Supreme Court No. 1023511
(Court of Appeals No. 83588-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

ADAM MYERS,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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# RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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## Washington Court of Appeals



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## A. IDENTITY OF RESPONDENT AND DECISION BELOW

Respondent Adam Myers requests this Court deny review of the Court of Appeals published decision in State v. Myers, No. 83588-2-I (August 7, 2023).

## B. COUNTERSTATEMENT OF THE ISSUES

A defendant's right to the assistance of counsel includes the right to confer privately with their attorney. The prejudice from violating the attorney-client relationship can arise from the State's use of confidential information, or from simply undermining the defendant's confidence in that critical privileged relationship. Where the prosecutor's office and other state actors engaged in misconduct infringing on Mr. Myers's privileged attorney-client communications, the trial court misapplied the law, denying Myers's motion to dismiss under CrR 8.3. The Court of Appeals reversed in a published decision, finding the trial court's ruling would not "dissuade…the prosecutor's office from repeating this conduct in the future."

Should this Court deny review where the Court of Appeals applied the correct legal standard, understood the facts in the record, and issued a decision consistent with this Court's prior decisions, including Cory and Peña Fuentes, involving governmental misconduct and the Sixth Amendment right to counsel under the Washington and United States Constitutions?

## C. STATEMENT OF THE CASE

The State charged Mr. Myers with one count of robbery in the first degree after an alleged theft of just over $700 from a Wells Fargo bank in Snohomish. CP 164.

Before trial, Mr. Myers moved to dismiss under CrR 8.3 due to governmental misconduct after the State's seizure of privileged attorney-client communications from Mr. Myers's jail cell. CP 142-57; 11/2/21 RP 119-29.[1] The trial court held a hearing on the motion to dismiss in early November 2021, and

[1] The report of proceedings from the CrR 8.3 hearing is cited as "11/2/21 RP." The rest of the trial is cited as "RP."

found the State's actions had infringed on Mr. Myers's Sixth Amendment right to counsel. CP 57 (COL 3); 11/2/21 RP 160.

1. The State commits misconduct

The trial court found that while Mr. Myers was being held in Snohomish County Jail, he wrote letters to his former landlord, explaining he robbed the Snohomish bank under duress. CP 129; 11/2/21 RP 149-50. After lead Detective Saarinen obtained the letters, she decided to seek a handwriting sample from Mr. Myers to match the letters from jail. CP 129; CP 145; 11/2/21 RP 149-50.

Detective Saarinen asked the Snohomish County Jail to obtain a sample of Mr. Myers's handwriting by searching his cell. 11/2/21 RP 150-51; CP 144. Jail Officer Ryakhovskiy searched Mr. Myers's cell in September 2021 while Myers was in the yard on "recreational time." 11/2/21 RP 151. Officer Ryakhovskiy located ten documents in Mr. Myers's cell and photographed them. 11/2/21 RP 152-53. Officer Ryakhovskiy transmitted the photographic files to Detective Saarinen, who

curiously admitted to reading some of the words contained in the documents, but claimed she did not read the documents themselves. 11/2/21 RP 76-78, 153. The detective admitted she saw the words – "The Story," "not believed," and "notes about defense." 11/2/21 RP 79, 153.

Based on her review, Detective Saarinen was "extremely alarmed" that the seized documents were privileged. 11/2/21 RP 79, 153. Rather than turn the documents over to defense counsel or a neutral arbiter, Detective Saarinen called the deputy prosecutor to inform him of her concerns. Id. at 79, 154. The detective felt so alarmed about the privileged documents that she immediately deleted the files she received from the jail and emptied her computer's recycle bin. Id. at 80.

2. The State commits further misconduct

The assigned deputy prosecutor asked Detective Saarinen not to share the contents of the privileged documents with him, or with anyone else. Id. at 80-81. Yet rather than ask a neutral party, such as a judicial officer, to review the documents, the

deputy prosecutor passed the privileged documents to yet another state actor. Id. at 81, 154. The prosecutor divulged Mr. Myers's seized, privileged documents to an "uninvolved detective" from another unit – Detective Dave Bilyeu of the Snohomish County Sheriff's Office Major Crimes Unit. Detective Bilyeu retrieved the privileged documents from the jail officer and reviewed them. Id. at 81, 154. Bilyeu determined that four out of five documents contained privileged attorney-client communications. 11/2/21 RP 155-56.

Only at this point did the State notify Mr. Myers's attorney and provide her with the seized privileged materials. 11/2/21 RP 157. Mr. Myers promptly moved to dismiss under CrR 8.3(b) for the violation of his Sixth Amendment right to counsel. CP 142-57.

3. The trial court erroneously finds the State proved Mr. Myers was not prejudiced by the misconduct; however, the Court of Appeals correctly reverses Mr. Myers's conviction in a published decision.

The trial court agreed the State's conduct was not "proper." 11/2/21 RP 167-68. Yet the court incorrectly determined the conduct "does not rise to the level of egregiousness where prejudice should be presumed." 11/2/21 RP 167-68. The trial court denied Mr. Myers's motion to dismiss, instead ordering the lesser remedy of suppression of the seized materials. Id. 11/2/21 RP 167-68, 170-71.

The trial court was wrong, and as the Court of Appeals held, the court was required to hold the State to its burden to disprove any prejudice to Myers beyond a reasonable doubt. Slip op. at 14. The record establishes the trial court applied an improper standard. Slip op. at 14.

The trial court applied the lesser remedy of suppression of Mr. Myers's seized documents, which as the Court of Appeals found, "does nothing more than affirm the existing

state of the law with regard to the seized documents or information contained therein." Slip op. at 25 (noting the documents were already inadmissible as privileged attorney-client communications).

The Court of Appeals properly reversed Mr. Myers's conviction in a published rebuke of the governmental misconduct committed by several branches of state actors. The Court relied on this Court's case law (Peña Fuentes and Cory), and its own case law, State v. Irby, State v. Garza, and State v. Granacki. Slip op. at 11, 12, 14, 25.[2]

The Court of Appeals denied the State's motion for reconsideration, instead, issuing a substituted opinion which clarified its holding on remedy. Slip op. at 25-26.

[2] State v. Peña Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014); State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963); State v. Irby, 3 Wn. App. 2d 247, 415 P.3d 611 (2018); State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000); State v. Granacki, 90 Wn. App. 598, 959 P.2d 667 (1998).

D. THIS COURT SHOULD DENY REVIEW

In its attempt to obtain this Court's review under RAP 13.4(b), the State desperately claims its petition satisfies each of the four considerations governing review under the Rule. Petition for Review at 12. The State fails to meet the criteria of even one of the subsections of RAP 13.4(b), and for this reason, this Court should deny review.

**1. The Court of Appeals opinion is consistent with this Court's decisions and published decisions of the Court of Appeals.**

The Court of Appeals, quoting this Court's decision in Peña Fuentes, held, "The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, which includes the right to confer privately with … counsel." 179 Wn.2d at 811 (citing U.S. Const. amend. VI). "State intrusion into those private conversations is a blatant violation of a foundational right." Id.

The State now claims that the Court of Appeals decision is grounded on an "extension of Sixth Amendment of

jurisprudence unknown to Washington." Petition for Review at 18.

The State next argues that the Court of Appeals recognizes "such a thing as an ipso facto Sixth Amendment violation irrespective of prejudice examination." Petition for Review at 18-19. The State's argument is not aligned with, nor is it supported by, the Court of Appeals decision.

The State attempts to portray the opinion in Mr. Myers's case as in conflict with this Court's opinion in Peña Fuentes. Petition for Review at 21-22 (quoting 179 Wn.2d at 819). The State endeavors to create conflict where there is none. The Court of Appeals endorsed Peña Fuentes – it did not conflict with it. In Myers, the Court of Appeals never advocated for a per se prejudice rule; the Court merely held the trial court must use the proper standard of review when reviewing misconduct, as stated this Court in Peña Fuentes. Slip op. at 14.

The Court of Appeals clearly held: "the trial court misapplied controlling law as to the presumption of prejudice

and issued findings contrary to the law and evidence." The State is disingenuous when it argues the Court of Appeals extends Sixth Amendment jurisprudence in a novel manner. Petition for Review at 18. Review should be denied.

The State next suggests the Court of Appeals contradicted its own holding in State v. Irby. Petition for Review at 28-30. Although the State's precise argument as to Irby is unclear, the State seems to take issue with the Court of Appeals decision stating that the State's seizure of Mr. Myers's privileged legal materials constitutes a violation of a foundational right under Peña Fuentes. Petition for Review at 31. Again, without further development of the State's argument, it is difficult to respond; however, the Court of Appeals opinion clearly was aligned with and relied on its own decision in Irby. Slip op. at 14, 15, 17, 25. The State's attempt to create conflict should be seen for what it is. The petition should be denied.

### 2. The State fails to satisfy any other criteria for review under RAP 13.4(b).

Finally, the State asserts review is warranted for other reasons applicable under RAP 13.4(b), but does not provide argument relevant to this case. The State argues that unlike in State v. Cory, where there was nefarious eavesdropping that was "shocking to the conscience," no such conduct occurred in Mr. Myers's case, so dismissal is "not appropriate absent such shocking, unjustifiable conduct." Petition for Review at 17 (citing 62 Wn.2d 371, 377-79, 382 P.2d 1019 (1963)).

This is not the law. In Washington, where there is a state intrusion into privileged attorney-client communications, the court *presumes prejudice*, as even the State acknowledges. Petition for Review at 23. The Court of Appeals found the trial court failed to apply the correct standard, and the remedy the court imposed was "woefully inadequate." Slip op. at 25.

The court's remedy of suppression, after all, only suppressed documents that were already inadmissible.

> Ordering government actors to not disseminate information intercepted in violation of the Sixth Amendment is simply a command to follow rules by which they are already bound and, more critically, that they have already violated. This is no sanction at all on the government actors, who appear to have genuinely believed that their conduct was wholly appropriate, so there is no discouragement from engaging in similar behavior in the future.

Slip op. at 25.

Contrary to the State's argument, the Court of Appeals explicitly stated that the prosecutor's "institutionalized" use of an internal review team[3] "fails to recognize, much less honor, the unique nature of this constitutionally protected [attorney-client] relationship." Slip op. at 19. The Court of Appeals found this practice impermissible and emphasized that the trial court minimized this and other misconduct of the prosecutor's office, thereby establishing the trial court's misapplication of controlling authority. Slip op. at 20.

[3] The internal team was called a "taint team" by the State at argument. Slip op. at 19.

This Court should squarely reject the State's petition for review. The State is clearly disappointed with the Court of Appeals decision, but there is simply no conflict requiring this Court's clarification on Sixth Amendment jurisprudence.

## E. CONCLUSION

The Court of Appeals properly applied existing case law to the facts in Mr. Myers's case and found outrageous governmental misconduct required reversal. This Court should deny review.

DATED this 5th day of October, 2023.

This document is in 14-point font and contains 2,065 words, excluding the exemptions from the word count per RAP 18.17.

Respectfully submitted,

s/ Jan Trasen

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 102351-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: October 5, 2023

## WASHINGTON APPELLATE PROJECT

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