EFiled: Oct 09 2018 09:56AM EDT
Filing ID 62537202
Case Number 232,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE AS AMICUS CURIAE, IN SUPPORT OF APPELLEE

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF DELAWARE
Ryan Tack-Hooper (Bar I.D. 6209)
Karen Lantz (Bar I.D. 4801)
100 W. 10th St., Suite 703
Wilmington, DE 19801
(302) 654-5326
rth@aclu-de.org
klantz@aclu-de.org

Attorneys for Amicus Curiae

October 9, 2018

Table of Contents

Table of Authorities

Cases

Other Authorities

Statement of Interest

Proposed Amicus Curiae, the American Civil Liberties Union Foundation of Delaware ("ACLU of Delaware"), submits this brief to urge affirmance of the Superior Court decision dismissing Mr. Robinson's indictment. This brief addresses the role of attorney-client privilege in maintaining the integrity of the justice system, especially for people in prisons. It also addresses the reasons for adopting a rule that considers the substantial inherent prejudice that results from intercepting privileged communications and the need to deter such intrusions.

The ACLU of Delaware is a state affiliate of the American Civil Liberties Union ("ACLU"), a nonprofit, nonpartisan, member organization. The ACLU of Delaware has worked since 1961 to support the guarantees of the Constitution, including the right to counsel. The ACLU of Delaware frequently corresponds by mail with clients in prison, including prisoners facing criminal charges. In order to ensure free exchange of information and advice in the context of the extreme lack of privacy in prison, ACLU of Delaware attorneys tell these clients that the attorney-client privilege protects the confidentiality of our communications, and that any unwarranted breach of this privilege would be met with sanctions and other formal consequences for the state. The motion to file this brief has been approved by ACLU of Delaware's Legal Review Panel.

Facts

According to the State, prosecutors instructed prison officials to search for and remove documents, including correspondence and notes from conversations between an attorney and her client, Jacquez Robinson, a defendant in a criminal matter. State's Opening Brief ("Op. Br.") 13. The documents, which the prosecutors and investigators knew included attorney-client privileged materials, were then reviewed by investigators employed by the Department of Justice, and by the paralegal assigned to the criminal prosecution of Mr. Robinson. Op. Br. 14-15. The prosecutor who had supervisory authority over the trial team was also given access to these documents, though he testified that he did not review them. Op. Br. 15.

It is undisputed that the prosecutors did not inform defense counsel for Mr. Robinson that they planned to intentionally review attorney-client privileged documents. *State v. Robinson*, 2018 WL 2085066, at *2 (Del. Super. Ct. May 1, 2018). They did not inform defense counsel immediately after the review of the privileged materials. *Id.* They did not inform counsel about the nature of the seizure of the documents even after she petitioned for the return of legal documents that she learned had been seized. *Id.* The prosecutors did not inform the Court of their plan to intentionally review attorney-client privileged documents prior to

reviewing them, nor seek court approval. *Id.* While the parties dispute whether there was an "effective screen" between the paralegal that read the documents and the other members of the trial team, there is no evidence of any formal procedure undertaken to prevent dissemination, even unwittingly, of confidential attorney-client communications including defense strategy. Op. Br. 13, 16; Ans. Br. 8-17.

In this appeal, the State maintains that this secret and deliberate review of attorney-client privileged materials was entirely legal, and asks this Court to agree.

Argument

A. The attorney-client privilege is necessary to preserve the fairness of the justice system—especially in the prison context

The confidentiality of attorney-client communications with detainees is constitutionally protected regardless of whether the communication involves a civil or criminal matter.[1] Confidential written correspondence with prisoners builds trust with clients and provides a secure outlet for people who may not be able to safely talk with anyone around them about criminal cases or civil complaints. The right to open communication with counsel requires inmates to trust that prison authorities

[1] *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 575-76 (1974); *Bieregu v. Reno*, 59 F.3d 1445, 1452 (3d Cir.1995).

and other state officials respect the privilege. This fragile trust is weakened and the right is threatened any time the state intrudes into the privilege without appropriate protective processes.

Letters and note-taking provide an efficient, inexpensive, reliable way for prisoners and their lawyers to communicate about the facts that are critical to building a criminal defense, post-conviction appeal, or civil suit to vindicate other constitutional rights. If, in order to assure confidentiality, attorneys with incarcerated clients had to travel to the prison or arrange a legal phone call every time they needed to communicate, the ability to zealously represent those clients would be significantly impaired. Many of the inmates in Delaware's prisons are also indigent, and they are provided legal services by public defenders with large caseloads, as well as non-profit and pro bono attorneys, who could not adequately represent those clients without relying on the confidentiality of written communication. For these reasons, it is critical that attorney-client communications are meticulously and consistently shielded from unnecessary and unwarranted inspection.

In criminal matters, the confidentiality of communications is also protected by the Sixth Amendment right to assistance of counsel.[2] Because the right to assistance of counsel is "fundamental and essential to a fair trial," that obligation is applied as well to the states through the due process clause of the Fourteenth Amendment.[3] Defendants who are held in pretrial detention are already at a significant disadvantage in the preparation of their defense.[4] So it is particularly important for these defendants to be able to communicate freely and confidentially with counsel, by correspondence and in person, to prepare a defense.

The attorney-client privilege itself, while not a constitutional rule, "is the oldest of the privileges for confidential communications known to the common

---

[2] U.S. Const. amend. VI.

[3] *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (internal quotations omitted). *See also Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.") (internal quotations omitted).

[4] *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (noting that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself"); *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978) ("[O]ne of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense."), *rev'd on other grounds, Bell v. Wolfish*, 441 U.S. 520 (1979).

law,"[5] and is an essential component of constitutional rights. In the seminal *Upjohn* case, the Supreme Court opined that "if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[6]

The behavior of the State in this case—seizing and reviewing Robinson's legal correspondence and documents without any court oversight, formal screening, or notification to defense counsel—injects just such uncertainty into the prospective attorney-client relationship, and does so for every inmate in Delaware. The inability to predict with certainty when the State will take it upon itself to intrude into the privilege eviscerates the privilege. It chills the free exchange of information that is a bedrock purpose of the privilege.[7]

In this case, whatever the nature of the suspicion the State had with regard to wrongdoing on the part of an incarcerated person or that person's attorney, it has

---

[5] *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961)).

[6] *Id.* at 393.

[7] *Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) ("[O]pening properly marked legal mail alone . . . implicates both the First and Sixth Amendments because of the potential for a 'chilling effect.'").

the means to appropriately balance the need to investigate suspected wrongdoing with the protection of constitutional rights. For example, an application for an appropriate order or a search warrant would have allowed court supervision over any limited intrusions into the privilege, including the appointment of a special master, and would have maintained public confidence in the fairness and integrity of the criminal justice system.

B. The United States Supreme Court has left open the question of when deliberate and unnecessary intrusion into the attorney-client relationship justifies dismissal in the absence of proof of prejudice

The United States Supreme Court has addressed law enforcement intrusions into attorney-client privilege in a line of cases culminating in *Weatherford v. Bursey* and *United States v. Morrison*.[8] These cases have "left open the question of whether 'intentional and unjustified intrusions upon the attorney-client relationship may violate the Sixth Amendment even absent proof of prejudice.'"[9]

---

[8] *Weatherford v. Bursey*, 429 U.S. 545, 557 (1977); *United States v. Morrison*, 449 U.S. 361, 361 (1981). The United States Supreme Court is the only court whose decisions bind this Court on questions of federal law. *Johnson v. Williams*, 568 U.S. 289, 305 (2013) ("[T]he view of the federal courts of appeals do not bind [a state supreme court] when it decides a federal constitutional question . . .").

[9] *United States v. Mitan*, 499 F. App'x 187, 193 (3d Cir. 2012) (quoting *Shillinger v. Haworth*, 70 F.3d 1132, 1140 (10th Cir. 1995)).

In *Weatherford*, the Supreme Court considered the consequence of an undercover agent attending an attorney-client meeting "not to spy," but because it was "necessary to avoid raising the suspicion that he was in fact the informant."[10] The Court held that there was no violation of the Sixth Amendment because the agent did not communicate privileged information to the prosecution and because the intrusion was not purposeful.[11] The Court acknowledged that the right to counsel is inherently threatened by "inhibition of free exchanges between defendant and counsel because of the fear of being overheard."[12] However, the Court found that this concern was less significant in the undercover informant context because the intrusion from a third party "may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings."[13]

The circumstances in *Weatherford* contrast sharply with deliberate and secret interception of attorney-client communications, because deliberate and secret interception cannot be reasonably avoided by careful defense attorneys and

---

[10] *Weatherford*, 429 U.S. at 557.

[11] *Id.*

[12] *Id.* at 554 n.4.

[13] *Id.*

is not justified by the need to protect undercover agents. In Mr. Robinson's case, an application to a court and *ex parte* and *in camera* review of the communications would have achieved any legitimate law enforcement purpose. *Weatherford*'s discussion of the different degree of chilling effect based on the nature of the intrusion suggests that deliberate interception of communications, when not necessary for law enforcement purposes, should be treated differently from cases involving incidental intrusion by third parties working with the state.[14]

Morrison involved two DEA agents who attempted to persuade a criminal defendant to abandon her lawyer and to cooperate with them.[15] The Court assumed without deciding that the Sixth Amendment can be violated even if there is no evidence in the record of some specific prejudice beyond the effect of the intrusion itself.[16] But the Court held that even under that assumption of some degree of *per se* prejudice, there was not sufficient prejudice arising from the DEA agents'

---

[14] *See* 429 U.S. 554 n.4, 557.

[15] *Morrison,* 449 U.S. at 361.

[16] *Id.* at 364 ("We shall assume, without deciding, that the Sixth Amendment was violated in the circumstances of this case.").

ultimately fruitless conversation with the defendant to warrant dismissal of the indictment.[17]

Morrison contains no holding as to whether and when prejudice may be presumed or when it may be so great as to warrant dismissal. But it does provide some guideposts.[18] The Court observed that the fact that a violation is deliberate is not on its own sufficient to warrant dismissal of an indictment.[19] The opinion goes on to raise one possible set of facts that might make such dismissal justified—a pattern of abuse.[20] *Morrison* leaves open the question of which other circumstances, when added to a deliberate violation, might justify dismissal on deterrence grounds.

In sum, neither *Weatherford* nor *Morrison* resolves the question of when deliberate and unnecessary interception justifies dismissal even in the absence of proof of prejudice—either because such prejudice is presumed and substantial and

---

[17] *Id.* at 366-67.

[18] *Id.* at 366 n.2.

[19] *Id.*

[20] *Id.* ("[T]he record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness.").

dismissal is necessary to remedy it, or because dismissal is warranted on deterrence grounds.[21]

C. Dismissal is warranted as a remedy for prejudice that is presumed to exist as the result of any deliberate and unnecessary intrusion

In this case, dismissal is warranted both as a remedy to substantial prejudice that is presumed on these facts and, independently, on deterrence grounds because of the pattern of intrusions.

1. Prejudice is presumed when there is deliberate intrusion into the privilege without law enforcement necessity

Drawing on the United States Supreme Court's ruling in *Weatherford*, the Third Circuit Court of Appeals has held that prejudice may be presumed when the government "intentionally plants an informer in the defense camp."[22] The Tenth

---

[21] *See State v. Granacki*, 959 P.2d 667, 670 (Wash. Ct. App. 1998) (noting that there is "more than one purpose for dismissing a case where the State violates a defendant's right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages the odious practice of eavesdropping on privileged communication between attorney and client") (internal quotation omitted).

[22] *See United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984) (listing three different ways to find a Sixth Amendment violation, including intentional intrusion, disclosure of defense strategy, and proof of actual prejudice).

Circuit Court of Appeals follows a similar rule for intentional intrusions.[23]

There are several reasons that intentional intrusion justifies this presumption so long as there is no law enforcement necessity at issue. First, in the absence of a countervailing law enforcement interest justifying the intrusion, there is no justification for the difficulty of a case-specific examination of prejudice since there is nothing to weigh on the other side.[24] Second, deliberate intrusions are more susceptible to prophylactic rules because law enforcement officials know they are occurring.[25] Third, the nature of an unnecessary and deliberate intrusion itself demonstrates inadequate regard for the attorney-client privilege and Sixth Amendment rights, increasing the likelihood that the intrusion was used for further improper purposes even if there is no evidence of this misuse readily available to the defense.

While some quantum of prejudice is rightly presumed from any intentional violation, not every such violation leads to a presumption of *substantial* prejudice.

---

[23] *See Shillinger v. Haworth*, 70 F.3d 1132, 1139–40 (10th Cir. 1995) ("*Weatherford* may not dictate a rule that would require a showing of prejudice in cases where intentional prosecutorial intrusions lack a legitimate purpose").

[24] *See Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995).

[25] *Id.* at 1141–42.

That is *Morrison*'s holding.[26] When, for example, agents merely unsuccessfully attempt to cause a client to disclose privileged information, there is no substantial prejudice to be presumed.[27] But when the deliberate intrusion in question involves actual law enforcement review of privileged communications, the prejudice that is presumed is substantial.[28]

In contrast to a case like *Morrison*, which did not involve any intrusion into privileged communications,[29] a deliberate intrusion into privileged communications necessarily harms the entirety of the attorney-client relationship. Regardless of what prosecutors may later testify about what was done with such information, reasonable clients in such circumstances will doubt whether free and honest communication with counsel is wise and may not continue to openly share information with their attorneys. Such deliberate intrusion chills the free exchange of information between attorneys and clients far beyond the chill resulting from

---

[26] *See* 449 U.S. at 366.

[27] *Id.*

[28] *See, e.g., State v. Perrow*, 231 P.3d 853, 857 (Wash. Ct. App. 2010) ("[D]ismissal is the sole adequate remedy when, like here, the State intercepts privileged communications between an attorney and client.").

[29] 449 U.S. at 362–63.

incidental intrusion.[30] In the absence of some law enforcement necessity for the violation, such deliberate interception of attorney-client communications is a violation of the Sixth Amendment justifying extreme remedies.[31]

2. This case involves deliberate intrusion without a law enforcement necessity

In this case, the State agrees that employees of the Department of Justice deliberately reviewed attorney-client materials.[32] But the State contends that this was not a deliberate intrusion into the privilege as the concept is employed in Sixth Amendment jurisprudence because the employees did not seek out defense strategy.[33] No binding precedent requires this narrow interpretation of what it means to deliberately intrude into the privilege, and such an interpretation is contrary to the rationale behind the treatment of deliberate intrusions. As detailed above, the reasons for the presumption of prejudice in this context—lack of countervailing interests, efficacy of prophylactic rules, inferences about further improper conduct, and the increased chilling effect of deliberate intrusions—apply

---

[30] *See Weatherford*, 429 U.S. at 554 n.4 (noting that incidental intrusion is easier to avoid than intentional interception, making the latter a larger threat to the Sixth Amendment).

[31] *Perrow*, 231 P.3d at 857.

[32] Op. Br. 13.

[33] Op. Br. 28.

no differently if the prosecutors who knowingly direct the misconduct did not intend to gain trial advantage.

The State also contends that because it was investigating a purported violation of a protective order, then it had a legitimate law enforcement purpose. But the inquiry into the purpose of the intrusion is not to determine whether law enforcement had some justification for wanting to violate attorney-client privilege. Instead, the question is whether the means that the State chose to achieve some legitimate end were "necessary," like they were in *Weatherford*.[34] If state officials deliberately violate the privilege when it is unnecessary, then the existence of some law enforcement rationale does not justify the violation.

Given this precedent, this Court need not resolve the question of whether defense strategy was actually disclosed to the trial prosecutors in Mr. Robinson's case. Should the Court nevertheless reach this question, the State should bear a high burden of proving there was no such disclosure.[35] In this case, any doubt

---

[34] *See State v.* Garza, 994 P.2d 868, 873 (Wash. Ct. App. 2000) (noting that the trial court failed to investigate why "closely examining or reading the materials was required"); *Weatherford*, 429 U.S. at 557 (noting that the intrusion was "necessary to avoid raising the suspicion").

[35] *See State v. Fuentes*, 318 P.3d 257, 259 (Wash. 2014) (holding that it is the state's burden to prove "beyond a reasonable doubt" that its intentional intrusion into attorney-client communications had not prejudiced the defendant).

created by gaps in the evidence should be resolved against the State, since the State's lack of formal, documented procedure for screening the prosecution team from privileged communications and defense strategy is what makes the extent of the disclosure difficult to gauge.

D. Dismissal is warranted on deterrence grounds because the record demonstrates a pattern of intrusion

As the United States Supreme Court recognized in *Morrison*, while the fact that a violation is deliberate does not automatically warrant dismissal of an indictment on deterrence grounds, evidence of a pattern of violation may justify such dismissal.[36] Such dismissal on deterrence grounds may be warranted regardless of whether defense strategy is disclosed to the trial prosecutors.[37] Attorney-client communications are chilled by any such unnecessary intrusion. Such dismissal discourages "the odious practice of eavesdropping on privileged communication between attorney and client."[38]

---

[36] *Morrison,* 449 at 366 n.2 ("[T]he record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness."); *see also Bank of Nova Scotia* 487 U.S. 250, 259 (1988) (distinguishing the facts from a scenario in which there is a history of prosecutorial misconduct).

[37] 959 P.2d 667, 670 (1998) (upholding dismissal based on cursory review of notes summarizing communications between attorney and client).

[38] *Id.*

In this case, the record shows that the review of Mr. Robinson's attorney-client privileged material was not an isolated incident. The Special Investigator testified "that he has previously conducted similar searches targeting a defendant's legal documents in other cases."[39] This would not be surprising, given that the State's position in this appeal is that it is entitled to intrude upon otherwise privileged and constitutionally protected communications, without any court review and approval or formal screening mechanisms, so long as it has some law enforcement rationale for doing so.

Furthermore, the State was on notice since at least 2011 that the Superior Court would find a "failure to have instituted some process" to insulate a member of the prosecution team from attorney-client privileged materials would be considered a violation of a defendant's Sixth Amendment rights.[40] No such process or policy was evident by the time the prosecution's paralegal reviewed Robinson's attorney-client correspondence and notes.

---

[39] *State v. Robinson*, 2018 WL 2085066, at *14 (Del. Super. Ct. May 1, 2018).

[40] *State v. Cannon*, Case ID No. 1001007728, at 7-8 (Del. Super. Ct. Jan. 3, 2011); *see also id.* at 7 ("I think it is important for that process to be developed if it has not been already so that in the future we don't find ourselves in a similar situation.").

Therefore, apart from the question of whether the *per se* prejudice resulting from the intrusion is substantial enough to warrant dismissal under *Morrison*, dismissal of the indictment is independently an appropriate remedy to deter the State's pattern of misconduct.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the Superior Court.

/s/ Ryan Tack-Hooper
Ryan Tack-Hooper (ID No. 6209)
Karen Lantz (ID No. 4801)
American Civil Liberties Union Foundation
of Delaware
100 W. 10th St., Suite 703
Wilmington, DE 19801
(302) 654-5326
rth@aclu-de.org
klantz@aclu-de.org

Attorneys for Amicus Curiae

October 9, 2018