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Case Number 232,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellant,	)	
v.	)	No. 232, 2018
	)	
JACQUEZ ROBINSON,	)	
	)	
Defendant Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S REPLY BRIEF

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Date: October 29, 2018

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page**

ARGUMENT

I. THE STATE'S CONDUCT DID NOT VIOLATE ROBINSON'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL.

The Superior Court found the State violated Robinson's Sixth Amendment rights as a result of the warrantless search and seizure of Robinson's legal materials from his prison cell, on three separate grounds: (1) under *Weatherford v. Bursey*,[1] finding a violation because Robinson suffered "substantial prejudice;" (2) under *United States v. Levy*,[2] finding a violation because Robinson's defense strategy was actually disclosed to the prosecution team, thereby establishing a presumption of prejudice; and (3) under *United States v. Morrison*,[3] finding a violation because the State deliberately interfered with Robinson's right to the assistance of counsel when it intentionally seized and reviewed Robinson's attorney-client communications without seeking judicial approval or oversight, even if there was no showing of prejudice.[4] In his answering brief, Robinson contends the court correctly presumed prejudice under *Levy* and *Morrison* and found "the State's egregious acts amounted to disclosure of confidential trial strategy to the prosecution and that the State

[1] 429 U.S. 545 (1977).

[2] 577 F.2d 200 (3d Cir. 1978).

[3] 449 U.S. 361, 365 (1981).

[4] *State v. Robinson*, 2018 WL 2085066, at *10-13 (Del. Super. Ct. May 1, 2018).

intentionally intruded upon the constitutionally protected attorney-client relationship." (Ans. Br. at 2). Notably, Robinson does *not* argue the court correctly found a Sixth Amendment violation was established under *Weatherford*, by meeting his burden to show he suffered actual, substantial prejudice. Instead, Robinson claims prejudice can be *presumed* under the "*Weatherford* rubic," due to the "egregious nature" of the State's conduct. (*Id.* at 30-32, 40). Robinson's arguments are unavailing. Presuming prejudice is at odds with United States Supreme Court precedent, and Robinson's inability to establish he suffered any actual, substantial prejudice as a result of the warrantless seizure of his legal materials, is fatal to his Sixth Amendment claim.

A. The Superior Court Erred In Presuming Prejudice To Find A Sixth Amendment Violation.

Citing the Third Circuit's decision in *United States v. Costanzo*,[5] Robinson claims a defendant need not prove prejudice under *Weatherford* to establish a Sixth Amendment violation. (*Id.* at 30). Robinson argues that *Costanzo*, a federal habeas case, recognized a Sixth Amendment violation can be established without a showing of actual prejudice: (1) when the government 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

[5] 740 F.2d 251 (3d Cir. 1984).

confidential defense strategy, but a disclosure by a government informer leads to prejudice to defendant. (*Id.*). According to Robinson, numerous courts have deployed the "*Weatherford* rubic" articulated in *Costanzo* to hold prejudice may be presumed where there is evidence attorney-client information was improperly communicated to the prosecution. (*Id.* at 30-34). In support of this claim, Robinson relies upon: (1) *Shillinger v. Haworth*[6] and *State v. Lenarz*,[7] which adopted a *per se* standard that prejudice may be presumed when a prosecutor has intentionally and unjustifiably invaded the attorney-client privilege; (2) *State v. Bain*,[8] *United States v. Mastroianni*,[9] and *United States v. Danielson*,[10] which held a rebuttable presumption of prejudice arises when the prosecution becomes privy to a defendant's confidential trial strategy; and (3) *Levy*,[11] which established a *per se* rule that prejudice, and thus a violation of the Sixth Amendment, will be presumed to occur when confidential defense strategy is disclosed to the government by an informant. Robinson also claims prejudice can be presumed under *Morrison*, if there

[6] 70 F.3d 1132 (10th Cir. 1995).

[7] 22 A.3d 536 (Conn. 2011).

[8] 872 N.W.2d 777 (Neb. 2016).

[9] 749 F.2d 900 (1st Cir. 1984).

[10] 325 F.3d 1054 (9th Cir. 2003).

[11] *Levy*, 577 F.2d at 208-10.

was a deliberate attempt to interfere with the attorney-client relationship. (*Id.* at 35-36). Robinson's reliance on these cases is misplaced.

Regardless of whether the presumption of prejudice is rebuttable or not, or if the prosecution improperly intentionally intruded on the attorney-client privilege and/or became privy to defense strategy, any rule permitting prejudice to be presumed to establish a Sixth Amendment violation, or placing the burden of proof on the prosecution, is at odds with the United States Supreme Court's holdings in *Morrison* and *Weatherford*. In *Morrison*, the United States Supreme Court rejected a *per se* approach to even purposeful or intentional government intrusion into privileged attorney-client communications and placed the burden to prove prejudice on defendant.[12] Although *Morrison* assumed a Sixth Amendment violation and focused on the remedy, and, therefore, did not address a presumption of prejudice approach, *Morrison* did not hold, or even suggest, that a deliberate attempt to interfere with the attorney-client relationship, without more, would automatically establish a Sixth Amendment violation.[13]

Moreover, *Weatherford* clearly establishes there is no *per se* rule that a Sixth Amendment violation occurs every time the government intentionally interferes with

[12] *See Morrison*, 449 U.S. at 364-67.

[13] *See id.* (reversing Third Circuit's decision that Morrison's right to counsel was violated and dismissal was warranted).

the relationship between a criminal defendant and his attorney.[14] In *Weatherford*, the United States Supreme Court rejected a *per se* right-to-counsel rule established by the Fourth Circuit that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial."[15] In reversing, the *Weatherford* Court recognized that some showing of prejudice by the defendant to his or her preparation for, or the conduct of, the trial is an indispensable element for finding that alleged government misconduct violated the Sixth Amendment.[16] The United States Supreme Court explained:

> If anything is to be inferred from . . . [previous decisions by the Supreme Court in *Black v. United States*[17] and *O'Brien v. United States*[18]] with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have

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[14] *Weatherford*, 429 U.S. at 550-51, 554-58; *see also Malinski v. State*, 794 N.E.2d 1071, 1081 (Ind. 2003) ("There is no *per se* rule that every intrusion by the prosecution into the relationship between a criminal defendant and his attorney constitutes a Sixth Amendment violation."); *Williams v. Woodford*, 384 F.3d 567, 584-85 (9th Cir. 2004) (recognizing *Weatherford* requires criminal defendant to show actual injury to state claim based on alleged violation of right to counsel); *United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980) (same).

[15] *Weatherford*, 429 U.S. at 549-52.

[16] *Id.* at 550-51, 554-58 (holding Weatherford had not suffered any deprivation of Sixth Amendment rights, even though undercover police agent attended meetings between Weatherford and counsel, because agent's attendance did not have any effect on Weatherford's trial and conviction).

[17] 385 U.S. 26 (1966).

[18] 386 U.S. 345 (1967).

> produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the per se rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant.[19]

Weatherford's emphasis on the defendant's need to prove particularized harm from an intrusion on the attorney-client relationship shows a Sixth Amendment violation occurs only if: (1) the government intentionally invades the attorney-client relationship, *and* (2) the invasion results in particularized prejudice to the accused.

Further, although *Weatherford* did not involve a situation where defense strategy was actually disclosed to the prosecution, *Weatherford* did not hold or even suggest that actual disclosure of defense strategy to the prosecution, without more, would automatically establish a Sixth Amendment violation. To the contrary, *Weatherford's* rejection of the Fourth Circuit's *per se* rule demonstrates Sixth Amendment violations must be evaluated in terms of their effect on the fairness of the criminal trials that follow and not on a *per se* basis without determining whether trial prejudice to defendant occurred.

Citing *United States v. Mitan*,[20] Robinson also claims *Levy* is still good law. (Ans. Br. at 34). Robinson is wrong. In *Mitan*, the Third Circuit did not "appl[y] *Levy*," as Robinson claims. Rather, the Third Circuit recognized, as it did in its

[19] *Weatherford*, 429 U.S. at 552.

[20] 499 F. App'x 187 (3d Cir. 2012).

earlier decision in *United States v. Voigt*,[21] that the United States Supreme Court's decision in *Morrison* called into question its interpretation in *Levy* that *Weatherford* did not impose an "actual prejudice" test.[22] The Third Circuit held it did not need to decide whether *Morrison* precluded the presumption of prejudice approach adopted in *Levy* because the defendant could not show the factual predicate for the presumption (*i.e.*, an intentional invasion of the defense camp).[23] *Mitan* thus recognized the defendant was not entitled to any relief unless he proved actual harm. The Third Circuit made clear the defendant had to show his *privileged* conversations had been invaded. In other words, the court was not concerned with the *possibility* the government's access to unprivileged communications might enable a prosecutor to glean information about which he had not been aware. Rather, the court required defendant show the prejudice he suffered was the result of a review by the government of privileged communications, something Robinson cannot show here.

Shillinger, *Lenarz*, *Bain*, *Mastroianni*, *Danielson*, and *Levy*, which have unique facts and represent extreme cases of prosecutorial misconduct, are also factually distinguishable, because the prosecutor in those cases had access to, or

[21] 89 F.3d 1050 n.9 (3d Cir. 1996) ("[T]o the extent that *Levy* can be read as holding that certain government conduct is *per se* prejudicial, we note that the Supreme Court has since held to [the] contrary [in *Morrison*].").

[22] *Mitan*, 499 F. App'x at 192-93 & n.6.

[23] *Id.*

read, documents containing defendants' trial strategy and nonetheless tried the cases to conclusion. Thus, in *Shillinger*,[24] *Lenarz*,[25] and *Levy*,[26] the prosecutors' intrusion into defendants' privileged communications irreversibly tainted defendants' cases, because confidential information was provided to the individual prosecutors, and used against the defendant in each case at trial, thereby releasing defense strategy

[24] In *Shillinger*, the defense attorney was required for security reasons to have a deputy sheriff present at trial preparation sessions with his client. 70 F.3d at 1134. The prosecutor, by his own admission, purposefully obtained substantive information from the sheriff regarding defendant's conversations with his attorney in those sessions, and then *used* specific information obtained from that "purposeful intrusion" during his cross-examination of defendant at trial. *Id.* at 1134-36.

[25] In *Lenarz*, the prosecutor invaded the attorney-client privilege by intentionally reading privileged materials on defendant's seized computer containing "a highly specific and detailed trial strategy," "highly specific facts relating to the credibility of the complainant [upon which one case was entirely based] and the adequacy of the police investigation in that case, . . . which went to the heart of the defense," and "statements by the defendant of how best to defend the case," despite a court order not to do so, before trying the case. 22 A.3d at 539-40, 551. The Connecticut Supreme Court found the prosecutor "clearly invaded privileged communications that contained a detailed, explicit road map of the defendant's trial strategy" during the one and a half years preceding trial, allowing him to use the information in preparing for trial, and the record strongly suggested the prosecutor may have revealed defendant's trial strategy to witnesses and investigators and drawn on his knowledge of the privileged communications when examining witnesses during trial. *Id.* at 554-58. Because the case had been tried to conclusion, the court found the disclosed information had been released to the "public domain." *Id.*

[26] In *Levy*, DEA agents purposefully employed Levy's co-defendant, who was represented by the same counsel as Levy, to obtain and reveal confidential defense strategy to them. 577 F.2d at 202-05. The DEA agents, in turn, revealed the deceptively acquired information to prosecutors, who used the information at trial, thereby releasing it into the "public domain." *Id.*

into the "public domain." Although it was unclear whether the prosecutors in *Bain*,[27] *Mastroianni*,[28] and *Danielson*[29] actually used defendants' confidential information to the government's advantage at trial, the prosecutors undisputedly received and had access to confidential defense strategy, and nonetheless tried the cases.[30]

This case is very different. Robinson's trial has not yet occurred, and no privileged information has been released to the "public domain." Thus, no evidence is tainted. Further, there is no evidence the Trial Prosecutors[31] were privy, or had

[27] In *Bain*, defendant's confidential trial strategy wound up in the possession of multiple prosecutors who tried the case, and it was unclear whether the State used the information to develop evidence or witnesses or to otherwise gain an advantage or make decisions detrimental to defendant during trial. 872 N.W.2d at 780-82, 793.

[28] In *Danielson*, an informant was used in a deliberate attempt to obtain evidence regarding new crimes being committed by defendant, who was already under indictment and represented by counsel. 325 F.3d at 1062. During undercover meetings between defendant and the informant, privileged information about defendant's trial strategy was obtained and communicated to the prosecution team, including the prosecutor who then tried the case. *Id.* at 1062-74.

[29] In *Mastroianni*, the government authorized a cooperating co-defendant to attend a joint meeting of defendants and their counsel prior to trial, and thereafter debriefed him concerning future criminal activity and obtained confidential communications. 749 F.2d at 902-08.

[30] Finding it would be "virtually impossible" for defendants to show prejudice where it was possible the State could have used confidential information to defendant's detriment at trial, these courts did not presume the trial was tainted, but instead placed the burden on the government to rebut a presumption defendant was prejudiced. *Id.*; *Bain*, 872 N.W.2d at 782, 792-93; *Danielson*, 325 F.3d at 1074.

[31] For the sake of clarity, the State refers to individuals using the names assigned by the Superior Court in its May 2018 Opinion, although it shortened "Prosecution Team Paralegal" to "Paralegal." *See Robinson*, 2018 WL 2085066.

access to, any of Robinson's privileged communications, and the record is replete with testimony that no notes or records were made of the contents of Robinson's documents to shield any communication from inadvertent disclosure in the future.[32] Because the Trial Prosecutors were shielded from learning any details of Robinson's trial strategy, and Robinson's cases have never been tried, there is no threat that the State could have used confidential information to Robinson's detriment. Moreover, there is no suggestion in this case that the State purposely seized privileged materials to gain access to Robinson's defense strategy or acted with the intent of using them in support of the prosecution's case. Rather, in searching Robinson's cell and reviewing documents found in his cell, the State sought relevant, first-hand evidence of whether a protective order had been violated.

Robinson nonetheless claims the Superior Court "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." (Ans. Br. at 40). Robinson also appears to claim the record is not clear that there was no actual disclosure of defense strategy to the Trial Prosecutors, stating "the judge was able to make credibility determinations based on live testimony [and] [t]hat testimony was inconsistent,

[32] *See Voigt*, 89 F.3d at 1070-71.

contradictory, and featured memory lapses by key witnesses." (*Id.* at 41). Robinson is mistaken.

First, the witnesses' testimony was consistent and did not involve any memory lapses concerning the fact that no disclosures were made to the Trial Prosecutors. All witnesses testified that no information gleaned from the cursory review of documents removed from Robinson's cell was shared with the Trial Prosecutors. (A404-08; A486; A537; A542; A549-50; A597-98). And the Trial Prosecutors confirmed they neither learned of nor saw the contents of anything found in Robinson's cell. (A123; A120-21; A338-40; A447-49). Further, although the Paralegal reviewed Robinson's documents, the record is replete with testimony by the State's witnesses that no communication, defense strategy, or privileged document was conveyed to the Trial Prosecutors.

Second, the Superior Court's factual findings that the State failed to establish a taint team and effectively insulate the prosecution team, are belied by the record. As discussed in the State's opening brief, all witnesses testified that, while not perfect, the *ad hoc* screen was effective. Critically, there has been no communication or disclosure of defense strategy or of any privileged documents to the Trial Prosecutors. Indeed, as detailed in the Affidavits and as testified to at the hearing, the State was scrupulous in its effort to prevent the Trial Prosecutors from procuring confidential defense strategy. Although the Paralegal did have access to

the seized materials, the evidence establishes the Paralegal did not discuss with, or pass on, any details or information regarding Robinson's trial plans, strategy, or the contents of anything found in Robinson's cell to the Trial Prosecutors working on the case.[33] There is also no basis to suppose confidential information may be inadvertently leaked to the Trial Prosecutors by the Senior Prosecutor, Chief Investigator, and/or Paralegal. Each of these individuals testified they did not share the substance of *any* document reviewed with the Trial Prosecutors, which the Trial Prosecutors confirmed. Moreover, none have a specific recollection of any fact today. The Paralegal will also provide no future assistance to the Trial Prosecutors, having been removed from Robinson's cases.[34]

Third, while a precise accounting of the evidence seized, the documents reviewed, and substantive notes may have yielded a more precise record here, such an inventory would have required a comprehensive review of Robinson's documents and increased the chances for Robinson's concerns to have actually come to fruition.

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[33] *See Weatherford*, 429 U.S. at 548-49 (finding no Sixth Amendment violation where informant did not discuss with, or pass on to, the prosecuting attorney or his staff "any details or information regarding the [defendant's] trial plans, strategy, or anything having to do with the criminal action pending against [defendant]").

[34] In its opening brief, the State noted the Paralegal was no longer employed by the Department of Justice ("DOJ"). (Op. Br. at 17, 40). The Paralegal has since re-joined the DOJ, effective October 15, 2018. In any event, the Paralegal's re-hiring does not change the fact she did not share the substance of *any* document reviewed with Trial Prosecutors or her removal from Robinson's cases.

Faced with this Catch-22, the State appropriately chose a path that best favored the integrity of Robinson's confidential communications.

B. The Superior Court Wrongly Held Robinson Established "Substantial Prejudice" Under *Weatherford*.

Notably, in arguing the State's actions violated Robinson's Sixth Amendment rights, Robinson does not contend he made any showing of prejudice, substantial or otherwise, or that he even suffered "actual prejudice," as the Superior Court found.[35] (*See* Ans. Br. at 27-41). Rather, Robinson claims: (1) prejudice can be presumed under the "*Weatherford* rubic" and *Morrison* to establish a Sixth Amendment violation as a result of the State's deliberate and intentional intrusion into his protected legal communications, and (2) a Sixth Amendment violation was established under *Levy*, because the evidence shows that trial strategy was actually disclosed to the prosecution team. (*Id.*). Robinson's inability to establish actual prejudice under *Weatherford* is fatal to his Sixth Amendment claim.

First, even if the State improperly intruded on the attorney-client privilege in this case and/or Robinson's seized documents contained "defense strategy," it is improper to presume prejudice. As discussed, *Weatherford* establishes interference,

[35] *Robinson*, 2018 WL 2085066, at *11.

even if deliberate, only violates the Sixth Amendment right to counsel *if* it substantially prejudices defendant.[36]

Second, while the Superior Court acknowledged defendant bears the burden to establish prejudice under *Weatherford*,[37] the court's finding that Robinson suffered "actual prejudice" ignores Robinson's failure to allege, let alone establish, any actual prejudice he suffered. Tellingly, Robinson still does not allege any actual prejudice, and vague allegations of prejudice do not suffice under *Weatherford*. Because Robinson failed to provide any factual support to enable the Superior Court to evaluate the substantiality of any actual prejudice he suffered, the Superior Court wrongly found Robinson suffered "actual," "substantial prejudice" under *Weatherford*.

Nothing in the record supports the Superior Court's finding that Robinson suffered *any* actual prejudice, as Robinson appears to concede. Trial has not yet occurred and no tainted evidence was used against him. Although the Paralegal reviewed Robinson's documents, no record of any materials was retained and no communication, defense strategy, or privileged document was conveyed to the Trial Prosecutors.

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[36] *Weatherford*, 429 U.S. at 554, 561.

[37] *State v. Robinson*, 2017 WL 4675760, at *5-6 (Del. Super. Ct. Sept. 19, 2017, revised Oct. 17, 2017).

Robinson argues the court did not err in focusing on the State's conduct, rather than the effect of that conduct on Robinson to find "actual prejudice," because "the State's intentional intrusion into [Robinson's] protected communications with his attorney is squarely at issue," and a Sixth Amendment violation occurs "[w]hen prosecutors engage in egregious conduct that intrudes on the attorney-client relationship." (*Id.* at 36). Robinson is mistaken. Even if the State deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, the United States Supreme Court has held the interference only violates the Sixth Amendment right to counsel *if* it substantially prejudices defendant.[38] For purposes of the Sixth Amendment, the critical consideration is the actual impact of governmental action on defendant.[39]

Unable to articulate any specific effect the State's actions had on him, Robinson states the Superior Court "was correct that the intrusion could chill the forthrightness and scope of future attorney-client communications." (*Id.* at 41). This hypothetical type of speculation ignores that Robinson has not established any actual injury, as required by *Weatherford*. Robinson did not show, let alone allege, he was reluctant or unable to disclose information to his attorney, or he has kept any communications to himself. By engaging in this type of speculation, the Superior

[38] *Weatherford*, 429 U.S. at 554, 561.

[39] *Id.* at 550-51; *Williams*, 384 F.3d at 584-85.

Court effectively lowered the standard of prejudice for right-to-counsel claims from "substantial prejudice" to "imaginable prejudice." As a result, the court's reasoning is plainly inconsistent with United States Supreme Court precedent.

C. The Superior Court Wrongly Held The State's Conduct Demonstrates A Deliberate Interference With Robinson's Sixth Amendment Rights.

Robinson argues the Superior Court properly found a Sixth Amendment violation because the State deliberately interfered with Robinson's right to the assistance of counsel. (*Id.* at 36-41). Robinson is mistaken. Even if the State deliberately interfered with Robinson's attorney-client relationship, the United States Supreme Court has held the interference only violates the Sixth Amendment right to counsel *if* it substantially prejudices defendant.[40] As discussed, the court erred in finding prejudice may be presumed and in finding Robinson established actual, substantial prejudice. Thus, even if the Court assumes the State's conduct was deliberate state interference with Robinson's confidential relationship with his counsel, Robinson fails to establish a Sixth Amendment violation because he has failed to establish prejudice.

Moreover, this case is different from cases where the government acts to intentionally interfere with the attorney-client privilege. The State did not

[40] *Weatherford*, 429 U.S. at 554, 561.

purposefully intrude upon confidential communications between Robinson and his attorney to gain access to confidential defense strategy, or attempt to use manipulative tactics or an undercover informant to intrude into his attorney-client relationship. Rather, the State sought relevant, first-hand evidence of whether a protective order had been violated based on Robinson's own statements. This distinction compels a different result.

Robinson contends the State has changed its argument by "now argu[ing] that it did not purposefully intrude upon [Robinson's] confidential communications, but merely sought evidence of a protective order violation." (*Id.* at 37). Not so. While the State did cite the crime/fraud exception in post-hearing briefing, the State has consistently maintained its motivation was to seek evidence for its investigation into a violation of protective orders. (*See* State's Response to Motion to Dismiss Indictment at A165; State's Sur-Reply to Defendant's Motion to Dismiss Indictment at A235-36; State's Answer to Post-Hearing Brief at A715-18).

Robinson also contends the record does not support the State's claimed motivation for its actions, because: (1) the Trial Prosecutors knew Defense Counsel had clarified she was allowed to show summaries to Robinson, and Defense Counsel had refused to provide documents to Robinson, from monitoring his calls; (2) the Trial Prosecutors or the Senior Prosecutor could have simply asked Defense Counsel about a potential protective order violation, as the prosecutor did in *Matter of*

Koyste;[41] (3) the Trial Prosecutors could have removed themselves from the investigation into whether the protective order was violated; and (4) the State could have applied for a search warrant, as the detective did in *State v. Cannon*,[42] or brought the potential violation to the Superior Court's attention. (Ans. Br. at 37-39).

The record reflects that, in May-June 2017, neither the Lead Trial Prosecutor nor the Paralegal recalled the August 2016 emails between Defense Counsel and a former prosecutor discussing the TMG Protective Order, despite being copied on them. (A357-62; A429; A561-63). And, Robinson's repeated assertions that Defense Counsel provided him protected information justified the State's limited search for documents covered by a protective order. In fact, witness safety demanded action.

Further, as explained in its briefing below, the State did not consider calling Defense Counsel a viable option because her "conduct was the heart of the potential protective order violation." (A423; A427-28). This case is markedly different from the scenario presented in *Koyste*. In *Koyste*, the prosecutor had no indication the protective order was breached knowingly or intentionally, and it was unclear whether the defense attorney or his investigator had possibly breached the order.

[41] 111 A.3d 581 (Del. 2015).

[42] Case ID No. 1001007728 (Del. Super. Ct. Jan. 3, 2011) (TRANSCRIPT) (Ex. C to Op. Br.).

Thus, the prosecutor inquired of counsel. In contrast, here, the evidence indicated that Defense Counsel *knowingly* and *intentionally* breached a protective order. Under the circumstances, the Senior Prosecutor did not believe it would be "fruitful" to contact Defense Counsel. His conclusion is reasonable and understandable based on the nature and content of Robinson's recorded conversations.

In addition, Robinson's argument ignores the Trial Prosecutors never investigated any breach of a protective order. The Trial Prosecutors testified they subpoenaed Robinson's phone calls and interviewed the Intermediate Inmate to prepare for trial, not to investigate any breach of a protective order. (A127; A331-32; A378; A442). This is evidenced by the Junior Trial Prosecutor's June 30, 2017 email of the recorded call transcripts to Defense Counsel. (A60-68). As soon as the Trial Prosecutors suspected a violation of a protective order, they brought it to the Senior Prosecutor's attention and were sequestered from the investigation to avoid tainting their role as prosecutors. (A127-28; A120-21; A338; A386-89; A404-407; A467-69). Finally, the State did not seek intervention of the court or a search warrant, because Robinson has no Fourth Amendment privacy rights in his prison cell, and thus, the State believed a search warrant was not required. (A424-25).

II. DISMISSAL OF THE INDICTMENT WAS NOT WARRANTED.

Robinson argues dismissal was the "only appropriate remedial choice." (Ans. Br. at 43). Not so. Even if the Court finds the State deliberately attempted to interfere with Robinson's attorney-client relationship, resulting in a Sixth Amendment violation, or presumes prejudice for establishing a Sixth Amendment violation, Robinson has the *burden* to establish prejudice to obtain a *remedy*.[43] Tellingly, Robinson fails, as he did below, to advance *any* specific claim of prejudice – let alone the level of prejudice required to dismiss an indictment.[44] Dismissal of the indictment was plainly inappropriate given Robinson's inability to demonstrate any prejudice to his counsel's ability to provide adequate representation in these criminal proceedings or his right to receive a fair trial.

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[43] *Morrison*, 449 U.S. at 365-66 (finding respondent "has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings," and holding "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate"); *Bailey v. State*, 521 A.2d 1069, 1083-86 (Del. 1987) (recognizing defendant must show prejudice under *Morrison* to obtain remedy for interference with right to be assisted by counsel).

[44] *Morrison*, 449 U.S. at 365-66; *compare Bailey*, 521 A.2d at 1089-92 (finding no basis for dismissal where State was not negligent or delinquent in gathering or preserving evidence); *Hammond v. State*, 569 A.2d 81, 90-91 (Del. 1990) (agreeing dismissal was not appropriate remedy for State's loss of evidence); *Hunter v. State*, 55 A.3d 360, 368-72 (Del. 2012) (same); *Jackson v. State*, 770 A.2d 506, 516-17 (Del. 2001) (affirming conviction, despite *Brady* violation).

Although Robinson has never alleged any actual prejudice, Robinson claims he did not concede he had not suffered prejudice or injury. (*Id.*). Robinson claims when he said, "[i]t is difficult to assess the prejudice flowing from any disclosures by [the Paralegal] to her colleagues on the prosecution team, because the analysis would be prospective rather than retrospective," (A694), he meant "that it is difficult to ascertain how a prosecution team will make use of improperly obtained information at trial, either consciously or subconsciously," making dismissal the only appropriate remedy. (Ans. Br. at 43). Regardless of whether or not Robinson conceded a lack of prejudice or injury, Robinson ignores he has failed to meet his burden of showing "demonstrable prejudice, or substantial threat thereof," to warrant dismissal. Neither Robinson's briefing below nor his answering brief advance any specific claim of prejudice. Consequently, there is no factual basis supporting the drastic relief imposed by the court.

To the extent Robinson alleges a prospective threat of prejudice as a result of confidential information being inadvertently leaked to the Trial Prosecutors by the Paralegal, such claim is predicated on mere speculation. There is no factual basis to suppose that any retained knowledge poses a threat to Robinson's Sixth Amendment rights, or the prosecutors will act unethically. The Paralegal testified she did not share the substance of *any* document reviewed with the Trial Prosecutors, which the Trial Prosecutors confirmed, and she does not have a specific recollection of any fact

today and will provide no future assistance in Robinson's cases. As the United States Supreme Court observed in *Weatherford*:

> As long as the information possessed by [the informant] remained uncommunicated, he posed no substantial threat to [defendant's] Sixth Amendment rights. Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.[45]

Thus, even assuming a Sixth Amendment violation, Robinson failed to establish prejudice warranting dismissal.

Robinson claims this case stands apart from *Morrison*, *Bailey v. State*,[46] *Cannon*, and *Puryear v. State*,[47] in which the appropriate tailored remedy fell short of dismissal. (Ans. Br. at 44-45). Not so. Robinson has never argued he suffered any demonstrable prejudice as a result of the State's actions. And, there has been no showing the attorney-client relationship was damaged. Although the court found that defense strategy was conveyed to the Paralegal, she was removed from Robinson's cases, and there is no evidence the Trial Prosecutors learned of any defense strategy. As in *Morrison*, *Bailey*, *Cannon*, and *Puryear*, the State did not

[45] *Weatherford*, 429 U.S. at 556-57.

[46] 521 A.2d 1069 (Del. 1987).

[47] 2000 WL 975055 (Del. May 30, 2000), *aff'g*, *State v. Puryear*, 1998 WL 1029235 (Del. Super. Ct. Nov. 9, 1998).

obtain any legal advantage as a result of the seizure. Finally, dismissal is not warranted, even if the State's conduct was improper. This Court has held an indictment may not be dismissed based on prosecutorial misconduct, absent a showing of demonstrable prejudice.[48] Robinson has not made such a showing.

Robinson also claims dismissal was appropriate because the State has never suggested what the tailored remedy might be. (*Id.* at 46). Robinson's argument is unavailing. As the Superior Court recognized, *Morrison* imposes the burden of proving prejudice to obtain a remedy on defendant and requires the court to tailor the remedy to the injury suffered.[49] Nothing in *Morrison* suggests the State has the burden to request a lesser remedy where defendant seeks dismissal. By failing to tailor the remedy to fit the injury suffered by Robinson, the Superior Court erred.

Further, the State was unable to suggest a remedy, because Robinson has never demonstrated any prejudice, and to date, the State, which did not make copies or document the items taken from Robinson's prison cell and has no access to the seized documents, has not seen any evidence of prejudice. The State has consistently stated Robinson's seized documents are not relevant to the issue in this case. Should the Court disagree with that position, the State respectfully requests the Court

[48] *Puryear*, 2000 WL 975055, at *1.

[49] *Robinson*, 2017 WL 4675760, at *4-5.

conduct an *in camera* review of those documents before rendering any decision as to a finding of actual prejudice.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

/s/Elizabeth R. McFarlan (ID No. 3759)
Department of Justice
820 N. French Street, 7th Floor
Wilmington, Delaware 19801

Dated: October 29, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellant,	)	
v.	)	No. 232, 2018
	)	
JACQUEZ ROBINSON,	)	
	)	
Defendant Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,500 words, which were counted by Microsoft Word 2016.

Dated: October 29, 2018 /s/ Elizabeth R. McFarlan