NO. _____

COA NO. 56814-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

APPEAL FROM THE COURT OF APPEALS, DIVISION II, AND THE GRAYS HARBOR COUNTY SUPERIOR COURT

PETITION FOR REVIEW

NORMA J. TILLOTSON
Prosecuting Attorney
for Grays Harbor County

BY: _____
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

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IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner, the State of Washington, was the Respondent in the Court of Appeals on the direct review of Anthony Couch's criminal convictions for rape in the second degree and assault in the second degree. The State asks this Court to grant review of the published opinion of the Court of Appeals, Division II, in *State v. Couch,* No. 56814-4-II, reversing Appellant's convictions, issued January 23, 2024 (attached). The Court of Appeals also denied the State's motion for reconsideration by order issued February 29, 2024 (attached).

STATEMENT OF THE CASE

Anthony Couch was charged by information in Grays Harbor County Superior Court cause number 20-1-343-14 with rape in the second degree and assault in the second degree. CP 1. Mr. Couch was convicted as charged following a jury trial

and given his criminal history, was sentenced to life under the POAA (Persistent Offender Accountability Act). CP 11-22.

Prior to trial Mr. Couch's attorney, Christopher Swaby, filed a motion to dismiss the charges as some of Mr. Couch's phone calls had been inadvertently recorded by the jail phone system and one piece of Mr. Couch's legal mail had been opened by an employee of the Grays Harbor County Sheriff's Office. CP 51-73.

On November 23, 2021 a hearing was held on the motion. 11/23/21 RP 140 et seq. There are numerous cameras throughout the Grays Harbor County Jail for security purposes; none of them are wired for sound. 11/23/21 RP 166. The jail also has two phone lines: a recorded line for all outgoing and incoming calls, and a "privileged" do-not-record line for communication between inmates and their attorneys. 11/23/21 RP 168. All of the recorded (non "privileged" attorney calls) begin with an announcement that the call is being recorded and

is subject to monitoring. 11/23/21 RP 168. Notices that inmate calls are recorded and subject to monitoring are also posted in the elevators in the jail and in the booking area. *Id.* The phone system, or "platform," is provided by ICS Solutions. 11/23/21 RP 163.

On October 25, 2021 Chief Davis, the Grays Harbor County Jail superintendent, received an email request from Christopher Swaby, Appellant's trial attorney, to put Ruth Rivas's name on the privileged do-not-record phone list for Mr. Couch (approximately in April of 2021 Ms. Rivas had joined Mr. Couch's defense team as co-counsel). 11/23/21 RP 169, 180. Although in Wyoming on vacation, Chief Davis was able to add Ms. Rivas's name to the do not record list the next morning, October 26. 11/23/21 RP 170.

Prior to being added to the do-not-record list, Ms. Rivas had spoken with Mr. Couch on the recorded line, from approximately April to October of 2021. 11/23/21 RP 166,

208. Chief Davis was able to identify 70 recorded calls to and from Ms. Rivas's number (they weren't all between her and Mr. Couch as she represented other inmates in the jail). 11/23/21 RP 172-73. *Significantly, Mr. Couch testified that prior to Ms. Rivas's number being put on the do-not-record privileged phone list, the announcement that the call was being recorded would play; and yet, he still called her on the recorded line.* 11/23/21 RP 146; 154-55. The phone system also allowed Chief Davis to see whether the phone calls had been listened to; they had not been, nor did Chief Davis listen to them. 11/23/21 RP 173-74. Chief Davis immediately sent an email to ICS Solutions requesting that those 70 calls be "locked" so that no one could search for or listen to them. 11/23/21 RP 174. Chief Davis later received confirmation from ICS Solutions that the phone calls had been deleted. 11/23/21 RP 176.

Also, Attorney Swaby accessed the Grays Harbor jail's new inmate video visitation system before the Grays Harbor jail

had set the system up for attorneys to use and had conversations with the defendant. Chief Davis, the system administrator, was unaware that Mr. Swaby was using the system to meet with his client. When Chief Davis was notified that attorney Swaby was using the system, he "switched" Mr. Swaby to an unrecorded platform. There was no evidence that anyone reviewed or listened to those video sessions. 11/23/21 RP 178-79; 183-86.

As for the one letter that had been opened prior to being delivered to Mr. Couch, Jail Sergeant Gina Buchanan found a letter postmarked June 12 to Mr. Couch marked as legal mail in the inmate mail basket. 11/23/21 RP 189. When she went to distribute the mail, she noticed it had been opened by a support specialist who worked in the Grays Harbor County Sheriff's Office. 11/23/21 RP 189-190. The contents of the letter were not visible. 11/23/21 RP 190. Sergeant Buchanan did not remove nor read the contents of the envelope. 11/23/21 RP 191. To her knowledge no one else in the Sheriff's Office read

the contents either. 11/23/21 RP 191-93. She delivered the letter to Mr. Couch, informed him that it had been opened but should not have been, that it was not a regular practice, and later made a copy of the envelope only to prevent it from happening in the future (and presumably to show the envelope as she found it). 11/23/21 RP 191. There was no evidence at the hearing that anyone from the State ever saw or read the contents of the envelope.

The trial court did not enter written findings; its oral ruling was as follows:

> All right. All right. Well, the – the only communication between Mr. Couch and either Mr. Swaby or Ms. Rivas that we know to have been recorded consists of the approximately 70 phone calls that were placed between Mr. Couch and Mr. – and Ms. Rivas, or vice versa, prior to the time that Ms. Rivas was added to the priv – privileged list. And the testimony is that none of those 70 phone calls had been listened to or overheard by anyone and that they have all been deleted as of November 4. There is no evidence before this Court to establish that any person eavesdropped or otherwise has listene3d to any of the recorded phone call between Ms. Rivas and Mr. Couch.

There is no evidence that any phone call between Mr. Couch and Mr. Swaby has ever been recorded.

Regarding the video that I saw, there was no audio. While there may have been documents exchanged, it is impossible to know what those documents contained. It's not visible within the video and there's been no evidence presented that – that anyone ever viewed those videos or was able to see any contents of any writing that may have been exchanged during this meeting with what I believed to be persons who did not enjoy a privilege with Mr. Couch to begin with.

The Grays Harbor County Sheriff's Corrections Division has an absolute right to have video cameras in any location they deem appropriate and necessary for security within their facility. The Sheriff's office and its employees are not entitled to eavesdrop on conversations that are privileged and there is no evidence that that occurred. The cases cited by Mr. Swaby in his motion to dismiss where the Court found concern or reason to find violations of the Attorney-client privilege, the evidence was clear that someone eavesdropped or overheard conversations. In one of the cases, the conversations that were overheard were – were heard inadvertently. But in – in each case cited by Mr. Swaby the – one of the salient facts was that a conversation between an attorney and his or her client had been listened to in some way. And there is no evidence in this case that that occurred, other than with the 70 phone calls between Mr. Couch and Ms. Rivas at a time when Ms. Rivas was – had

not been identified through a – the process in place at the sheriff's office as a person entitled to privileged communications.

So the last issue raised in this motion to dismiss deals with inference [sic] with the mail. The only evidence before the Court in support of this part of the motion pertains to the letter postmarked June 12 of 2021, that was marked attorney-client correspondence. Sergeant Buchanan was candid about what happened, that the envelope had been opened. When she says that, she took it to Mr. Couch. She did not look at the contents. She's not aware of anyone else having looked at the contents. And there's 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. The contents of the envelope were not visible when Sergeant Buchanan gave this envelope from him so that she could make a copy of it and she used that today during her testimony.

While I certainly understand that Mr. Couch would have legitimate well-founded concern about the fact that this envelope had been opened, I do not believe that that incident in and of it itself [sic] creates any kind of substantial interference with his ability to communicate freely with his attorneys, especially in light of the fact that there is no evidence to support any speculation that – that this occurred on other occasions or that anyone ever viewed the contents of the envelope that was postmarked June 12th. ***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. The motion is denied.

11/23/21 RP 211-15 (emphasis added); CP 79 (order).

ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Review should be granted pursuant to RAP 13.4(b)(1) because the decision below conflicts with Washington State Supreme Court precedent.

The Court of Appeals held that the State failed to disprove prejudice to the defendant beyond a reasonable doubt. However, in order to reach that conclusion, the court applied a *per se* presumption of prejudice when a privileged communication is merely intercepted, but no eavesdropping occurs. This is contrary to controlling precedent. The U.S. Supreme Court has specifically rejected the *per se* presumption of prejudice when a privileged communication is intercepted,

but not listened to, and the Washington Supreme Court specifically adopted that precedent.

In *State v. Pena Fuentes,* 179 Wn.2d 808, 318 P.3d 257 (2014), a detective listened to six calls between the defendant and his attorney. *Id.* at 816. The Court held that "the presumption of prejudice arising from such eavesdropping is rebuttable." *Id.* at 819. However, this Court also said that "the 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.*" *Id.* (citing *Weatherford v. Bursey,* 429 U.S. 545, 557-58, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)) (emphasis added).

In *Weatherford,* Bursey and an informant were charged with vandalizing the selective service office. *Weatherford* at 547. The informant was charged in order to protect his identity.

Id. The informant and his attorney sat in with Bursey and Bursey's attorney while discussing the upcoming trial. *Id.* at 547-48. There was no evidence the informant ever passed any information from the meetings to the prosecutor. *Id.* at 548. The informant testified against Bursey at trial, and Bursey was convicted. *Id.* at 549. Bursey then sued the informant under 42 U.S.C. sec. 1983 for violating his Sixth and Fourteenth Amendment rights to effective assistance of counsel. *Id.*

The U.S. District Court entered judgment in favor of the defendants, but the Fourth Circuit reversed, finding that any intrusion into the attorney-client relationship warrants a new trial, and it was immaterial whether the informant told anyone about the communications. *Id.* at 549-50.

The U.S. Supreme Court reversed, specifically disclaiming a per se rule assuming prejudice. *Id.* at 550. The Supreme Court found that the district court, like the trial court here, found that the information had never been disseminated.

Id. at 555. Although *Weatherford* was a civil sec. 1983 case, the Washington Supreme Court specifically adopted the rejection of a per se prejudice rule for eavesdropping cases in the criminal context.

This case is like *Weatherford* in that there was an *interception* of a communication (in *Weatherford* by the informant, here by an automatic recording system) but no eavesdropping as in *Pena Fuentes.*

This distinction was not lost on the trial court, which is why it did not engage in an inquiry of determining whether the State disproved prejudice beyond a reasonable doubt.

2. Review should be granted pursuant to RAP 13.4(b)(2) because the opinion below is in conflict with a published opinion of the Court of Appeals: State v. Irby, 3 Wn. App. 2d 247, 415 P.3d 611 (2018), a Division I case, and the test for prejudice set forth therein.

In its opinion the Court of Appeals held that there was "no indication that the trial court applied the correct legal standard" in its ruling on the defendant's motion because it did

not rule whether the State had proved the absence of prejudice beyond a reasonable doubt. *Couch* opinion at 1. The reason the trial court never expressly engaged in this inquiry is because the court expressly ruled there had not been a violation of the defendant's rights. The court stated, "I do not find that there has been *any violation* of the attorney-client privilege." 11/23/21 RP 214 (emphasis added).

Division I formulated a four-part test which is consistent with both *Weatherford* and *Pena Fuentes*:

1. Did a state actor participate in the infringing conduct alleged by the defendant?

2. If so, did the state actor(s) infringe on a Sixth Amendment right of the defendant?

3. If so, was there prejudice to the defendant? That is, did the State fail to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable doubt?

4. If so, what is the appropriate remedy to select and apply, considering the totality of the circumstances present, including the degree of prejudice to the

> defendant's right to a fair trial and the degree of nefariousness of the conduct by the state actor(s)?

State v. Irby, 3 Wn. App. 2d 247, 252-53, 415 P.3d 611 (2018).

This test is consistent with *Weatherford* and *Pena Fuentes* because the first two questions of the test ask if prejudice is *possible.* Clearly, if there is no state action or, as the trial court ruled here, there is no infringement, there is no need to require the State to prove anything. Significantly, as to part 2 of the test, consistent with the trial court's decision below, 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 right and no remedy need be applied."* *Irby,* 3 Wn. App. 2d at 253 n. 3 (emphasis added).

This is consistent with *Weatherford* and other federal decisions, keeping in mind that the right to counsel under the Washington State Constitution and the Sixth Amendment right to counsel are coextensive. *Heinemann v. Whatcom Cy.,* 105

Wn.2d 796, 800, 718 P.2d 789 (1986). In *United States v. Sawatzky,* 994 F.3d 919 (8th Cir. 2021), the defendant's jail cell was searched prior to his sentencing and several documents, including correspondence between him and his attorney, were seized and were reviewed by a government "conflict attorney." *Sawatzky* at 922. None of the documents or information was read by the prosecutor or used against the defendant at sentencing. *Id.* at 923. Finding that the defendant had not shown prejudice, and similar to the aforementioned quote from *Irby,* the Eighth Circuit held:

> A *defendant establishes* a Sixth Amendment violation if (1) "the government *knowingly* intruded into the attorney-client relationship," and (2) "the intrusion *demonstrably prejudiced the defendant, or created a substantial threat of prejudice."*

Sawatzky at 923 (emphasis added) (citations omitted). The Ninth Circuit is in accord:

> Despite the high approbation our system has for the attorney-client privilege, the Supreme Court has twice held that government invasion of that

> privilege or the defense camp is not sufficient by itself to cause a Sixth Amendment violation. The defendant must have been *prejudiced* by such actions. *United States v. Morrison*, 449 U.S. 361, 365, 101 S. Ct. 665, 668, 66 L. Ed. 2d 564 (1981); *Weatherford v. Bursey,* 429 U.S. 545, 558, 97 S. Ct. 837, 845, 51 L. Ed. 2d 30 (1977). Our circuit has also explicitly held that prejudice is required. *See United States v. Shapiro,* 669 F.2d 593, 598 (9th Cir. 1982); *United States v. Bagley,* 64 F.2d 1235, 1239 (9th Cir.), *cert. denied,* 454 U.S. 942, 102 S. Ct. 480, 70 L. Ed. 2d (1981); *United States v. Irwin,* 612 F.2d 1182, 1186-87 (9th Cir. 1980) ("it is apparent that *mere government intrusion* into the attorney-client relationship, although not condoned by the court, is not of itself violative oof the Sixth Amendment right to counsel. Rather, the right is only violated when the intrusion substantially prejudices the defendant.") (footnote omitted).

United States v. Hernandez, 937 F.2d 1490, 1493 (9th Cir. 1991) (emphasis on "prejudiced" by the court; remaining emphasis added).

Mr. Couch never established that the State *knowingly* did anything (given the safeguards in place that were circumvented by defense counsel) nor was there evidence of prejudice or the substantial likelihood of prejudice, given that the phone calls

were never listened to. *Sawatzky* at 923. Furthermore, the rebuttable presumption of prejudice enunciated by the Washington Supreme Court in *Pena Fuentes* and followed in other cases like *Irby* was originally based on *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963) where there was active purposeful eavesdropping (wiring the jail conference room with microphones to eavesdrop on confidential conversations between attorneys and defendants, resulting in dismissal); that is not the case here. As noted previously, our Supreme Court specifically adopted *Weatherford's* rejection of a *per se* presumption of prejudice Accordingly, prejudice should not be presumed.

The opinion below conflicts with *Irby* in that it does not apply, or incorrectly applies, the test for prejudice set forth therein. It faults the trial court for not engaging in the inquiry in part 3 of the *Irby* test without considering that the trial court decided the matter on part 2 – a necessary inquiry under

Weatherford, Pena Fuentes, Sawatzky and *Hernandez* (and cases cited therein), *supra.* The trial court's ruling was that no Sixth Amendment violation occurred, so the State never had the burden of disproving prejudice, consistent with the test set forth in *Irby.*

Accordingly, this Court should grant review on this issue.

3. Review should be granted pursuant to RAP 13.4(b)(2) as the Court of Appeals' instructions to the trial court on remand are in conflict with other published Court of Appeals cases.

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. Per the court's opinion, 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 remedy mandated by the court conflicts with the holdings in *Pena Fuentes* and *Irby, supra, 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 of Appeals in this case, the Supreme Court found that the record was unclear on what standard the trial court used.[1] *Id.* at 820. The Supreme Court remanded 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

[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.

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* 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, presumably because the first two elements of the test, state actor and infringement on a Sixth Amendment right, had been met. 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 form having the assistance of an attorney at trial." *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* . . . " (purposeful interception of communication). *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] Unreported, cited pursuant to GR 14.1(a) for such persuasive authority as the Court deems appropriate.

place to protect the confidentiality of attorney-client communications which defense counsel, albeit inadvertently, circumvented.

Review should be granted on this issue as the Court of Appeals refusal to remand for further hearings conflicts with other published Court of Appeals decisions,

4. Review should be granted pursuant to RAP 13.4(b)(3) as to whether the attorney – client relationship was "chilled" as it implicates the Sixth Amendment right to counsel and thus presents a significant question of law under the Constitution of the State of Washington or of the United States.

A criminal defendant's right to counsel in a criminal prosecution is a constitutionally protected right, and denial of that right is a denial of due process. U.S Const. amend VI; U.S. Const. amend. XIV; Wash. Const. art. I sec. 3; Wash. Const art. I sec. 22; *State v. Cory,* 62 Wn.2d 371, 373, 382 P.2d 1019 (1963). A critical, and statutorily protected, aspect of the right is that communications between a defendant and his or her attorney is privileged. RCW 5.60.060(2)(a). Intrusion into

private attorney-client communications violates a defendant's right to effective representation and due process. *Cory* at 374-75. When the State intercepts privileged attorney-client communications infringing on the defendant's Sixth Amendment right to an attorney, prejudice is presumed. *Pena Fuentes,* at 819-20. The State can rebut this presumption by showing "beyond a reasonable doubt that the defendant was not prejudiced." *Pena Fuentes* at 820.

The Sixth Amendment requires that a defendant have confidence that their communications with their attorney remain confidential. *Cory* at 374.

As for Mr. Couch's assertion that he was "chilled" in his communication with his attorneys as a result of the alleged intrusion (recorded phone calls that were not listened to and one piece of mail that was opened, but no evidence that it was read), to the extent that that may be true, it is well-nigh irrebuttable by the State.

Compare the instant case to the findings regarding the State intrusion in *Irby* following remand and further hearings:

> The superior court found the jail had no consistent policy on how inmate kites were handled during Irby's incarceration thee in 2016, that lack of policy led to Irby's confidential attorney client communications being inappropriately opened, viewed and time stamped by jail staff, and it was unclear whether Irby's kites containing these confidential communications were delivered to his attorney. The court found these actions by the jail staff *destroyed* Irby's relationship with his attorney.

State v. Irby, 2023 Wash. App. Lexis 2067 at 16 (emphasis added).

It cannot be said, based on the record below, that the State "destroyed" Mr. Couch's relationship with his attorney. Mr. Couch never alleged that he and his attorneys were unable to communicate in preparation for trial. Indeed, Mr. Couch testified that he (or they) acted to avoid any further intrusions by routing legal mail through their private investigator. 11/23/21 RP 149-50. Mr. Couch continued to use the recorded

line to talk to attorney Rivas, knowing the call was being recorded. 11/23/21 RP 146; 154-55

Since Mr. Couch and his counsel were able to continue communication without the risk of intrusion, and because Mr. Couch clearly disregarded that risk when he called Ms. Rivas, it is clear that the attorney-client relationship was not eroded by the technical intrusion, much less "destroyed" as the court described it in *Irby,* 2023 Wash. App. Lexis 2067 at 16.

Accordingly, review of this issue should be granted.

CONCLUSION

The decision below conflicts with Washington State Supreme Court precedent, with published opinions of the Court of Appeals and presents a significant question of constitutional law, e.g. the Sixth Amendment right to counsel.

The trial court correctly found that there was no infringement of Mr. Couch's Sixth Amendment right to counsel. There was no evidence that the recorded phone calls

were ever listened to, nor that the one piece of legal mail, inadvertently opened, was ever read, nor that the information contained therein was forwarded to the State or used as evidence against Mr. Couch. Having found no infringement, the trial court was not required to address the issue of presumed prejudice. This is consistent with this Court's rejection of the presumption of prejudice in *Pena Fuentes* and the test set forth in *Irby*. The Court of Appeals decision below conflicts with this precedent.

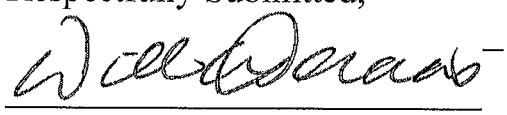
The record does not support the decision below that Mr. Couch's ability to consult with his attorney was "chilled."

Review should be granted, the Court of Appeals reversed, and Mr. Couch's conviction should be affirmed.

This document contains 4987 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 29th day of March, 2024.

Respectfully Submitted,



WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

WAL /

Filed
Washington State
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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.

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 ORDER DENYING MOTION FOR RECONSIDERATION

Respondent State moves for reconsideration of the court's January 23, 2024 published opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Veljacic

FOR THE COURT:

Maxa, J.

MAXA, P.J.

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

March 29, 2024 - 8:43 AM

Transmittal Information

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Superior Court Case Number:	20-1-00343-6

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