Supreme Court No. 102939-0
Court of Appeals No. 56814-4-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington

v.

Anthony Lynn Couch

Grays Harbor County Superior Court
Cause No. 20-1-00343-14
The Honorable Judge David L. Edwards

Answer to State's Petition for Review and Respondent's Cross-Petition

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

In the lead up to Anthony Couch's trial, state actors recorded his conversations with his attorneys. They also opened his legal mail. The Court of Appeals properly determined that the government unlawfully intruded on Mr. Couch's private communications with counsel. In reversing Mr. Couch's convictions, the lower court correctly applied well-established precedent.

However, the Court of Appeals erred by leaving open the possibility of a remedy short of dismissal. Except in those "rare circumstances where there is no possibility of prejudice,"[1] an intrusion into attorney-client communication requires dismissal. The Supreme Court should grant review solely to determine the proper remedy. It should remand with instructions to dismiss the prosecution.

[1] *State v. Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014).

DECISION BELOW AND ISSUES

Respondent/Cross-Petitioner Anthony Couch asks the court to deny the State's Petition for Review of the Court of Appeals' Published Opinion reversing his convictions.[2] He also asks the court to review the lower court's refusal to dismiss the prosecution because government actors intruded on his private conversation with counsel.

This case presents two issues:

1. Did the Court of Appeals properly apply well-established precedent in reversing Mr. Couch's convictions?
2. Did the Court of Appeals err by refusing to dismiss Mr. Couch's case after concluding that he was prejudiced by the State's intrusion into private attorney/client conversations?

STATEMENT OF THE CASE

While awaiting his trial on serious felony charges, Anthony Couch was held at the Grays Harbor County Jail. RP (8/10/20) 6; RP (11/23/21) 145. While he was in custody, the jail recorded numerous phone calls he made to his attorneys. RP

[2] A copy of the Opinion is attached.

(11/23/21) 142, 146, 162-163, 172-173, 180. For months, the jail also recorded his video visits with counsel. RP (11/23/21) 142, 147 179, 183-186. On at least one occasion, jail staff opened attorney/client correspondence.[3] RP (11/23/21) 148-149, 187-193, 200-201.

The court held a hearing on Mr. Couch's motion to dismiss for governmental misconduct. RP (11/23/21) 140-215. Mr. Couch testified that once he learned of the intrusions, he stopped calling his attorneys, stopped participating in video visits, and stopped corresponding with his attorneys in writing. RP (11/23/21) 147-151, 158-161.

Chief Travis Davis, who runs the jail, could not say whether anyone had watched the recorded video visits.[4] RP (11/23/21) 186. The staff person who opened Mr. Couch's legal

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[3] Mr. Couch testified that the problem occurred multiple times. RP (11/23/21) 200-201.

[4] He claimed that Mr. Couch's recorded phone calls had not been accessed, and that he locked the phone recordings and later deleted them after learning they were privileged. RP (11/23/21) 172-176.

mail did not testify; a jail sergeant who addressed the issue did not know if anyone had read the correspondence. RP (11/23/21) 193.

The trial court denied the motion to dismiss. RP (11/23/21) 212-215. Following his conviction, Mr. Couch was sentenced to die in prison as a persistent offender. RP (3/24/22) 925, 926, 939; CP 11, 14. Mr. Couch appealed on numerous grounds.[5] CP 25-26.

The Court of Appeals reversed. The court concluded that the trial judge applied the wrong standard. Opinion, p. 10. The court also concluded "as a matter of law under the facts of this case that the State did not prove beyond a reasonable doubt that Couch was not prejudiced." Opinion, p. 11.

The court cited unrebutted testimony that the intrusions chilled Mr. Couch's communications with his attorneys. Opinion, p. 11. The court also pointed out the State's failure to

[5] Finding one issue dispositive, the Court of Appeals did not address the other grounds. *See* Opinion, p. 2 n. 1.

prove "that nobody involved in Couch's case had [reviewed] the attorney client communications." Opinion, pp. 11-12. The State has sought review of that decision.

However, the court declined to order dismissal of the prosecution. Opinion, pp. 12-13. Mr. Couch now seeks review of that portion of the decision.

ARGUMENT

I. THE SUPREME COURT SHOULD DENY THE STATE'S PETITION BECAUSE THERE IS NO BASIS FOR REVIEW.

The State failed to rebut the presumption of prejudice that attaches when the government intercepts attorney-client conversations. The Court of Appeals correctly applied established law when it reversed Mr. Couch's convictions. There is no basis for review.

An accused person has a constitutional right to confer privately with defense counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §22; *State v. Fuentes*, 179 Wn.2d 808, 818, 318 P.3d 257 (2014). This is a "foundational right." *Id.*, at 820.

Prejudice is presumed when the government intrudes on attorney-client communications. *Id.,* at 819. The state bears the burden of showing "beyond a reasonable doubt that the defendant was not prejudiced." *Id.,* at 820. This is so even when no information is communicated to the prosecutor. *Id.*

Here, the jail recorded an unknown number of video calls between Mr. Couch and his attorney. RP (11/23/21) 179, 183-186. Jail staff opened at least one piece of legal mail addressed to Mr. Couch. RP (11/23/21) 189. Jail staff could not say whether anyone had read the attorney-client correspondence or listened to the recordings.[6] RP (11/23/21) 178-186, 193.

The Court of Appeals applied the framework adopted by this court. Opinion, pp. 9-12. It found that state actors intruded on confidential attorney-client communications, presumed prejudice, and concluded that the State failed to prove a lack of prejudice beyond a reasonable doubt. Opinion, pp. 9-12.

[6] Or if they were ever destroyed.

The Petitioner's request for review rests on two arguments: that the decision conflicts with precedent, and that the case presents a significant question of constitutional law. Petition, pp. 9-29 (citing RAP 13.4(b)(1)-(3). Petitioner's arguments reflect a misunderstanding of the law, the facts established at the hearing, and of the Court of Appeals' decision. They do not justify review under RAP 13.4(b).

No conflict with *Fuentes*. The Petitioner erroneously suggests that the Court of Appeals applied an irrebuttable presumption of prejudice, contrary to Supreme Court precedent. Petition, pp. 9-12. This is false.

The Court of Appeals did not find the violations prejudicial *per se*. Opinion, pp. 11-12. Instead, the court applied a presumption of prejudice and concluded that the State did not rebut the presumption. Opinion, pp. 11-12. It pointed out that (a) the State did not rebut Mr. Couch's testimony that the intrusions chilled communication with his attorneys in the run up to trial, and (b) the State failed to show that no one accessed

the video recordings or read Mr. Couch's legal mail. Opinion, pp. 11-12.

Because the Court of Appeals applied the proper framework, its decision does not conflict with *Fuentes*. Review under RAP 13.4(b)(1) is not available.

No conflict with *Irby*. The Petitioner's next argument (that the decision conflicts with *Irby*[7]) again rests on the mistaken belief that the Court of Appeals applied an irrebuttable presumption of prejudice. Petition, pp. 12-18. This is false, as outlined above.

The Petitioner also appears to argue that there was no state action here. Petition, p. 14. This is false. The jail is a state actor.

The Petitioner suggests that the State did not act knowingly.[8] Petition, p. 16. But Chief Davis knew that the jail

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[7] *State v. Irby*, 3 Wn. App. 2d 247, 415 P.3d 611 (2018).

[8] The Petitioner does not cite any Washington authority requiring a defendant to show a knowing violation of the right to counsel.

(*Continued*)

recorded video visits, and that it did not have a system for exempting attorney video calls. RP (11/23/21) 179, 183-186. Furthermore, the mail that was improperly opened was marked "attorney client correspondence," and the sergeant who testified was able to immediately identify it as confidential. RP (11/23/21) 189-193.

The Petitioner also seems to suggest that the defendant bears some initial burden of showing prejudice. Petition, pp. 12-18. This, too, is false. The burden is on the State to prove an absence of prejudice beyond a reasonable doubt. *Fuentes*, 179 Wn.2d at 819-820. As the *Fuentes* court noted, "the defendant is hardly in a position to show prejudice when only the State knows what was done with the information." *Id.*, at 820; *see also Irby*, 3 Wn. App. 2d at 258.

There is no conflict with *Irby*. RAP 13.4(b)(2) does not provide a basis for review.

Petition, pp. 15-16. Where no authority is cited, this court should presume that counsel found none after diligent search.

No conflict from remand instructions. The Petitioner claims that the Court of Appeals erred by directing the trial court to determine "whether to dismiss Couch's case or order a new trial with sufficient remedial safeguards." Opinion, p. 13; Petition, p. 18.

This remedy does not conflict with any Supreme Court decision or published Court of Appeals opinion. It is a result that is not foreclosed by *Fuentes, Irby,* or any other case cited by Petitioner.

The Petitioner's argument rests on a mistaken understanding of the facts established at the hearing. According to the Petitioner, "the record shows that no one listened to, read or watched the intercepted communications."[9] Petition, p. 19.

As the Court of Appeals pointed out, "the State's evidence on this issue was inadequate." Opinion, p. 11. Chief Davis "did not know whether or not anyone had viewed the

[9] *See also* Petition, at 24, referencing a "letter that had been opened but not read."

videos." Opinion, p. 11. The jail sergeant who testified about the letter "did not know if anyone read the opened mail," and the State "did not call as a witness the employee who had opened the mail." Opinion, p. 11. Nor did the State call "any of the prosecutors or police investigators handling the case." Opinion, p. 11.

The Petitioner also suggests that the Court of Appeals should remand for a new evidentiary hearing. Petition, pp. 19-25. Petitioner suggests that the court's decision conflicts with *Fuentes, Irby,* and *State v. Myers*, 27 Wn. App. 2d 798, 533 P.3d 451 (2023), *review denied,* 539 P.3d 8 (2023).[10]

The Court of Appeals' decision does not conflict with any of these cases. First, the remedy here is the same remedy applied in *Myers.* There, the court vacated the Judgment and Sentence and remanded with instructions to "determine whether

[10] The Petitioner also cites *State v. Garza,* 99 Wn. App. 291, 994 P.2d 868 (2000). *Garza* predates *Fuentes.* The *Garza* court applied a framework wholly unlike that mandated by the Supreme Court in *Fuentes.* It has no applicability here.

to grant the… motion to dismiss, or to impose some lesser remedy" using the correct standard.[11] *Myers*, 27 Wn. App. 2d at 823-824.

Second, unlike in *Fuentes* and *Irby*, the record here was sufficiently clear for the appellate court to "conclude as a matter of law that the State did not produce sufficient evidence to prove the absence of prejudice beyond a reasonable doubt." Opinion, p. 1; *see also* pp. 5, 11.

By contrast, in *Fuentes*, the motion to dismiss was decided without an evidentiary hearing. *Fuentes*, 179 Wn.2d at 817. The only facts before the court came from the prosecutor's declaration. *Id*. *Fuentes* established the State's burden to prove an absence of prejudice beyond a reasonable doubt, and

[11] It directed the trial court to "conduct[] a proper inquiry under *Irby* and considering the totality of the circumstances as established by the [prior] testimony of the various government actors" when selecting a remedy. *Id.*, at 824.

remanded to give the prosecution the opportunity to meet this burden.[12] *Id.*, at 827.

Similarly, in *Irby*, the information relating to prejudice stemmed from a prosecutor's declaration.[13] *Irby*, 3 Wn. App. 2d at 260. The court remanded for elaboration of the record, stating (without further explanation) that "[t]he error identified does not, at this time, warrant vacation of the judgment and sentence." *Id.*, at 263 n. 7.

Here, by contrast, the error *does* warrant vacation of the Judgment and Sentence and remand for a proper remedy. Opinion, pp. 1, 5, 11-13. The cases cited by the Petitioner do not conflict with the Court of Appeals' decision in this case. RAP 13.4(b)(1) and (2) does not provide a basis to review the appellate court's choice of remedy.

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[12] The court also directed the trial judge to allow the defendant "discovery related to the eavesdropping to allow him to respond to the State's arguments regarding prejudice." *Id.*

[13] The testimony presented at an evidentiary hearing established the violations, but did not address prejudice.

No significant constitutional question. The Petitioner complains that Mr. Couch's testimony—that the intrusion chilled attorney-client communication— "is well-nigh irrebuttable." Petition, p. 26. This may be true; however, it is not a basis for review. When the government intrudes on the attorney-client relationship, it must bear the consequences.

The Petitioner also appears to suggest that Mr. Couch had some burden to prove that communication was "destroyed" rather than merely "chilled." Petition, p. 27. This is incorrect.

First, it reflects a misunderstanding of the law. Mr. Couch had no burden. Instead, it is the State's burden to prove beyond a reasonable doubt that the violation caused no prejudice. *Fuentes*, 179 Wn.2d at 820. As the Court of Appeals noted, "the State made no effort to refute [Mr. Couch's] testimony" that his communications with counsel were chilled. Opinion, p. 11.

Second, an intrusion into the attorney-client relationship is prejudicial when it impedes communication, even if it does

not "destroy" communication. The Supreme Court has not suggested that a certain level of prejudice is acceptable when this "foundational right" is violated. *Fuentes*, 179 Wn.2d at 820. Instead, "the State has the burden to show beyond a reasonable doubt that the defendant was *not prejudiced*." *Id.*, at 819-820 (emphasis added).

This case is controlled by *Fuentes.* The constitutional questions addressed by the Court of Appeals have already been resolved by the Supreme Court. RAP 13.4(b)(3) does not provide a basis for review.

The Supreme Court should deny the State's Petition.

II. THE COURT SHOULD GRANT MR. COUCH'S CROSS-PETITION, AND REQUIRE DISMISSAL WHENEVER GOVERNMENT INTRUSION INTO ATTORNEY-CLIENT COMMUNICATION CREATES A POSSIBILITY OF PREJUDICE.

The Supreme Court should grant review to determine the proper remedy when there is some possibility of prejudice. It has concluded that "there are rare circumstances where there is no possibility of prejudice to the defendant," and that "the

extreme remedy of dismissing the charges is [not] required when there is no possibility of prejudice." *Fuentes*, 179 Wn.2d at 819.

However, this court has not determined the proper remedy when the State fails to meet its burden to rebut the presumption of prejudice. The court should grant review solely to determine the proper remedy when the defendant is prejudiced by a violation of the right to confidential attorney-client communication.

Citing *Irby* and *Myers*, the Court of Appeals directed the trial court to consider remedies short of dismissal. Opinion, p. 13. The court suggested that "a new trial untainted by government misconduct… is an available remedy." Opinion, p. 13.

This is unrealistic and will erode confidence in the criminal justice system. Once the State intrudes upon an accused person's private communications with counsel, the

accused can never be confident that the intrusion will have no impact.

Furthermore, although CrR 8.3(b) provides the mechanism for bringing a violation to the court's attention, it does not control the remedy. *See* Opinion, p. 12 (addressing "the proper remedy under CrR 8.3(b).") Instead, courts must keep in mind that intrusion into attorney-client conversations "is an egregious violation of a defendant's constitutional rights and cannot be permitted." *Id.*

When the State intrudes on the attorney-client relationship and there is a "possibility of prejudice,"[14] the only proper remedy is dismissal. There is "no way to isolate the prejudice resulting from an eavesdropping activity." *State v. Cory*, 62 Wn.2d 371, 377, 382 P.2d 1019 (1963).

In *Cory*, the Supreme Court did "not appreciate the logic" of requiring a showing of prejudice "in a second trial, in

[14] *Fuentes*, 179 Wn.2d at 819.

order to secure a dismissal." *Id.* If "the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first." *Id.* Once the State fails to prove an absence of prejudice, dismissal is required. *Id.*

Here, dismissal is "the only disposition of the case which would afford an adequate remedy to [Mr. Couch]." *Id.*, at 379. The Supreme Court should grant review and hold that dismissal is required except in "those rare circumstances where there is no possibility of prejudice." *Fuentes*, 179 Wn.2d at 819. The violation of attorney-client communication will impact the case in unknown ways and will impact another trial. It resulted in prejudice that has a far-reaching and unknowable effect. The Court of Appeals' choice of remedy conflicts with the Supreme Court's decisions in *Cory* and *Fuentes.* It also raises a significant issue of constitutional law that is of substantial public interest. The Supreme Court should grant review under RAP 13.4(b)(1), (3), and (4).

CONCLUSION

The Supreme Cout should deny the State's Petition for Review. It should grant Mr. Couch's cross-petition and dismiss the prosecution.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 2818 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted April 25, 2024.

BACKLUND AND MISTRY

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Anthony Lynn Couch DOC# 894169
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on April 25, 2024.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

January 23, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY LYNN COUCH, SR. aka ANTHONY CLARK, Appellant.	No. 56814-4-II PUBLISHED OPINION

MAXA, P.J. – Anthony Couch appeals his convictions of second degree rape and second degree assault, arising from an incident involving his former girlfriend. Couch also appeals his sentence of life without release/parole (LWOP) as authorized under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570.

Couch argues that the trial court erred when it denied his CrR 8.3(b) motion to dismiss for government misconduct when state actors video and audio recorded his communications with his attorneys and opened his legal mail. We conclude that there is no indication that the trial court applied the correct legal standard – requiring the State to show beyond a reasonable doubt that Couch was not prejudiced – for the intrusion on Couch's attorney-client communications. In addition, we conclude as matter of law that the State did not produce sufficient evidence to prove the absence of prejudice beyond a reasonable doubt. Therefore, we hold that the trial court erred in denying Couch's CrR 8.3(b) motion.

The trial court generally has discretion to fashion an appropriate remedy for government misconduct under CrR 8.3(b). However, we hold that the only appropriate remedies when the State has intruded on attorney-client communications and cannot disprove prejudice beyond a reasonable doubt is dismissal or a new trial untainted by government misconduct. Accordingly, we reverse Couch's convictions and sentence, and we remand for the trial court to determine whether to dismiss the case or order a new trial with sufficient remedial safeguards.[1]

FACTS

The State charged Couch with second degree rape-domestic violence and second degree assault-domestic violence after he allegedly forced his former girlfriend to have sex with him after she broke off their relationship.

Before the trial began, Couch filed a motion to dismiss for governmental misconduct under CrR 8.3(b). Couch claimed that the Grays Harbor County Jail had illegally recorded conversations between him and defense counsel and had opened his legal mail. The trial court held a hearing on the motion and heard testimony from Couch, Chief Corrections Deputy Travis Davis, and Eugina Buchanan, a corrections sergeant.

Couch testified that Christopher Swaby and Ruth Rivas were his assigned defense counsel. He stated that he talked to his attorneys about a number of subjects: "Trial strategy, witnesses that may be needed, private investigator, investigation, what they need to be doing, who they need to contact. At one point it was to switch a judge. There – there's a variety of

[1] On the merits, Couch argues that (1) the prosecutor engaged in misconduct during his closing and rebuttal arguments, (2) the trial court violated his right to confrontation when it denied his recross-examination of the alleged victim after the State's redirect, (3) defense counsel rendered ineffective assistance of counsel, (4) cumulative error deprived him of his right to a fair trial, and (5) the POAA is categorically unconstitutional for nonhomicide offenders and for offenders whose strike offenses were low-level felony convictions. Because we remand for dismissal or a new trial, we do not address these issues.

things." 1 Rep. of Proc. (RP) at 145. All of the conversations were in furtherance of his defense at trial.

Couch testified that he spoke multiple times with Rivas on the phone. However, he later learned that the telephone conversations had been recorded. Couch also had a number of video conferences with Swaby, and later learned that they had been recorded. Finally, Couch stated that Sergeant Buchanan informed him that a piece of his legal mail had been opened. He said that the envelope was clearly labeled legal mail.

Couch testified that after he found out that his telephone calls with Rivas were being recorded, he stopped talking to her on the phone. After he found out his video meetings with Swaby were being recorded, he stopped meeting with him. And after his legal mail was opened, he stopped using mail to communicate with his lawyers. Couch stated, "And still right now, I don't want to use the telephones, I don't want to use this kiosk, I don't want to use mail. I've been chilled on a lot of things that I . . . want to communicate with [Swaby] and Ms. Rivas, but I – I can't." 1 RP at 150-51.

Davis testified that when a phone number was placed on the privileged list at the jail, phone calls to and from that number were not recorded. Audio and video also were not recorded between accounts identified as attorneys and their clients during video visits.

In October 2021, Swaby requested Rivas to be put on the privileged list. Davis stated that after he added Rivas to the privileged list, he checked the phone system to see if there had been any recorded calls with her number before it was added to the privileged list. There were 70 recorded calls that were made with her involving various inmates. The software indicated that no one had listened to any of the calls. Davis then "locked" the calls so no one could find or listen to them, and they were deleted from the system.

Regarding the video calls, Davis testified that the video system was set up for family visits, and they were recorded. He did not realize until May 7, 2021 that lawyers like Swaby were using the system. So he assumed that conferences between Swaby and Couch were recorded until May 7. Davis stated that he had no knowledge as to whether or not anyone had watched the video recordings.

Buchanan testified that she found an opened envelope marked as legal mail and addressed to Couch. The contents of the envelope were not visible. Buchanan testified that a support specialist at the sheriff's office, who no longer worked there, had opened the mail. Buchanan took the mail directly to Couch and notified him that it was opened and then she made a copy of the outside of the envelope. She testified that she did not have any knowledge as to whether or not any employee of the sheriff's office or the county viewed the contents of the envelope.

The State did not call as witnesses any of the prosecutors or police investigators handling the case as to whether they had seen the videos or the opened legal mail. The State also did not call the employee who had opened the mail to testify.

The trial court denied Couch's motion to dismiss. The court first stated that the only recorded communications between Couch and defense counsel were the 70 telephone calls involving Rivas. But the court found that there was no evidence that anyone had listened to or overheard the recordings. In addition, the video of the attorney meetings was without audio, and any documents exchanged were not able to be read. And there was no evidence that the sheriff's office eavesdropped on those conversations.

Regarding the opened legal mail, the trial court noted Buchanan's testimony that she did not look at the contents and she was not aware that anyone else looked at the contents. The court

found that there had "been no evidence presented by the defendant that any human being observed the contents of that envelope at any time, other than him and the person who sent it to him had." 1 RP at 214.

In conclusion, the trial court stated,

> I do not find that there has been any violation of the attorney-client privilege. And to the extent that there has been a violation, there's certainly no evidence before the Court that any prejudice resulted especially in light of the uncontroverted facts of this case that no one ever listened to or – or any conversations or – or overheard any conversations or viewed any video inappropriately or viewed the contents of Mr. Couch's mail.

1 RP at 214-15.

Verdict and Sentence

The jury convicted Couch of second degree rape and second degree assault.

Couch previously had been convicted of two other felonies that were strike offenses under the POAA – vehicular assault by DUI or reckless driving in 2006 and second degree assault in 2010. Because Couch's current offenses also were strike offenses, the trial court sentenced Couch to life in prison without the possibility of early release.

Couch appeals his convictions and his sentence.

ANALYSIS

A. INTRUSION ON ATTORNEY-CLIENT COMMUNICATIONS

Couch argues that state actors unlawfully intruded on his communications with his attorneys and that the trial court erred because it did not require the State to establish the absence of prejudice beyond a reasonable doubt. We conclude that there is no indication that the trial court applied the correct legal standard in ruling on Couch's motion to dismiss, and that as a matter of law the State did not prove the absence of prejudice beyond a reasonable doubt.

1. Legal Principles

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to the assistance of counsel, and that right includes the right to confer privately with their attorney. *State v. Myers*, 27 Wn. App. 2d 798, 804, 533 P.3d 451 *review denied*, 539 P.3d 8 (2023). A state actor's intrusion into private conversations between attorney and defendant violates this right. *Id.* And there is no distinction between an intrusion by jail security and an intrusion by law enforcement. *State v. Irby*, 3 Wn. App. 2d 247, 258, 415 P.3d 611 (2018).

If a state actor has violated the defendant's Sixth Amendment right, prejudice to the defendant is presumed. *Myers*, 27 Wn. App. 2d at 809. Significantly, the presumption of prejudice applies regardless of the intention of the state actors or the degree of interference. *Id.* at 809-10. The presumption of prejudice can be rebutted, but only if the State proves beyond a reasonable doubt that the defendant was not prejudiced. *Id.* at 809. "Because the 'constitutional right to privately communicate with an attorney is a foundational right,' the State must be held to the 'highest burden of proof to ensure that it is protected.' " *Id.* (quoting *State v. Peña Fuentes*, 179 Wn.2d 808, 820, 318 P.3d 257 (2014)).

CrR 8.3(b) states that the trial court may dismiss a criminal prosecution due to "governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Intruding on confidential attorney-client communications constitutes misconduct under CrR 8.3(b). *Irby*, 3 Wn. App. 2d at 256. We review a trial court's CrR 8.3(b) ruling for abuse of discretion. *Myers*, 27 Wn. App. 2d at 804. An abuse of discretion exists when the trial court applies the wrong legal standard. *Id.*

2. Applicable Cases

In *Peña Fuentes*, the defendant filed a motion for a new trial after being convicted of three offenses. 179 Wn.2d at 812, 814-15. The prosecutor and the police then decided to investigate possible witness tampering. *Id.* at 816. The prosecutor asked a detective to listen to the defendant's phone calls from jail. *Id.* The detective notified the prosecutor that he had listened to all of the defendant's phone calls, including six conversations between the defendant and his attorney. *Id.*

The prosecutor immediately told the detective not to listen to any more phone calls and not to disclose the content of the attorney-client conversations to anyone. *Id.* at 817. The prosecutor also requested that the detective be removed from the investigation. *Id.* The prosecutor then told defense counsel about the eavesdropping and submitted a declaration stating that the detective did not disclose the content of the attorney-client phone calls to him. *Id.* Because of the detective's conduct, the defendant moved to dismiss the charges. *Id.* Although the trial court agreed that the conduct was egregious, it denied the motion to dismiss, finding that the police misconduct did not affect the previous trial or the motion for a new trial. *Id.*

The Supreme Court adopted the rule that when eavesdropping on attorney-client communications has occurred, the State must prove the absence of prejudice beyond a reasonable doubt. *Id.* at 819-20. The court held that the record was unclear as to what standard the trial court applied and therefore remanded for the trial court to consider whether the State proved the absence of prejudice beyond a reasonable doubt. *Id.* at 820.

In *Irby*, the defendant filed a motion to dismiss, claiming that the jail guards opened and read his outgoing mail that contained privileged legal communications for his attorney. 3 Wn. App. 2d at 251. Although the trial court found that the jail guards violated the defendant's right

to counsel, the trial court did not presume prejudice because no investigative law enforcement were involved in the infringing conduct. *Id.* at 251, 257. The trial court then placed the burden of proving prejudice on the defendant and found that he had not done so. *Id.* at 251-52.

Division One of this court held that the trial court erred by not imposing a presumption of prejudice and not requiring the State to prove the absence of prejudice beyond a reasonable doubt. *Id.* at 259-60. The court rejected the trial court's distinction between misconduct by law enforcement and by jail security officers, stating the presumption of prejudice applied in both instances. *Id.* at 258-59. The court reversed and remanded for the trial court to hold an evidentiary hearing in which the court must apply the presumption of prejudice and require the State to prove beyond a reasonable doubt that the defendant was not prejudiced. *Id.* at 263.

In *Myers*, the defendant was arrested for first degree robbery of a bank. 27 Wn. App. 2d at 802. Pursuant to a search warrant, law enforcement found a handwritten note in the defendant's home that appeared to be the one given to the bank teller. *Id.* In an effort to compare the handwriting, corrections deputies seized five documents from the defendant's jail cell. *Id.* An employee at the sheriff's office called the prosecutor when she viewed the documents, believing that they contained privileged attorney-client communications. *Id.* In order to determine whether the documents were privileged, the prosecutor had a detective that was not involved in the case to review the documents. *Id.* at 802-03. The detective concluded that several of the seized documents may have contained privileged attorney-client communications. *Id.* at 803.

The trial court declined to apply a presumption of prejudice because the conduct of law enforcement and the prosecutor was not sufficiently egregious. *Id.* at 809. The court then concluded that the defendant had failed to demonstrate actual prejudice. *Id.*

Division One held that the trial court misinterpreted and misapplied the law in several ways. *Id.* at 808, 809, 812-13, 814, 15. The court emphasized again that prejudice must be presumed and the defendant had no burden to show prejudice, and that the State must prove the absence of prejudice beyond a reasonable doubt. *Id.* at 809, 813-14. The court reversed and remanded for the trial court to apply the proper legal standards. *Id.* at 823.

3. Trial Court Error

Peña Fuentes and *Irby* established the proper framework for the trial court here to address the alleged violation of Couch's Sixth Amendment right to confer privately with his attorneys.[2] First, the court must determine whether state actors intruded on confidential attorney-client communications. *Irby*, 3 Wn. App. 2d at 252-53. Second, if an intrusion occurred, the court must presume prejudice to the defendant. *Peña Fuentes*, 179 Wn.2d at 811. Third, the court must determine whether the State proved beyond a reasonable doubt that the intrusion did not prejudice the defendant. *Id.* at 819-20.

Applying this framework here, it is undisputed that state actors intruded on Couch's communications with his attorneys in violation of his Sixth Amendment right to confer privately with those attorneys. The Grays Harbor County Jail (1) recorded multiple telephone calls between Couch and Rivas, (2) video recorded several meetings between Couch and his attorneys, and (3) opened at least one piece of legal mail. Therefore, the trial court was required to presume prejudice to Couch. The only question for the trial court was whether the State proved beyond a reasonable doubt that Couch was not prejudiced.

However, there is no indication from the record that the trial court applied this legal framework. The court should have acknowledged that state actors had violated Couch's Sixth

[2] *Myers* had not yet been decided when the trial court addressed Couch's motion to dismiss.

Amendment right. Instead, the court concluded, "I do not find that there has been any violation of the attorney-client privilege" because nobody had listened to the recordings. 1 RP at 214. But the existence of a *violation* is indisputable – state actors recorded attorney-client communications.

Possibly because of the conclusion that no violation had occurred, the trial court did not explicitly state that it was required to presume that Couch had been prejudiced. Instead, the court stated that if there had been a violation, there was "certainly no evidence before the Court that any prejudice resulted especially in light of the uncontroverted facts of this case that no one ever listened to or – or any conversations or – or overheard any conversations or viewed any video inappropriately or viewed the contents of Mr. Couch's mail." 1 RP at 215. Further, the court found that there had "been no evidence *presented by the defendant* that any human being observed the contents of that envelope at any time, other than him and the person who sent it to him had." 1 RP at 214 (emphasis added). To the extent that the court implied that *Couch* was required to present evidence of prejudice, that implication was incorrect. Prejudice was presumed.

Finally, the trial court did not explicitly state that the State was required to prove the absence of prejudice beyond a reasonable doubt. As noted in the previous paragraph, the court concluded that there was no evidence of prejudice. But the court did not conclude that the State had proved *beyond a reasonable doubt* that Couch had not been prejudiced.

There is no indication that the trial court applied the correct legal standard – requiring the State to show beyond a reasonable doubt that Couch was not prejudiced – when addressing Couch's motion to dismiss. Therefore, the trial court erred in analyzing Couch's CrR 8.3(b) motion to dismiss.

4. Failure of Proof Beyond a Reasonable Doubt

The courts in *Pena Fuentes*, *Irby*, and *Myers* all remanded for the trial court to address whether the State was able to prove the absence of prejudice beyond a reasonable doubt. *Pena Fuentes*, 179 Wn.2d at 820; *Irby*, 3 Wn. App. 2d at 263; *Myers*, 27 Wn. App. 2d at 823. However, we conclude as a matter of law under the facts of this case that the State did not prove beyond a reasonable doubt that Couch was not prejudiced.

Couch presented testimony showing how he had been prejudiced by the state actors' intrusion on his attorney-client communications. He testified that after he found out about the intrusions, he stopped talking to Rivas on the phone, he stopped meeting with Swaby over video, and he stopped using mail to communicate with his lawyers. As a result, his communications with his lawyers – which focused on trial preparation – were chilled.

At the hearing, the State made no effort to refute this testimony. The State presented no evidence that Couch had been able to fully communicate with his lawyers despite the intrusion on their attorney-client communications. Therefore, the State was unable to prove that Couch was not prejudiced in this way.

Instead, the State focused on whether anyone had listened to the recorded telephone calls, viewed the recorded video conferences, or read the opened legal mail. But the State's evidence on this issue was inadequate. Davis testified he did not know whether or not anyone had viewed the videos. Buchanan testified that she did not know if anyone read the opened mail. The State did not call as witnesses any of the prosecutors or police investigators handling the case as to whether they had seen the videos or the opened legal mail. The State also did not call as a witness the employee who had opened the mail to testify as to whether she read the mail or

shared it with anyone else. As a result, the State was unable to prove that nobody involved in Couch's case had seen the attorney-client communications.

The record demonstrates that the State did not prove beyond a reasonable doubt that Couch was not prejudiced by state actors' intrusion on his attorney-client communications. Therefore, we hold that the trial court erred in failing to grant Couch's CrR 8.3(b) motion based on government misconduct.

B. REMEDY FOR INTRUSION ON ATTORNEY-CLIENT COMMUNICATIONS

Because we have determined that the State cannot prove beyond a reasonable doubt that Couch was not prejudiced, we must address the proper remedy under CrR 8.3(b) for the State's intrusion on Couch's attorney-client communications.

CrR 8.3(b) states that a trial court "may" dismiss a criminal prosecution based on government misconduct. This means that dismissal based on government misconduct is allowed but not required under CrR 8.3(d). *Irby*, 3 Wn. App. 2d at 264. The trial court has discretion to craft an appropriate remedy. *Id.* "[T]he trial court should consider the totality of the circumstances, evaluating both the degree of prejudice to [the defendant's] right to a fair trial and the degree of nefariousness of the conduct by the state actors." *Id.*

When the State fails to prove the absence of prejudice beyond a reasonable doubt, dismissal certainly is one available remedy and must be "thoroughly and meaningfully" considered by the trial court. *Myers*, 27 Wn. App. 2d at 821. However, the court must recognize that " 'dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective.' " *Irby*, 3 Wn. App. 2d at 264 (quoting *State v. Garza*, 99 Wn. App. 291, 301-02, 994 P.2d 868 (2000)).

In addition, ordering a new trial untainted by government misconduct also is an available remedy. *Irby*, 3 Wn. App. 2d at 264-65. Given the seriousness of governmental intrusion on attorney-client communications, we conclude that these are the only two remedies available to the trial court. *See id.* (stating that "[i]n the event that the trial court determines that a remedy short of dismissal is warranted, vacation of the judgment will nevertheless be necessary.") The new trial must include remedial safeguards to ensure that the State does not benefit from state actor misconduct. "[I]n anticipation of yet another trial, other remedies might include—singularly or in combination—suppression of evidence, disqualification of specific attorneys from [the defendant's] prosecution, disqualification of the [prosecuting attorney's office] from further participation in the case, or exclusion of witnesses tainted by the governmental misconduct." *Id.* at 265.

Therefore, on remand the trial court must determine in its discretion whether to dismiss Couch's case or order a new trial with sufficient remedial safeguards.

CONCLUSION

We reverse Couch's convictions and sentence, and we remand for the trial court to determine whether to dismiss the case or order a new trial with sufficient remedial safeguards.

MAXA, P.J.

We concur:

LEE, J.

VELJACIC, J.

BACKLUND & MISTRY

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