

**ARIZONA SUPREME COURT**

MARK WILLIAM CLARY, JR.,	)	No. CR-16-0388-PR
	)	
Petitioner/Appellant,	)	Court of Appeals No.
	)	1 CA-CR 13-0694
v.	)	
	)	Maricopa County Superior
STATE OF ARIZONA,	)	Court No. CR2012-119994-001
	)	SE
Respondent/Appellee.	)	
	)	

---

**BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR  
CRIMINAL JUSTICE  
IN SUPPORT OF PETITIONER MARK WILLIAM CLARY, JR.**

Rhonda Elaine Neff, Bar No. 029773  
Kimerer & Derrick, P.C.  
1313 E. Osborn Road, Suite 100  
Phoenix, AZ 85014  
(602) 279-5900  
[rneff@kimerer.com](mailto:rneff@kimerer.com)

Attorney for  
**Arizona Attorneys for Criminal Justice**

## TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES .....	iii
INTRODUCTION .....	1
INTERESTS OF <i>AMICUS CURIAE</i> .....	3
ARGUMENTS	
I. The right to counsel for a criminal defendant includes the defendant’s right to speak freely and openly with counsel without intrusion by state actors and when that right is deliberately infringed upon dismissal should be required.....	4
II. Once proof of intrusion is presented, the burden to prove prejudice in a violation of the right to privileged attorney-client communication properly rests with the state and should not be shifted to the defendant.....	7
III. Fourth Amendment principles of independent source and inevitable discovery should not be applied in an attempt to clear the taint of a Sixth Amendment violation of the right to privileged communication with counsel .....	10
IV. When an indictment is based at least in part on perjured testimony, the court should not apply a sufficiency standard to excuse a prosecutor from their obligation to inform the court, defendant, and grand jury of the perjured testimony .....	12
CONCLUSION .....	15

## TABLE OF CASES AND AUTHORITIES

CASES	PAGES
<i>Barber v. Mun. Court</i> , 24 Cal. 3d 742 (1979) .....	9
<i>Fisher v. United States</i> , 425 U.S. 391 (1976) .....	4-5
<i>Hoffa v. United States</i> , 385 U.S. 293 (1966) .....	8
<i>Nelson v. Royston</i> , 137 Ariz. 272 (1983).....	12
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928) .....	7
<i>Pool v. Superior Court In &amp; For Pima Cty.</i> , 139 Ariz. 98 (1984) .....	8-9
<i>State v. Albe</i> , 148 Ariz. 87 (App. 1984).....	9
<i>State v. Fodor</i> , 179 Ariz. 442 (App. 1994).....	13
<i>State v. Gortarez</i> , 141 Ariz. 254 (1984) .....	12
<i>State v. Lewis</i> , 115 Ariz. 530 (1977).....	11
<i>State v. Moody</i> , 208 Ariz. 424 (2004).....	12, 13, 15
<i>State v. Pecard</i> , 196 Ariz. 371 (App. 1999) .....	4, 5, 6, 8, 9, 10
<i>State v. Penney</i> , 229 Ariz. 32 (App. 2012) .....	5
<i>State v. Rosengren</i> , 199 Ariz. 112 (App. 2000).....	11
<i>State v. Warner</i> , 150 Ariz. 123 (1986).....	4, 5-6, 7, 8, 9
<i>Swidler &amp; Berlin v. United States</i> , 524 U.S. 399 (1998) .....	4, 5
<i>Trebus v. Davis in &amp; For Cty. Of Pima</i> , 189 Ariz. 621 (1997) .....	12
<i>United States v. Basurto</i> , 497 F.2d 781 (9th Cir. 1974) .....	12, 14, 15

<i>United States v. Claiborne</i> , 765 F.2d 784 (9 <sup>th</sup> Cir. 1985).....	13
<i>United States v. Levy</i> , 577 F.2d 200 (3d. Cir. 1978).....	6, 10-11
<i>United States v. Morrison</i> , 449 U.S. 361 (1981) .....	4, 7, 9
<i>United States v. Sager</i> , 227 F.3d 1138 (9th Cir. 2000).....	12
<i>United States v. Spillone</i> , 879 F.2d 514 (9th Cir. 1989).....	12-13
<i>Wilson v. Superior Court</i> , 139 Cal. Rptr. 61 (App. 1977).....	8, 10

**ARIZONA REVISED STATUTES**

A.R.S. § 13-107.....	15
A.R.S. § 13-2701.....	13

**UNITED STATES CONSTITUTION**

U.S. Const. amend IV .....	10, 11
U.S. Const. amend. V.....	4
U.S. Const. amend VI .....	2, 4, 5, 6, 7, 10, 11, 15

**ARIZONA CONSTITUTION**

Ariz. Const. art. II, § 4 .....	4
Ariz. Const. art. II, § 24 .....	4

**OTHER AUTHORITIES**

Ariz. R. Crim. P. 6.1 .....	4
Ariz. R. Crim. P. 12.9 .....	15

## INTRODUCTION

This case involves the application of multiple constitutional rights and the remedy for breaches of those rights. First, it involves the deliberate intrusion into attorney-client communications by law enforcement and the proper remedy for the violation. It addresses whether the state should benefit either directly or indirectly from the deliberate violation, including whether application of the independent source and inevitable discovery doctrines apply. Second, it evaluates a prosecutor's duty to seek a new indictment once the prosecutor learns that the indictment was based, even partially, on perjured testimony of law enforcement.

The Court of Appeals' opinion in *State v. Clary*, 1 CA-CR 13-0694, dilutes one of the most fundamental rights of a defendant – the right to be free of intrusion into privileged attorney-client communication. The application of law and the remedies utilized by the Court of Appeals provide minimal deterrence to state actors to uphold a defendant's rights. This case represents one of the many cases showing the need for a clear and easily applicable standard for deliberate violations of a defendant's right to privileged communication. There should also be a clear standard for the State in its obligation to inform the grand jury if it learns that an indictment was based on perjured testimony on a material matter.

*Amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) asks this Court to vacate the Court of Appeals' opinion and dismiss all charges with

prejudice because it fails to sufficiently protect the defendant's right to privileged attorney-client communication, erroneously shifts the burden to defendant to prove prejudice, applies the wrong constitutional standards in Sixth Amendment violation cases, and misapplies the current law of this Court when the prosecution learns of perjured testimony presented to the grand jury.

## **INTERESTS OF *AMICUS CURIAE***

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

*Amicus* offers this brief in support of Petitioner because the right to communicate in private with counsel is one of the most fundamental rights of a criminal defendant and deliberate infringement by law enforcement cannot be tolerated. A defendant should not bear the burden of proving the state's violation was prejudicial nor should the state benefit from deliberate infringements of defendant's fundamental rights. Finally, the integrity and accuracy of our fact finding process requires that the state dismiss a case if it learns the indictment is based, even in part, on perjured testimony on a material issue.

## ARGUMENTS

- I. The right to counsel for a criminal defendant includes the defendant's right to speak freely and openly with counsel without intrusion by state actors. When that right is deliberately infringed upon, dismissal should be required.**

The right to counsel is one of the most fundamental rights that a criminal defendant has. U.S. Const. amend. V, VI, Ariz. Const. art. II, §§ 4 and 24. The attorney-client privilege is one of the oldest and most important recognized privileges. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). The right to assistance by counsel is critical to ensuring fairness in an adversarial criminal process and must be “carefully guarded by the courts.” *State v. Warner*, 150 Ariz. 123, 127 (1986); *United States v. Morrison*, 449 U.S. 361, 364 (1981). In *Clary*, the court interprets deliberate violations of the Sixth Amendment in a way that alleviates the deterrent effect of dismissal.

Arizona has found a defendant' right to confer in private with counsel so fundamental and compelling that the right is codified in our Rules of Criminal Procedure. Ariz.R.Crim.P. 6.1(a). An attorney cannot effectively represent a defendant when the state is permitted to intrude on the attorney-client relationship “chill[ing] free discussion between a defendant and his attorney.” *State v. Pecard*, 196 Ariz. 371, 377, ¶ 27 (App. 1999). The Supreme Court in *Fisher* stated:

[A]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the

absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.

*Fisher v. United States*, 425 U.S. 391, 403 (1976). The defendant's rights protect against improper intrusions by the state. *Pecard*, 196 Ariz. at 377, ¶ 27; *Warner*, 150 Ariz. at 127. "Sixth Amendment violations do not simply turn on the state's successful acquisition of information but more fundamentally on the interference with access to counsel." *Pecard*, 196 Ariz. at 378, ¶ 32.

Arizona differentiates between the right to confer with counsel and the right to privileged communication. In *Clary*, the court blurred the distinction. (Ct. App. Op. ¶¶ 15-16). Interference with the right to confer with counsel requires suppression. *State v. Penney*, 229 Ariz. 32, 36, ¶ 17 (App. 2012). Interference with communication may require dismissal. *Warner*, 150 Ariz. at 128-29. This is a key distinction. Interference with the right to confer prevents communication from happening whereas interference with communications risks disclosure of confidential information. *See Swidler*, 524 U.S. at 403 (encouraging full and frank communication between attorneys and clients promotes public interest in the "observance of law and the administration of justice"). It disadvantages the defendant by exposing facts and defense strategy.

Law enforcement deliberately violating the right to privileged communication is not a new concept. *Warner*, 180 Ariz. at 125-26 (Sheriff seizure

of defendant's documents/recording); *Pecard*, 196 Ariz. at 374-375 (recording defendant calls, opening privileged mail, and seizure of legal documents). The fact that it continues to happen supports strong sanctions. Law enforcement is not being deterred from engaging in misconduct and, under *Clary*, may be rewarded for it. The Court should acknowledge the need for a bright-line rule for these egregious violations. Law enforcement's deliberate invasion into attorney-client communication should result in dismissal and not just suppression of *some* evidence. The Third Circuit rejected a case-by-case analysis of Sixth Amendment violations involving disclosure of defense strategy and, instead, required dismissal with prejudice. *United States v. Levy*, 577 F.2d 200, 210 (3d. Cir. 1978). It found that dismissal was the only option because the defense strategy at that point was already in the public domain and there was no way to cure the violation. *Id.* ("public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain.") Likewise, in Arizona, the state continues to reap the benefit of the wrongfully obtained information by using it in charging and strategy decisions.

Defendant is the only one disadvantaged if suppression is the remedy for deliberate violations into privileged communications. Defendant loses the ability to talk openly with counsel out of fear his confidences will be used against him. This

fear is even worse for in-custody defendants who remain under the watchful eye of law enforcement. Counsel cannot adequately represent a defendant who is afraid to communicate with the one person he is supposed to trust with his liberty. Suppression simply cannot remove the taint of the violation.<sup>1</sup> The remedies for Sixth Amendment violations should not be so narrowly tailored that defendant's rights become illusory. *See Morrison*, 449 U.S. at 364 (“remedies should be tailored to the injury suffered...and should not unnecessarily infringe on competing interests.”) Dismissal of the charges is sometimes the only way to adequately protect a defendant's fundamental right. *Warner*, 150 Ariz. at 128-129 (quoting *Olmstead v. United States*, 277 U.S. 438, 470 (1928)(Holmes, J., dissenting). Immunizing the defendant from prosecution is a drastic remedy occasionally necessary to deter deliberate violation of the right to private attorney-client communications. Deliberate violations of this right are “deplorable” and “cannot be tolerated.” *Warner*, 150 Ariz. at 127-28.

**II. Once proof of intrusion is presented, the burden to prove prejudice in a violation of the right to privileged attorney-client communication rests with the state and should not be shifted to the defendant.**

This Court's precedent requires the state to prove beyond a reasonable doubt that a defendant is *not* prejudiced. However, in *Clary*, the burden is erroneously

---

<sup>1</sup> In *Clary*, the defendant was tried for second degree murder despite officers acknowledging they had no probable cause to charge homicide or aggravated assault until after they learned of the alcohol during his call. (Pet. Rev. at 4-5).

shifted to defendant. (Ct. App. Op. at 7) (“Thus, Clary cannot establish that Siewert’s testimony regarding Clary’s apparent intoxication could reasonably have affected the proceeding’s outcome.”). Such a shift would be disastrous.

It is not possible in some cases for the prosecution to proceed absent proof that the invasion was not prejudicial. *Warner*, 150 Ariz. at 128-129 (citing *Hoffa v. United States*, 385 U.S. 293 (1966) and *Wilson v. Superior Court*, 139 Cal.Rptr. 61, 64 (App. 1977)). The *Warner* court stated:

In this and all further cases where the state invades the attorney-client relationship and interferes with a defendant's right to counsel the *state has the burden* to demonstrate that no evidence introduced at trial was tainted by the invasion. The trial court must be convinced beyond a reasonable doubt that defendant will be able to obtain a fair trial . . . .

*Id.* at 123 (emphasis added); *Pecard*, 196 Ariz. at 378, ¶ 35 (burden of proof shifted to the state to prove interception of attorney-client communication was not prejudicial).

In *Clary*, the court erroneously relied on *Morrison*’s finding that, absent some demonstrable prejudice, dismissal is inappropriate even for deliberate violations. (Ct. App. ¶ 15). First, Arizona courts are not required to read our state constitution in lock-step with the United States Supreme Court’s reading of the federal constitution. *Pool v. Superior Court In & For Pima Cty.*, 139 Ariz. 98, 108 (1984) (the courts should give weight to federal precedent but “should not follow

federal precedent blindly.”). Arizona set itself apart from *Morrison* by leaving the burden on the state in *Pecard* and *Warner*. *Pecard* and *Warner* were both ruled on after *Morrison*. The Court of Appeals “is not empowered to overturn a decision of the supreme court of this state.” *State v. Albe*, 148 Ariz 87, 89 (App. 1984). Beyond this, the reliance on *Morrison* was also erroneous as *Morrison* involved interference with the right to confer and not deliberate intrusion into the attorney-client communication.

It makes sense to keep the burden on the state because it is in the better position to reveal what communication it obtained, what was discussed, and how that information was used. Requiring defendant to prove prejudice inflicts more damage to defendant by requiring disclosure of additional facts or strategy that may be affected by the state’s misconduct. *See Barber v. Mun. Court*, 24 Cal.3d 742, 758 (1979)(defendant should not be forced to disclose the nature of the confidential communication requiring him to “reopen the wound his adversary inflicted upon him in the first place.”). The defendant is rarely privy to state strategy in charging or prosecuting the case. Prior rulings have already put the burden on the state. This Court should not allow that burden to be shifted to the defendant.

**III. Fourth Amendment principles of independent source and inevitable discovery should not be applied in an attempt to clear the taint of a Sixth Amendment violation of the right to privileged communication with counsel.**

Even if the proper remedy for a Sixth Amendment violation is suppression, the court should not apply the Fourth Amendment principles of independent source and inevitable discovery. A Sixth Amendment violation, at a minimum, requires suppression of *all* evidence “derived directly or indirectly” from the violation and precludes “the state [from] offer[ing] rebuttal to any evidence produced by the defendant or cross-examine defense witnesses except to impeach them with prior felony convictions.” *Pecard*, 196 Ariz. at 379, ¶ 40 (citing *Wilson v. Superior Court*, 70 Cal.App.3d 751 (1977)). In *Clary*, the court required suppression only if there is no independent source or the inevitable discovery does not otherwise apply. (Ct. App. Op. at 8-9). Application of these Fourth Amendment principles to Sixth Amendment violations would have devastating implications to defendant’s rights. In the absence of dismissal, the proper remedy is suppression of *all* evidence touched directly or indirectly by the violation.

This ensures prejudice caused by the violation is as limited as possible. As the Third Circuit stated in *Levy*:

No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the fourth amendment area, could accommodate the broader sixth amendment policies. We think that the inquiry into prejudice must stop at the point where attorney-client confidences are

actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

*Levy*, 577 F.2d at 209. There is no proper analogy between the Fourth Amendment and Sixth Amendment because the interests at stake are substantially different. *Id.* Under the Fourth Amendment, the expectation of privacy underlies the exclusionary rule. *Id.* The Sixth Amendment involves “the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense.” *Id.*

The state cannot avoid the effects of a Sixth Amendment violation through the independent source and inevitable discovery doctrines. *State v. Rosengren*, 199 Ariz. 112, ¶ 30 (App. 2000)(citing *State v. Lewis*, 115 Ariz. 530, 533 (1977)). The public’s interest in bringing defendant to trial should not render defendant’s constitutional rights “hollow or illusory.” *Id.* at ¶ 32. There should be an easy-to-follow standard requiring suppression of all evidence touched directly or indirectly by the violation. The right to privileged communication with counsel is fundamental to our system of justice especially where a person’s liberty is at stake. The court should not provide a pass to the state when it violates this right.

**IV. When an indictment is based at least in part on perjured testimony, the court should not apply a sufficiency standard to excuse a prosecutor from their obligation to inform the court, defendant, and grand jury of the perjured testimony.**

In *Clary*, the court applied a sufficiency standard in determining whether dismissal is required if an indictment is based, at least partially, on perjured testimony on a material matter. (Ct. App. Op. ¶ 15). This Court should follow its precedent and not permit a sufficiency standard. Arizona follows the Ninth Circuit rule in *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974), requiring an indictment be dismissed if defendant’s due process rights are violated by an indictment based partially on perjured testimony if that testimony is material and jeopardy has not attached. *State v. Moody*, 208 Ariz. 424, 440 (2004)(citing *State v. Gortarez*, 141 Ariz. 254, 258 (1984) and *Basurto*, 497 F.2d at 785).

In *Clary*, the court side-stepped *Basurto*, by finding the state presented “overwhelming unchallenged<sup>2</sup> testimony that sufficiently supports the indictment.” (Ct. App. Op. ¶ 15). The court relied on a number of Ninth Circuit cases it claimed limits *Basurto*. See, e.g. *United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000)(dealing with misstatement rather than perjured testimony); *United States v.*

---

<sup>2</sup> Grand jury testimony is always unchallenged. *Nelson v. Royston*, 137 Ariz. 272, 277 (1983). The limited exception is a *Trebus* request. *Trebus v. Davis in & For Cty. of Pima*, 189 Ariz. 621 (1997). In order for *Trebus* to apply, the case either has to go back on remand or the defendant has to know of the violation prior to the grand jury presentation, which would be rare since defendants usually don’t receive discovery until after indictment.

*Spillone*, 879 F.2d 514, 524 (9th Cir. 1989); *United States v. Claiborne*, 765 F.2d 784, 791 (9th Cir. 1985). However, Arizona has only applied the sufficiency standard to immaterial evidence that could not have influenced the grand jury. *Moody*, 208 Ariz. at 440-441.

This Court affirmed *Basurto*'s application in *Moody* after the cases cited by the Court of Appeals were determined. *Id.* at 440. A sufficiency standard cannot ensure the taint of perjured material testimony *could not have* influenced the grand jury's decision to indict. *See State v. Fodor*, 179 Ariz. 442, 453-54 (App. 1994)(Arizona does not require actual influence by the perjured testimony--only that it *could have* influenced the grand jury); *see also* A.R.S. § 13-2701(1)(material means "that which could have affected the course or outcome of any proceeding"). There is simply no way to know how the grand jury used the perjured testimony and what, if any, impact the testimony had on its willingness to indict. There is also no way for the defense to investigate and make a presentation of this kind of information, as deliberations are not recorded and defense has no access to the grand jurors.

This is particularly true where officers, such as in *Clary*, acknowledge they lacked evidence for the higher offense in the absence of the wrongfully obtained information. (Pet. Rev. at 5). Without evidence of alcohol consumption, the grand jury may not have indicted on the higher offenses giving *Clary* a lower starting

point in the charges he faced. The defendant was required to answer higher charges based *solely* on information acquired through a violation of his rights and based on the perjured testimony of law enforcement. This prejudices a defendant.

It is not reasonable to conclude that a conviction at trial after suppression of the wrongfully obtained evidence proves the state had sufficient evidence for the indictment.<sup>3</sup> (Ct. App. Op. ¶ 15)(“Notably, this evidence was presented at trial where the jury, without being provided any evidence of Clary’s alcohol impairment, found beyond a reasonable doubt that Clary was guilty.”). This is particularly true where defendant is acquitted of the offense charged and convicted of a lesser offense. A defendant is inevitably in a better position to defend his case if asked to answer for the charge in which the state has sufficient evidence. The state should not be rewarded for overcharging a defendant by using perjured testimony about wrongfully obtained evidence. The “no harm no foul” analysis does nothing to deter the state from seeking an indictment based on perjured testimony.

In *Basurto*, the Court found the state was in a better position to seek a new indictment because jeopardy had not attached and the statute of limitations was not exhausted. *Basurto*, 497 F.2d at 785. It put the burden of remedying injustice on

---

<sup>3</sup> Evidence used at trial is often times greater or different than evidence presented to the grand jury because of different burdens, time allotted, and the discovery available to a prosecutor at the time of the grand jury.

the prosecutor. *Id.* at 785-86. It makes sense for the state to bear the burden because a defendant is limited in the amount of time to challenge grand jury proceedings. Ariz. R. Crim. P. 12.9(b) (25 days from certified transcript or arraignment, whichever is later). The state, however, has a significantly greater amount of time in which it may seek charges. *See* A.R.S. § 13-107(B) (allowing 7 years for most felonies). The State can easily remand the case back to the grand jury and attempt an indictment free from any taint of perjury.

This Court should affirm *Moody* and the application of *Basurto* requiring dismissal where there is perjured testimony on a material matter presented to the grand jury prior to jeopardy attaching. Allowing the state to avoid consequences of presenting perjured testimony so long as there is a conviction at trial or other sufficient evidence presented to the grand jury will lead to absurd results. To interpret the analysis to include a sufficiency standard renders *Moody* and *Basurto* illusory because it would only apply in circumstances where a defendant is acquitted.

## CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court recognize that deliberate intrusions into a defendant's Sixth Amendment right to attorney-client communication warrants dismissal. In the event suppression is deemed the proper remedy, that such intrusions should not be subject to independent source

and inevitable discovery principles, and that the State not be permitted to proceed to trial when the indictment is based, in part, on perjured testimony.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of January, 2017.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By /s/ Rhonda Elaine Neff

Rhonda Elaine Neff

Kimerer & Derrick, P.C.

1313 E. Osborn Road, Suite 100

Phoenix, AZ 85014

Attorney for

**Arizona Attorneys for Criminal Justice**