork flow; she kept record of what was sent out; she would redact the

[56] A512.
[57] A473; A515.
[58] A515.
[59] A478.
[60] A408.
[61] A410.
[62] A436-437.
[63] A341.

statements we wanted redacted."[64] Ms. Prater was copied on most TMG and murder correspondence and Mr. Downs testified he "would not be surprised" that Ms. Prater in fact drafted many of the letters.[65] Mr. Denney testified that Ms. Prater would sometimes sit in on meetings about homicide cases, especially to discuss discovery, and was particularly involved with expert witnesses.[66]

Ms. Prater testified she was included in meetings about the TMG case and was familiar with the police reports and witness statements.[67] Through this participation, she was aware of the State's trial strategy. She also coordinated the appearance of witnesses and had direct contact with witnesses at times.[68] As demonstrated by the volume of emails among the defense, the State, and the Court, Ms. Prater was heavily involved in the day-to-day activities in Mr. Robinson's cases.[69] In fact, Ms. Prater was copied on the August 4, 2016 response from the State to Ms. Woloshin's inquiries about the TMG protective order—the one where the State explained to Ms. Woloshin she could provide summaries to Mr. Robinson.[70]

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[64] *Id.*
[65] A365.
[66] A456-458.
[67] A553.
[68] A554.
[69] B5-45.
[70] A40.

Mr. Ciritella laid out all the documents in a conference room.[71] He explained to Ms. Prater why he removed those documents.[72] After her review, he retrieved and secured the documents.[73] Mr. Ciritella wrote "Nothing Found?" in his notes to indicate Ms. Prater found nothing violative of the order.[74] The question mark signified that Mr. Grubb had not reviewed the documents yet.[75] The following Monday, July 3, 2017, at the request of Ms. Prater, he laid all the documents out again for Mr. Grubb to review.[76] Then Ms. Prater told him that Mr. Grubb was finished and he could collect the documents.[77]

Mr. Grubb testified he did not review the documents.[78] Ms. Prater also testified that she did not direct Mr. Ciritella to get the documents back out for Mr. Grubb to review.[79]

Ms. Prater finds no violation of the TMG protective order

Ms. Prater kept no inventory of what she reviewed.[80] She testified that 90% of the items were discovery she had provided, with cover letters from Ms.

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[71] A479.
[72] A485.
[73] A517-518.
[74] A69; A483.
[75] A483.
[76] A518-519; A490.
[77] A520.
[78] A434.
[79] A557.
[80] A534.

Woloshin.[81] She also reviewed a legal pad with writing and a letter-sized mailing envelope with blue-sleeved papers that had writing as well.[82]

Ms. Prater completed her review on June 30, 2017 and wrote to Mr. Grubb on July 1, 2017 that the documents should be returned to Mr. Robinson.[83] She did not make any notes of her review.[84] On July 5, 2017, Ms. Prater wrote an email to Mr. Grubb entitled "Robinson/Woloshin" with her findings:

> Mr. Robinson was in possession of co-defendant transcripts, which he is entitled to. There were no witness transcripts or police reports in Mr. Robinson's possession at the time the search was conducted. However, there was one copy of a two-page redacted FBI report in Mr. Robinson's possession as well as several pages of hand written notes detailing specific facts, witness statements, and other evidence all of which could only have been obtained via the police reports. It is my conclusion that Ms. Woloshin shared the redacted police reports with Mr. Robinson. The redacted police reports were not under protective order however, as the State always does, we had asked Ms. Woloshin not to share the redacted police report with her client, she did so anyway.[85]

Ms. Prater reached her conclusion even though no police reports were found in Mr. Robinson's possession, except a two-page FBI report.[86] She agreed that the information could also have come from summaries Ms. Woloshin was permitted to

[81] A534-535.
[82] A534.
[83] A73.
[84] A567.
[85] A89.
[86] A561.

discuss with Mr. Robinson.[87] Ms. Prater testified that she concluded that Mr. Robinson's handwritten notes reflected information he received from Ms. Woloshin.[88]

Ms. Prater remained assigned to Mr. Robinson's cases after her review of the seized documents

Although Mr. Grubb testified that he removed Ms. Prater from Mr. Robinson's case,[89] there was inconsistent testimony as to when it happened. Ms. Prater continued to be copied on emails with the Court and counsel on July 3, 2017,[90] July 6, 2017,[91] and July 7, 2017.[92]

Mr. Grubb did not recall the specific date Ms. Prater was removed.[93] Mr. Downs testified it was in the beginning of July sometime.[94] Mr. Denney testified that Ms. Prater was removed shortly after July 10, 2017, after an office conference that resulted in a continuance of the murder trial.[95] Ms. Prater could not recall exactly when it occurred, but estimated it was the second week of July.[96]

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[87] A563.
[88] A569.
[89] A413.
[90] B36, 40.
[91] B43.
[92] B44-45.
[93] A414.
[94] A345.
[95] A459-460.
[96] A566.

Ultimately, after the final effort in a series of the State's attempts to comply with an order to produce all communications relevant to this matter,[97] an email was discovered that fixed the date of Ms. Prater's removal at July 14, 2017.[98] As such, Ms. Prater remained assigned to Mr. Robinson's cases for two weeks after she reviewed the documents seized from his cell.

Ms. Woloshin learns that Mr. Robinson's documents have been seized and informs the Court; it is revealed that the DOJ directed the seizure

With the murder trial to begin on July 11, 2017, Ms. Woloshin visited Mr. Robinson on July 5, 2017. There she learned that DOC had seized all the legal documents in Mr. Robinson's cell, including materials protected by the attorney-client privilege.[99] She wrote that day to Judge Parkins advising of this development and asking that Mr. Robinson's right to counsel be protected.[100] Ms. Woloshin followed up with a letter the next day. In the letter, she explained, "it is unknown whether the actions of DOC officials were sanctioned by the State or not."[101] She asserted Mr. Robinson's right to his legal documents and presented a form of order

[97] *State v. Robinson*, 2017 WL 4675760 at *6, fn 43 (Del. Super., October 17, 2017).
[98] A154.
[99] A104.
[100] *Id.*
[101] A106.

for their return.[102] Judge Parkins sought a response from the State by noon the next day, July 7, 2017.[103]

Then followed a flurry of emails among Mr. Downs, Mr. Grubb, DOC, and Mr. Ciritella about getting the materials back to Mr. Robinson.[104] Mr. Downs asked Mr. Grubb in an email on July 6, 2017 if the materials from the cell had been returned, because "I have to notify the judge."[105] Mr. Ciritella delivered the documents to the warden on the morning of July 7, 2017.[106] Again, Mr. Downs emailed Mr. Grubb that morning to confirm that the "materials should be returned ASAP," because "Parkins wants an answer by noon today."[107]

Then, Mr. Downs wrote to Judge Parkins stating only, "I have been advised that the materials taken from Robinson's cell has [sic] already been or will be returned to him today."[108] He did not disclose that State had directed DOC to seize the materials. However, the Deputy Attorney General representing DOC, Gregory Smith, Esquire, had been copied on Judge Parkins' email. Mr. Smith wrote to Mr. Downs, "I am trying to figure out if Natalie's factual assertions are true. I will call

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[102] A106-107.
[103] A111.
[104] *See generally,* A71-91.
[105] A78.
[106] A84.
[107] *Id.*
[108] A114.

you later today."[109] On July 7, 2017, Mr. Downs wrote to Mr. Smith, "Cell was searched on Friday, June 30, 2017."[110]

Mr. Smith responded to Judge Parkins in a letter dated July 7, 2017.[111] He explained that Mr. Robinson's cell was searched at the request of DOJ investigators and that all the documents had been returned.[112]

Mr. Downs testified that his response to Judge Parkins was based on "the limited knowledge of what I knew."[113] Mr. Downs was not aware Mr. Smith was responding to Judge Parkins until he later received his copy of Mr. Smith's email.[114] Although he testified "I believe Mr. Grubb may have responded in more detail, I don't know," the emails he sent to Mr. Grubb indicate it was he, Mr. Downs who was to respond. In fact, Judge Parkins did not include Mr. Grubb on his email requesting a response.[115]

If Mr. Smith had not informed Judge Parkins that DOJ had directed the seizure, it may never have come to light.

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[109] A90.
[110] A91.
[111] A117-118.
[112] *Id.*
[113] A355. Although he testified, "I did not know whether [the documents] had been reviewed, or what the status was" (A353), he was copied on emails from Ms. Prater after her review indicating Mr. Robinson was allowed to have the documents. A76; A73.
[114] *Id.*
[115] A114.

The Motion to Dismiss is litigated in Superior Court; the State fails to produce documents as ordered

Ms. Woloshin filed the Motion to Dismiss the murder indictment on July 7, 2017.[116] When the trial judge recused himself,[117] the current judge was assigned.[118] The undersigned attorney was appointed for the limited purpose of litigating the motion to dismiss.[119] At a July 19, 2017 office conference, Mr. Grubb stated that "nothing [Mr. Robinson] was in possession of violated the protective order or orders."[120] At the Court's request, Mr. Grubb sent an email for the record so stating.[121] The Court established dates for a reply and sur-reply to the State's Answer to the Motion to Dismiss.[122]

Mr. Robinson's Reply contained a request for production of documents for "all communications between the DOC and DOJ regarding the seizure and review of the legal documents."[123] The request also sought "any memoranda, notes, or other documents drafted by the review team be produced."[124]

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[116] A motion to dismiss is also pending in the TMG cases; that motion is stayed pending the outcome of this appeal. B175; D.I. 74; B183; D.I. 23.
[117] A22; D.I. 101.
[118] A23; D.I. 107.
[119] A189.
[120] A188.
[121] A192.
[122] A190.
[123] A226.
[124] *Id.*

The next office conference occurred on August 21, 2017. Mr. Grubb responded to the request for production with Mr. Ciritella's two pages of handwritten notes.[125] Upon further discussion, Mr. Grubb explained that his understanding of the request for production was flawed.[126] The judge put a litigation hold on all emails and text messages and put safeguards in place to avoid automatic deletion.[127]

On September 20, 2017, Mr. Grubb responded to the production order with three emails concerning the seizure and review of Mr. Robinson's documents.[128] Mr. Grubb said at the next office conference on September 26, 2017 that those three emails were "the entirety of the documents that exist discussing the search and seizure that the Court had ordered."[129]

At the evidentiary hearing on October 25, 2018, the judge was surprised by Ms. Prater's testimony that she had not searched her emails and that there could be more emails pertaining to the matter.[130] The judge ordered once again that all the documents be produced.[131] On November 7, 2017, State Prosecutor Sean Lugg, Esquire, who took over the case from Mr. Grubb, wrote to the Court. He stated that

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[125] A69-70.
[126] A264.
[127] A277.
[128] B47-51 (Hearing Joint Exhibits 4-6).
[129] A284.
[130] A551; A576-577.
[131] A578.

the three emails produced by Mr. Grubb on September 20, 2017 established compliance with the order for production.[132]

Also on November 7, 2017, the Court wrote to the parties to discuss "several open questions" in the case.[133] Among other things, the Court again directed the State to conduct a "search for any documents and email messages regarding the seizure and/or the review of Defendant's document as well as any staffing changes that occurred as a result thereof."[134] The next hearing was scheduled to occur on November 21, 2017.[135]

On November 16, 2017, the State responded to the Court, furnishing 72 pages of documents.[136] Included in the attached submission were many pages of previously unprovided emails, including the July 14, 2017 email from Mr. Downs removing Ms. Prater from Mr. Robinson's cases.[137]

The Court finds that the documents seized from Mr. Robinson's cell included attorney-client communications and details of defense strategy

In its Reply to the State's Answer to the Motion to Dismiss, the defense requested an *in camera* review of all the legal materials seized.[138] The Appendix to

[132] B52-53.
[133] B54-56.
[134] B56.
[135] *Id.*
[136] B57-60.
[137] B61-132 (Hearing Joint Exhibit 8).
[138] A225.

the Reply included an affidavit from Ms. Woloshin and Cleon Cauley, Esquire, who is co-counsel on the murder case. The affidavit describes Mr. Robinson's legal materials as shown to counsel during prison visits on July 8 and 28, 2017.[139] At the office conference on August 21, 2017, the undersigned attorney explained that all those documents were now in his possession. The judge decided to hold off on the review for the time being.[140]

At the next office conference on September 16, 2017, counsel again explained that Ms. Woloshin had furnished the documents and they could be provided to the Court at any time.[141] After some discussion, the judge decided to defer the review until after the record was developed.[142]

The hearing failed to establish what documents were selected by Mr. Ciritella and subject to further review by Ms. Prater.[143] Mr. Lugg agreed, stating that identifying the documents is "somewhat of a challenge that we can't solve for the Court because there was no inventory."[144] The Court agreed to conduct an *in camera* review.[145]

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[139] A193-195.
[140] A279.
[141] A285.
[142] A289.
[143] A573.
[144] A574.
[145] A575.

By the date of the next hearing, on November 21, 2017, the judge had completed the review. The judge made a finding that the materials contained legal strategy, assessments of the case, and documents protected by the attorney/client privilege.[146] Mr. Lugg asserted he was in no position to argue the items were not privileged.[147] The parties agreed to make legal argument based on that factual finding, but Mr. Lugg asked for more time to think about it.[148] The Court stated that the State's position could be included in its briefing.[149]

In its post-hearing briefing, the State did not dispute the judge's factual finding.[150]

The State makes a chain-of-custody argument in its Opening Brief. It states, "Robinson gave Defense Counsel the documents he *alleges* were seized,"[151] and that the court reviewed documents Robinson *claims* were seized.[152] But the State never called Ms. Woloshin as a witness to challenge her collection of the documents from Mr. Robinson—or to ask her about anything else. Neither her affidavit nor the undersigned attorney's description of the receipt of the documents were challenged on the record. As such, the record establishes that all documents

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[146] A652-653.
[147] A654.
[148] A655.
[149] *Id.*
[150] A713.
[151] OB at 17 (emphasis added).
[152] OB at 18 (emphasis added).

were seized by the State and eventually returned to Mr. Robinson after some of them were reviewed again.[153] Mr. Robinson delivered them to Ms. Woloshin, who delivered them to the undersigned attorney, who then produced them to the Court for an *in camera* review.

[153] The State also claims that its personnel did not seize or review a notebook, challenging the relevance of the Court's holding that a notebook contained defense strategy. However, the paralegal reviewed a legal pad with writing and a letter-sized mailing envelope with blue-sleeved papers that had writing as well. A534. Moreover, the State, having never catalogued what it reviewed, declined the opportunity to review the seized documents.

ARGUMENT

I. DENIED. THE STATE'S INTENTIONAL AND IMPROPER REVIEW OF MR. ROBINSON'S PROTECTED LEGAL DOCUMENTS VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL.

A. Question Presented

Whether the prosecution's unjustified and warrantless seizure and review of Mr. Robinson's protected attorney-client communications violated Mr. Robinson's right to counsel under the Sixth Amendment.

This issue was preserved upon the filing of a Motion to Dismiss in the Superior Court on July 7, 2017.[154]

B. Standard and Scope of Review

For questions of law, this Court review's the Superior Court's legal determinations for errors in formulating or applying legal precepts.[155] This Court reviews factual findings by the Superior Court to determine whether competent evidence supports the findings and whether those findings were clearly erroneous.[156]

[154] A92-119.
[155] *Word v. State,* 801 A.2d 927, 929 (Del. 2002).
[156] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

C. Merits of Argument

1. Applicable Legal Precepts

The Sixth Amendment protects the confidentiality of attorney-client communications

The confidentiality of attorney-client communications in a criminal proceeding is a bedrock principle of our criminal justice system and is protected by the Sixth Amendment. As the United States Supreme Court held, "once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client privilege takes effect."[157]

As the State has conceded, these safeguards manifest in several ways. Attorney-client phone calls are not recorded by prison authorities. Attorney-client mail is not reviewed. The prisons and the Courts provided confidential settings for discussions between attorney and client. When a court approves certain warrants, attorney client communications are excepted.[158] These procedures exist to maintain the sanctity of a defendant's right to communicate with his or her attorney.

Intrusion by the government results in a constitutional violation

In *Weatherford v. Bursey*,[159] a civil rights action for damages, an undercover agent named Weatherford maintained his cover by getting himself arrested for

[157] *Patterson v. Illinois,* 487 U.S. 285, 290, n.3 (1988).
[158] A641-643.
[159] 429 U.S. 545 (1977).

vandalism along with Bursey.[160] Weatherford continued the ruse by accepting invitations to meet with Bursey and his lawyer. Weatherford did not discuss these meetings—not with his own supervisors and not with the prosecutors.[161] The *Weatherford* Court held that Bursey's proof of a civil rights claim fell short, because "there was no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford.[162] As such, Bursey's Sixth Amendment rights were not violated.[163]

The Third Circuit applied *Weatherford* in *United States v. Costanzo*, a federal habeas case.[164] Costanzo initially hired an attorney, but due to a conflict caused by representation of multiple defendants, the attorney did not end up representing any defendant.[165] Then that lawyer provided confidential information

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[160] *Id.* at 547.
[161] *Id.* at 548.
[162] *Id.* at 558.
[163] The State's reference to two cases proposing that *Weatherford* requires a showing of prejudice (OB at 21, fn 28) are not germane. *Williams v. Woodford*, 384 F.3d 567, 584-585 (9th Cir. 2004) involved a routine monitoring of an inmate's prison phone calls in which a call about an expert witness was recorded. The contact was inadvertent, there was no informer in the defense camp, and the prosecution did not know about the call. *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 2004) pertained to a DEA agent having contact with a represented government informant to encourage him to continue undercover work. Irwin was suspected of selling drugs while he was supposed to be acting as an informant. The prosecution was unaware of the DEA agent's activities and told him to stop when informed. The trial court suppressed the inculpatory conversations between the agent and Irwin at trial.
[164] 740 F.2d 251 (3d Cir. 1984).
[165] *Id.* at 254.

to the FBI.[166] The *Costanzo* Court noted held that even though the district court was not clearly erroneous in holding that the lawyer and Costanzo did not have an attorney-client relationship,

> that does not end our inquiry. The sixth amendment is also violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential strategy is disclosed to the prosecution by a government informer, or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant.[167]

Despite the finding of no actual prejudice on the specific facts of *Weatherford,* a defendant need not prove prejudice to establish a Sixth Amendment violation. The *Weatherford* rubric articulated in *Costanzo* has been deployed by various courts. In *State v. Lenarz,* a Connecticut direct appeal of a denial of a motion to dismiss, police obtained a search warrant for defendant's computer, but the warrant excluded attorney-client communications.[168] Nevertheless, the prosecutor accessed confidential communications. Lenarz moved to dismiss, but the motion was denied because the judge found the prosecutor's actions were not intentional.[169] Reversing, the Connecticut Supreme Court concluded that prejudice

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[166] *Id.*
[167] *Id.*
[168] *State v. Lenarz*, 22 A.3d 536, 539 (Conn. 2011).
[169] *Id.* at 541.

is presumed when the prosecutor invades the attorney-client privilege, even when the invasion is not intentional.[170]

In *Schillinger v. Haworth*, a Tenth Circuit habeas case, the defense attorney held pretrial meetings with his client in a courtroom, under a court-imposed condition that a sheriff's deputy be present as Haworth was incarcerated.[171] The defense lawyer paid the deputy for overtime and the conversations were supposed to be confidential. But the prosecutor nevertheless initiated discussions with the deputy and learned confidential defense trial strategy.[172]

After considering the relative merits of different approaches in the circuits, the Tenth Circuit affirmed the Sixth Amendment violation:

> Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment. In other words, we hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct.[173]

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[170] *Id.* at 542.
[171] *Schillinger v. Haworth,* 70 F.3d 1132, 1134 (10th Cir. 1995).
[172] *Id.* at 1135.
[173] *Id.* at 1142.

The egregious nature and the depth of the intrusion are key considerations under the *Weatherford* rubric. Egregious government conduct can result in a presumption of prejudice. As the Supreme Court of Nebraska held, the prosecution "makes a host of discretionary and judgmental decisions," neither an appellant or a court could ever sort out how a prosecutor had made use of a defendant's confidential trial strategy.[174] Both the First and Ninth Circuits have held that it would be virtually impossible for a defendant to show prejudice because the defendant can only guess at whether and how the information was used to the government's advantage.[175]

Actual disclosure of defense strategy is* per se *prejudicial to a defendant's Sixth Amendment rights

In *United States v. Levy*,[176] the Third Circuit contended with "a complex and difficult problem of joint legal representation of two criminal defendants," one of whom was a DEA informant.[177] During the period of joint representation, confidential trial strategy was discussed at meetings with their attorney. The prosecutors insisted that no information had been disclosed.[178]

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[174] *State v. Bain*, 872 N.W. 2d 777, 787 (Neb. 2016).
[175] *Bain* at 788, *citing U.S. v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003); *U.S. v. Mastroianni*, 749 F.2d 900 (1st Cir. 1984).
[176] 577 F.2d 200 (3d Cir. 2003).
[177] *Id.* at 202.
[178] *Id.* at 203.

The *Levy* Court held that the case illustrated the danger and futility of engaging in a prejudice analysis when strategy is actually disclosed to a member of the prosecution team. There is a substantial risk that agents of law enforcement who work up the cases would fail to disclose that the information was disclosed by an informer.[179] An actual prejudice test in those circumstances would be "virtually impossible."[180]

The *Levy* Court established a presumption of prejudice when defense strategy is actually disclosed to the government:

> In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case.[181]

The Third Circuit further explained its holding in *Levy* in 2012 in *United States v. Mitan*.[182] The Court explained that *Levy* applies when three factors coalesce: intentional government conduct, attorney-client privilege, and the release of confidential legal strategy.[183] Those factors were not present in *Mitan*. The

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[179] *Id.* at 208.
[180] *Id.*
[181] *Id.* at 209.
[182] 499 Fed Appx. 187 (3d Cir. 2012).
[183] *Mitan* at 192.

government was permitted to monitor Mitan's phone calls but not attorney-client communication. In one call with Mitan's brother, a legal citation was mentioned. The government agent immediately stopped reviewing the calls and sought advice from the Professional Responsibility Advisory Office. The government set up a separate unit known as a taint team to complete the review, even though Mitan was a *pro se* defendant with standby counsel.[184]

The State claims that *Levy* is no longer good law.[185] But in *United States v. Voigt*, the issue being decided was a Fifth Amendment claim of outrageous government conduct, and the Court held that *Levy* did not apply because Sixth Amendment concerns were not implicated.[186] In any event, *Mitan* was decided years after *Voigt* and applied *Levy.* In *United States v. Boffa,*[187] the District Court of Delaware noted that *Levy* had been repudiated because the United States Supreme Court had reached a different conclusion in *United States v. Morrison*.[188] However, *Morrison* did not address the quantum of conduct required for a Sixth Amendment violation, and *Levy* has not been overruled.

[184] *Id.* at 190.
[185] *Id.* at 26.
[186] *United States v. Voigt*, 89 F.3d 1050, 1071 (3d Cir. 1996).
[187] 89 F.R.D. 523 (D. Del. 1981).
[188] 449 U.S. 361 (1981).

Morrison ***focuses solely on remedy and simply presumed a Sixth Amendment violation***

Hazel Morrison, represented by counsel, was nevertheless approached by DEA agents who sought her cooperation in another case.[189] They disparaged her attorney and promised inducements if she cooperated and consequences if she did not. Morrison refused to cooperate. Her motion to dismiss was based solely on the behavior of the agents, and the prejudice was unspecified.[190] Government attorneys were not involved, and no confidential information was transmitted to the government.

In *Morrison*, the United States Supreme Court simply presumed a Sixth Amendment violation and did not revisit *Weatherford* or overrule *Levy.*[191] Notably, the Supreme Court did not criticize or reject the finding of the Third Circuit's holding in *Morrison*: conduct calculated to intrude upon the attorney-client relationship violates the Sixth Amendment.[192]

The Third Circuit was adhering to its precedent in *Via v. Cliff*, a civil rights action.[193] In that case, prison officials deliberately prevented the defendant's lawyer from communicating with the defendant six days before trial and then

[189] *Id.* at 362-363.
[190] *Id.* at 363.
[191] *Id.* at 364.
[192] *United States v. Morrison*, 602 F.2d 529, 531, 533 (3d Cir. 1979).
[193] 470 F.2d 271 (3d Cir. 1972).

denied the attorney a prison visit during the trial.[194] The court held that if the deliberate interference with the attorney-client relationship "was either wrongfully motivated or without adequate justification, he will have established an infringement on his constitutional right to counsel."[195]

As such, the Superior Court properly formulated the legal precepts applicable to the motion to dismiss: the three-part *Weatherford* test articulated in *Costanzo*, the presumption of prejudice if trial strategy is disclosed to the government pursuant to *Levy*, and the deliberate interference with the attorney client relationship left undisturbed in *Morrison.*[196]

2. The State's deliberate and intentional intrusion into Mr. Robinson's protected legal communications violated the Sixth Amendment.

Although the State complains in its brief that the Superior Court "erroneously" and "improperly" focused on the State's conduct, the State's intentional intrusion into Mr. Robinson's protected communications with his attorney is squarely at issue.[197] When prosecutors engage in egregious conduct that intrudes on the attorney-client relationship, a Sixth Amendment violation occurs. That is exactly what happened here.

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[194] *Id.* at 273-274.
[195] *Id.* at 275.
[196] *State v. Robinson*, 2017 WL 4675760 at *3-6 (Del. Super. October 17, 2017).
[197] OB at 22, 36.

The State engaged in intentional intrusion and deliberate interference

The State now argues that it did not purposefully intrude upon Mr. Robinson's confidential communications, but merely sought evidence of a protective order violation.[198] This is a far cry from the State's Superior Court arguments that Ms. Woloshin and her client were engaged in "suspected unlawful activity."[199] The State argued below it was justified in its actions due to the crime/fraud exception.[200] It argued Ms. Woloshin "*knowingly* and *intentionally*" breached the protective order.[201] The State claimed that Ms. Woloshin "either violated the TMG protective order or duped her client into believing she was providing him more than permitted."[202] As such, the State's argument on appeal does not accurately express the State's contemporaneous motivation for its actions. In any event, the record evidence tells exactly what happened.

The trial prosecutors knew that Ms. Woloshin had clarified that she was allowed to show summaries to Mr. Robinson. They knew from monitoring Mr. Robinson's phone calls that Ms. Woloshin refused to provide documents to Mr. Robinson. When Mr. Downs suspected a potential violation, he could have simply asked Ms. Woloshin about it. He did not. Once he learned the informant inmate's

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[198] OB at 28.
[199] A718.
[200] *Id.*
[201] A719 (emphasis in original).
[202] A715.

information was about attorney-client communications, he could have removed himself from the investigation. He did not.

When the prosecutors finally brought the matter to Mr. Grubb's attention, he had several options. He could have simply asked Ms. Woloshin. That is what the prosecutor did in 2015 in *Matter of Koyste*.[203] The defense lawyer admitted the violation, and self-reported to the judge the same day.[204] The State has never explained why neither Mr. Downs nor Mr. Grubb did not simply ask Ms. Woloshin.

Mr. Grubb did not seek an office conference with the judge, nor did he seek a rule to show cause. He did not even apply for a search warrant. In *State v. Cannon*, the detective obtained a search warrant based on evidence the defendant was fabricating a defense.[205] The search warrant specifically excluded legal correspondence.[206] The detective seized notebook pages, that upon review contained references to case law and other information. He self-reported the incident and the prosecutors took immediate steps to insulate themselves.[207]

[203] 111 A.3d 581 (Del. 2015).
[204] *Id.* at 584.
[205] *State v. Cannon*, ID No. 1001007728 (TRANSCRIPT); B136.
[206] B137.
[207] B139-140.

The judge found that Mr. Cannon's Sixth Amendment rights were violated and imposed a remedy, even though finding the State did not act intentionally or recklessly.[208]

The State has never explained why it did not simply apply for a search warrant, or what made this case different than *Koyste* or *Cannon.*

Instead, the State proceeded unilaterally and intrusively into Mr. Robinson's constitutionally protected papers. After a meeting that included Mr. Downs, Mr. Grubb sent an investigator to take everything from Mr. Robinson's cell and review it all. He gave the investigator no guidance to avoid attorney-client communications or work product. The second investigator knew even less.

Mr. Grubb directed Ms. Prater—a member of the prosecution team—to conduct a second review. Again, there was no guidance to avoid attorney-client communications. Inexplicably, Ms. Prater was not removed from her integral role with the prosecution team until two weeks after her review.

When Ms. Woloshin learned on July 5, 2017 that Mr. Robinson's papers had been taken, she had no idea that it was at the behest of the DOJ. The prosecutor did not inform the trial judge of that fact either. It was the DOC's attorney that informed the judge that the DOJ had directed the seizure.

[208] B142.

The State's egregious actions epitomize intentional, deliberate intrusion into the attorney-client relationship. At every turn, the State had opportunities to take more measured and legally appropriate action and chose intrusion every time. The State had every opportunity to insulate the prosecution team and chose inclusion instead. The egregious nature of this conduct violated Mr. Robinson's Sixth Amendment rights within the meaning of *Weatherford* and *Morrison.*

The Superior Court's finding that trial strategy was actually disclosed and that there was deliberate interference with the attorney-client relationship is supported by the evidence

The Superior Court's factual findings were not clearly erroneous. The Court's finding that a member of the prosecution team learned details of defense strategy, which violates the Sixth Amendment under *Weatherford.*[209] The judge properly held that the State's failure to keep any records, failure to establish a taint team, and failure to effectively insulate the prosecution team resulted in confidential defense strategy actually being disclosed to the State.[210]

The Superior Court was not clearly erroneous when deciding that the State's actions were egregious enough to constitute deliberate interference with Mr.

[209] *State v. Robinson*, 2018 WL 2085066 at *11 (Del. Super., May 1, 2018).
[210] *Id.* at *11-12.

Robinson's right to counsel.[211] The Court was correct that the intrusion could chill the forthrightness and scope of future attorney-client communications.[212]

The State contends, in a no-harm-no-foul argument, that no privileged communications were disclosed to the trial prosecutors.[213] But the judge was able to make credibility determinations based on live testimony. That testimony was inconsistent, contradictory, and featured memory lapses by key witnesses. Moreover, the State failed to comply with court orders throughout the proceedings, such as the order to identify all individuals involved, and the order to produce all documents and correspondence relating to the matter.[214]

The State's argument that it was not really reviewing privileged communications—while deliberately reviewing privileged communications—does not hold up to scrutiny. As the Court noted, establishing a rule that so long as the State has some excuse, it can review attorney-client communications, would eviscerate constitutionally protected Sixth Amendment rights.[215]

Applying the law to the evidence, the Superior Court properly found that Mr. Robinson's Sixth Amendment rights were violated.

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[211] *Id.* at *12-13.
[212] *Id.* at *13.
[213] OB at 22.
[214] *State v. Robinson*, 2018 WL 2085066 at *14 (Del. Super., May 1, 2018).
[215] *Id.* at *12.

II. DENIED. DISMISSAL WAS THE ONLY APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES, ESPECIALLY WHEN THE STATE NEVER SUGGESTED AN ALTERNATIVE.

A. Question Presented

Whether dismissal was the appropriate remedy for the Sixth Amendment violation committed by the DOJ when it deliberately intruded on Mr. Robinson's attorney-client relationship and obtained protected confidential information.

This issue was preserved upon the filing of a Motion to Dismiss in the Superior Court on July 7, 2017.[216]

B. Standard and Scope of Review

For questions of law, this Court review's the Superior Court's legal determinations for errors in formulating or applying legal precepts.[217] This Court reviews factual findings by the Superior Court to determine whether competent evidence supports the findings and whether those findings were clearly erroneous.[218]

[216] A92-119.
[217] *Word v. State,* 801 A.2d 927, 929 (Del. 2002).
[218] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

C. Merits of Argument

Dismissal was the appropriate remedy for the denial of a constitutional right

As this Court has expressed, the law must furnish a remedy for the deprival of an important constitutional right.[219] The counterbalance of rights with remedies is essential to the protections afforded under the Constitution.[220] The Superior Court considered other remedies to undo the prejudice to Mr. Robinson but concluded that only dismissal would provide redress.[221] The State made the judge's task more difficult by never suggesting a remedy and continuing to justify its actions.

The State frames the question in terms of a purported concession that Mr. Robinson had not suffered prejudice or injury.[222] No such concession was made. The point made in briefing, and on appeal, is that it is difficult to ascertain how a prosecution team will make use of improperly obtained information at trial, either consciously or subconsciously.[223] Such is the case here, and dismissal was the only appropriate remedial choice.

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[219] *McCoy v. State*, 112 A.3d 239, 258 (Del. 2015)(remanding for a new trial when defendant's right to peremptory challenges was denied).
[220] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).
[221] *State v. Robinson*, 2018 WL 2085066 at *17 (Del. Super., May 1, 2018).
[222] OB at 29.
[223] *See, e.g.*, A695-696 n. 153.

The Superior Court correctly held that the State's conduct and the prejudice to Mr. Robinson required the remedy of dismissal.

This case stands apart from other cases in which the appropriate remedy fell short of dismissal. For example, the Court noted that in *Morrison,* the defendant rebuffed the rogue DEA agents and the prosecutor was not involved; as such, no prejudice pertained.[224] The Delaware cases, the Court properly held, do not evince the same degree of misconduct, and other remedies were available.[225]

In *Bailey v. State*,[226] the Delaware Supreme Court affirmed the trial judge's refusal to grant dismissal when State action interfered with his trial preparations with his counsel. The judge was able to order contemporaneous remedies to ensure Bailey had access to his counsel and his papers.[227] In *Bailey*, all the actions taken, such as cell shakedowns, taking away his legal papers, and cutting short legal phone calls, were conducted by the DOC.[228] Those actions were not requested or ordered by the DOJ. The prosecution team was not involved, and certainly did not review protected communications.

State v. Cannon[229] presents a difficult comparison for the State. The judge in *Cannon* was able to provide a remedy short of dismissal because the State's timely

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[224] *State v. Robinson*, 2018 WL 2085066 at *15 (Del. Super., May 1, 2018).
[225] *Id.* at *14.
[226] 521 A.2d 1069 (Del. 1987).
[227] *Id.* at 1085-1086.
[228] *Id.* at 1084-1085.
[229] ID No. 1001007728 (TRANSCRIPT); B136.

admission of a breach enabled the Court to remedy the violation. The State had a search warrant that excluded privileged communications. When the detective inadvertently saw legal material, he self-reported and the prosecutors took immediate steps to shield themselves and involve a different prosecutor.[230] The judge found a Sixth Amendment violation and was able to fashion a remedy short of dismissal.[231]

In Mr. Robinson's case, the State's conduct was too egregious to remedy. Indeed, the State ignored the judge's admonition in *Cannon* to develop a process to ensure such constitutional violations would not happen in the future.[232] Instead, the State's process now does not even include an application for a search warrant.

In *Puryear v. State*,[233] police approached a defendant in court hoping to gain information on his lawyer, who was suspected of drug crimes. The defendant did not cooperate, and a different lawyer represented him at trial.[234] The prosecutor knew of the police contact and conceded the conduct was improper.[235] The Superior Court afforded Puryear a remedy, which was that Puryear's statements to

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[230] B148.
[231] B142.
[232] B139.
[233] 2000 WL 975055 (Del. May 30, 2000), *aff'g*, *State v. Puryear*, 1998 WL 1029235 (Del. Super. Nov. 9, 1998).
[234] *Id.* at *1.
[235] *State v. Puryear*, 1998 WL 1029235 at *1 (Del. Super. November 9, 1998).

the detective during the improper contact could not be used at trial.[236] This Court affirmed, because Puryear did not complain about the performance of his substitute counsel, and Puryear's rights were protected at trial.[237]

None of these Delaware cases involve the type of egregious and intentional violation present in Mr. Robinson's case. Moreover, in the two cases involving conduct by the DOJ, the prosecutors admitted that their conduct was improper. In all three cases, the judges were able to remedy the violation. But in Mr. Robinson's case, the State continues to argue its conduct was proper and did not result in a Sixth Amendment violation.

The Superior Court's holding that "*Morrison, Bailey, and Cannon* did not involve the same level of prejudice suffered in the instant case"[238] is well-reasoned and supported by the facts. Although the State criticizes the Superior Court for not "tailoring the remedy to fit the injury suffered by Robinson,"[239] the State has never suggested what that remedy might be. As such, dismissal was appropriate.

The Superior Court properly held that no lesser sanction would adequately address the State's conduct

As the finder of fact, the Superior Court judge was in the best position to observe the conduct of the parties and the testimony of the witnesses. The judge's

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[236] *Id.* at *3.
[237] *Puryear v. State*, 2000 WL 975055 at *1 (Del. May 30, 2000).
[238] *State v. Robinson*, 2018 WL 2085066 at *16 (Del. Super., May 1, 2018).
[239] OB at 45.

finding that the "State's conduct fell short of the Court's expectations for Delaware prosecutors"[240] is well-established. From the failure to identify witnesses, to having to be ordered three times to produce documents, to the *ad hominem* nature of its attacks on defense counsel, the State demonstrated a "seeming indifference to the serious constitutional issues at stake" in this matter.[241] For example, despite the State's current line of argument on appeal, in the Superior Court briefing the State argued that the review of Mr. Robinson's documents were justified because Ms. Woloshin committed a crime or fraud.

The Superior Court's findings regarding the State's "cavalier" attitude regarding Mr. Robinson's rights supported by the record and not clearly erroneous.[242]

The State's conduct was certainly a factor in the Court's decision to dismiss the case, and rightly so. Had the State made different decisions at many points throughout this matter, Mr. Robinson's rights could have been protected. The starting point would have been for Mr. Downs to express his concerns to Ms. Woloshin after interviewing the informant inmate in May 2017. But that did not happen, and neither did a host of other, better choices available to the State.

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[240] *State v. Robinson*, 2018 WL 2085066 at *13-14 (Del. Super., May 1, 2018).
[241] *Id.* at *13-15.
[242] *Id.* at *15.

The State now claims that it "candidly accepted responsibility" that the investigation was not executed as well as it could have been.[243] That statement is taken far out of context. Mr. Lugg made that remark while explaining to the judge why this case was different than others: that the State relied on the crime/fraud exception.[244] In other words, the State argued that things could have been in a "cleaner, better, more well-documented" way, but this case was different because every document would "not be privileged because it would fall within the crime/fraud exception."[245]

The State also states that the paralegal "is no longer a DOJ employee," apparently to argue that the knowledge she acquired is no longer accessible by the trial prosecutors.[246] But that fact is found nowhere in the record below and should not be considered by this Court. In any event, the State allowed Ms. Prater to remain assigned to Mr. Robinson's cases for two weeks after she read Mr. Robinson's privileged communications, so the damage was done.

The State further asserts the "the State has also clarified its policy for future searches, and established protocols for taint teams."[247] That is another assertion not found in the Superior Court record and should not be considered by this Court. Nor

[243] OB at 44. *See also* OB at 24.
[244] A646-647.
[245] *Id.*
[246] OB at 44.
[247] *Id.*

does that fact, if it is a fact, have any bearing on Mr. Robinson's case. Moreover, the judge in *Cannon* admonished the State in 2010 to develop a process to avoid such Sixth Amendment violations.[248] As the present case illustrates, that did not happen.

As the judge held, the Court is responsible for safeguarding the constitutional rights of the accused and to hold parties accountable for their conduct.[249] The Court did so here. No lesser sanction than dismissal was appropriate for the protection of Mr. Robinson's rights. Moreover, it was a proper exercise of the judge's authority to dismiss this case as a deterrent to future improper conduct by the State.

The Superior Court correctly applied the relevant legal precepts to the record evidence and should be affirmed by this Court.

[248] B139.
[249] *Id.* at *17.

CONCLUSION

For the foregoing reasons, Appellant Jacquez Robinson respectfully requests that this Court affirm the judgment of the Superior Court.

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Dated: September 27, 2018