FILED
SUPREME COURT
STATE OF WASHINGTON
5/6/2024 11:20 AM
BY ERIN L. LENNON
CLERK

NO. 102939-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner / Respondent,
v.
ANTHONY LYNN COUCH,
Cross Petitioner / Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

STATE'S REPLY TO CROSS PETITION

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T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

The court of appeals remanded this case with instructions to the trial court to "determine in its discretion whether to dismiss Couch's case or order a new trial with sufficient remedial safeguards." *Couch* at 2. Those remedial safeguards "'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.'" *Couch* at 13 (quoting *Irby* at 265) (bracketed materials by the court). Even if this case is retried by different prosecutors and defense attorneys, there is simply no evidence or witness tainted by government misconduct to exclude because the record shows that no one listened to, read or watched the intercepted communications. If, upon remand, a

new trial is ordered, it would be the same trial based on the same evidence.

The court of appeals denied the State's motion for reconsideration.

Otherwise, the State adopts and incorporates by this reference as though fully set forth the Statement of the Case in its Petition for Review filed herein.

ARGUMENT

Appellant's proposed standard of dismissal even in cases where there is *some possibility of* prejudice is Draconian and not supported by the case law established by this Court and the courts of appeal.

In his cross petition Appellant requests that this Court establish a hard and fast rule that, in the case of even *"some possibility"* of prejudice in the case of an intrusion of the attorney-client privilege, *no matter how slight or inadvertent,* the remedy should be dismissal. This proposed standard is Draconian and unnecessary, and ignores the fact specific analysis set forth in the case law addressing this issue

The remedy proposed by Appellant conflicts with the holdings in *State v. Pena Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014), *State v. Irby*, 3 Wn. App. 247, 415 P.3d 611 (2018), *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000), and *State v. Myers*, 27 Wn. App. 2d 798, 533 P.3d 451 (2023). All four cases were remanded for the trial courts to apply the correct standard to determine whether the presumption of prejudice was rebutted. *Pena Fuentes* at 822; *Irby* at 263; *Garza* at 301; *Myers* at 823.

In *Pena Fuentes* an investigating detective listened to six phone calls between the defendant and his attorney. *Pena Fuentes* at 816. Like the finding of the Court in this case, the Supreme Court found that the record was unclear on what standard the trial court used.[1] *Id.* at 820. This Court remanded

[1] *Pena Fuentes* is distinct from the instant case because in *Pena Fuentes* the trial court noted that the conduct was "egregious," while here the evidence is that the defense attorneys knowingly used recorded jail lines to communicate with the defendant and other clients, contravening the Grays Harbor County Jail's safeguards.

with instructions to allow the defendant more discovery and to apply the correct standard. *Id.* at 827.

In *Myers* a Snohomish County detective wanted to obtain samples of Myers' handwriting. She first requested that the jail provide her with any kites (written communications from incarcerated individuals to jail or medical staff or to their lawyers) the defendant had submitted. She then told jail security that additional samples would be helpful, and it was determined that jail guards would search the defendant's cell and seize handwritten materials; many of which turned out to be attorney-client communications. *Myers,* 27 Wn. App. 2d at 805-06. The court detailed, chapter and verse, over two pages of its opinion, the intrusions by Snohomish County into the attorney-client relationship between Myers and his counsel. *Id.* at 818-20. And yet the court remanded the case for further hearings, instructing the trial court to conduct "a proper inquiry under *Irby* and [to consider] the totality of the circumstances as

established by the testimony of the various government actors." *Id.* at 824.

> In *Garza,* suspecting an attempted escape from the jail,
>
> > officers conducted an extensive search of the pod where the damage occurred. They strip-searched the inmates and issued new clothes, removed mattresses and checked them with metal detectors, and examined drains, light fixtures, and the insides of television sets. The inmates' personal property, including legal documents containing private communications with their attorneys, was seized and "gone though."

Garza at 293. The court noted the U.S. Supreme Court's rejection in *Weatherford Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) of a per se rule that any government intrusion constitutes a Sixth Amendment violation: "[t]he constitutional validity of a conviction in these circumstances will depend on whether the improperly obtained information has 'produced, directly or indirectly, any of the evidence offered at trial.'" *Garza* at 298 (quoting *Weatherford,* 429 U.S. at 552).

In *Garza* the court found the intrusion to be *purposeful*, yet remanded the case for additional factfinding, *but did not require the court to begin with a presumption of prejudice absent a finding that the government's concerns did not justify the intrusion:*

> Certainly the escape attempt justified the search, but the precise question is whether the security concerns justified such an extensive intrusion into the defendant's private attorney-client communications. This determination requires a precise articulation of what the officers were looking for, why it might have been contained in the legal materials, and why closely examining or reading the materials was required. We conclude the superior court abused its discretion by failing to resolve these critical factual questions. Without more specific factfinding, it is impossible to determine whether the officer's actions were justified. If, on remand, the superior court finds the jail's security concerns did not justify the specific level of intrusion here, there should be a presumption of prejudice, establishing a constitutional violation.

Garza at 301. The court went on to say that *even if there is no presumption of prejudice* based on the factfinding on remand the defendants (in *Garza* three cases were consolidated for

appeal) could still prove prejudice in a variety of ways, including the chilling effect the intrusion on the attorney-client relationship. *Id.* 301. Finally, if a violation were found, "the superior court, in its discretion should fashion an appropriate remedy, *recognizing that dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective." Garza* at 301-02

In *Irby* the court also remanded for additional fact finding, directing that the trial court begin with a presumption of prejudice and place the burden on the State to prove the absence of prejudice beyond a reasonable doubt. 3 Wn. App. 2d at 263.

On remand, the trial court held a four-day hearing and ordered a new trial (rather than dismissal) based on the "totality of the circumstances" because "the destruction of the Defendant's confidence in his attorney prevented the Defendant from having the assistance of an attorney at trial." *State v.Irby,*

2023 Wash. App. Lexis 2067 at 18[2]. In affirming the trial court's decision, Division I held, in part, that the testimony at the hearing "supports the inference that there was not a plan at the jail to intercept private communications, and that there likewise was not a scheme to convey information from the jail kites to detectives or the prosecuting attorneys. *This is the opposite of Cory . . ."* (*State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963); *Cory* involved *active purposeful eavesdropping* (wiring the jail conference room with microphones to eavesdrop on confidential conversations between attorneys and defendants, resulting in dismissal)) (emphasis added). *Id* at 33-34.

In the case at hand, unlike *Pena Fuentes, Irby, Garza* and *Myers,* other than *one* letter that had been opened but not read, there was no purposeful intrusion into the attorney-client relationship. The Grays Harbor County jail had safeguards in

[2] Unpublished, cited pursuant to GR 14.1(a) for such persuasive value as this Court deems appropriate.

place to protect the confidentiality of attorney-client communications which defense counsel, albeit inadvertently, circumvented. Neither the Court of Appeals nor the Appellant identified *any* information obtained by the State, or *any* evidence admitted or testimony elicited at trial, tainted by, or resulting from, the alleged intrusion. Similar to *Irby*, what happened in the case at hand is also the "opposite of *Cory*." *Irby* at 34 (unpublished case).

CONCLUSION

This Court should deny Appellant's cross petition. This Court and the courts of appeal have consistently held that "dismissal is an extraordinary remedy, appropriate only when other, less severe sanctions will be ineffective." *Garza* at 301-02.

This Court should reaffirm its rejection of a per se presumption of prejudice in *Pena Fuentes*:

> [T]he United States Supreme Court has expressly rejected a per se prejudice rule for such

> eavesdropping . . .when an eavesdropper did not communicate the topic of the overheard conversations. The United States Supreme Court's reasoning is sound, and we agree with it.

Pena Fuentes at 819 (citing *Weatherford,* 429 U.S. 545 at 557-58).

This Court should reaffirm that the correct test in the case of an alleged violation of the attorney-client privilege is the four-part test set forth in *State v. Irby, supra.*

This Court should overrule the court of appeals and order that this case be remanded to the trial court with instructions that it hold further hearings on the allegation of the alleged breach of the attorney-client privilege "with a proper inquiry under *Irby." Myers* at 824.[3]

[3] In fact, applied the proper test. The trial court found that there had not been "any violation of the attorney client privilege" (step two of the *Irby* test). 11/23/21 RP 214. And the court in *Irby* held that in cases where "no prejudice to the defendant arose from the infringement, *a defendant has not been deprived of a Sixth Amendment tight and no remedy need be applied." Irby,* 3 Wn. App. 2d at 253 n. 3 (emphasis added),

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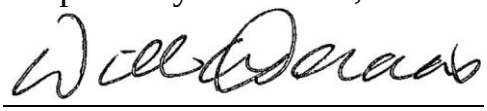
DATED this 6th day of May, 2024.

Respectfully Submitted,



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May 06, 2024 - 11:20 AM

Transmittal Information

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