NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 03/06/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN CARROLL DEMOCKER,	No. 1 CA-SA 12-0032
Petitioner,	DEPARTMENT B
v.	
THE HONORABLE GARY E. DONAHOE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI,	Yavapai County Superior Court No. P1300CR201001325
Respondent Judge,	**DECISION ORDER**
STATE OF ARIZONA, ex rel., SHEILA SULLIVAN POLK, Yavapai County Attorney,	
Real Party in Interest.	

The Court, Presiding Judge Diane M. Johnsen and Judges Donn Kessler and Patricia A. Orozco, participating, has considered the petition for special action, the response and the reply.

The petition for special action challenges the denial by the respondent superior court of petitioner's request for an evidentiary hearing on his Motion to Dismiss for Prosecutorial Misconduct or Motion to Disqualify the Yavapai County Attorney's Office. For the reasons set forth below,

No. 1 CA-SA 12-0032

Yavapai County
Superior Court
No. P1300CR201001325

IT IS ORDERED accepting jurisdiction of the petition for special action and granting relief.

When, as here, the superior court has denied a motion to dismiss or to disqualify the prosecutor based on alleged prosecutorial misconduct, the order is not subject to immediate appeal. Although the order may be reviewed on an appeal from a judgment of conviction, given the anticipated length and expense of the pending retrial, in the exercise of our discretion we conclude that petitioner lacks an adequate remedy from the superior court's ruling. *See generally Turbin v. Superior Court*, 165 Ariz. 195, 797 P.2d 734 (App. 1990).

The Clerk of the Court's report, along with Judge Mackey's comprehensive order dated March 16, 2011, established that unfortunate mistakes in the Clerk's electronic storage of case documents allowed Yavapai County Attorney's Office personnel to view and print documents that were filed ex parte and/or sealed by order of the court. The Clerk's report established that County Attorney's Office personnel viewed and/or printed the

documents even though the documents plainly were designated "ex parte" and/or "sealed."[1]

In its response to the petition, the State does not dispute or attempt to excuse the acts detailed in the report of the Clerk of the Court and Judge Mackey's order.[2] Rather, citing *State v. Pecard*, 196 Ariz. 371, 377, ¶¶ 28-29, 998 P.2d 453, 459

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[1] Pursuant to Rule 4.4(b) of the Arizona Rules of Professional Conduct, "A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." *See Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D. Ill. 2010) (lawyer's duty to disclose receipt of privileged document under this rule applies even when documents are received outside normal discovery process). The record in this case does not reveal one way or the other whether members of the County Attorney's Office notified the court or the defense that they had received sealed or ex parte documents.

[2] Certain orders issued under seal by the superior court bore endorsements indicating the court was transmitting them to the prosecution as well as to the defense. At a hearing on petitioner's motion to dismiss/disqualify, the superior court asked the prosecutor and petitioner's counsel if they had noticed the endorsements, and both said they were unaware of them. In this special action, the State suggests that petitioner is not entitled to relief because he knew all along that these orders were being sent to the County Attorney's Office. The State offers no authority for its implicit assertions that petitioner is estopped or that he has waived relief, or that the court personnel's mistakes somehow authorized the prosecution to download, read and print other documents submitted or filed under seal.

(App. 2000), the State argues the superior court properly denied petitioner's motion because petitioner failed to show he was prejudiced by the prosecution's acts. But *Pecard* does not support the State's contention that, under circumstances such as those here, petitioner was required to offer evidence with his motion that the prosecution's acts prejudiced his defense. To the contrary, our supreme court has held that when the prosecution "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." *State v. Warner*, 150 Ariz. 123, 128, 722 P.2d 291, 296 (1986). In *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004), the court explained:

> The defendant bears the initial burden to establish an interference in the attorney-client relationship. Once he does so, the state bears the burden of demonstrating that the defendant was not prejudiced by the interference and must convince the court beyond a reasonable doubt that the defendant received a fair trial.

Id. at 448, ¶ 77, 94 P.3d at 1143.

Petitioner's motion, along with the Clerk's report and the March 16, 2011, order, establish that members of the County Attorney's Office interfered with petitioner's relationship with

his counsel by viewing and/or printing sealed documents and other documents petitioner's counsel filed ex parte and under seal. Therefore, pursuant to *Warner* and *Moody*, we reverse the order denying petitioner's motion. As in *Warner*, we "remand for a hearing to determine how, if at all, defendant was prejudiced by the state's intrusion, with the burden on the state to prove" that petitioner has not been prejudiced. 150 Ariz. at 128, 722 P.2d at 296. In considering the issue of prejudice and whether and what remedy to grant petitioner, the superior court may consider and make findings with respect to the prosecution's motive in viewing and printing the confidential documents, any use the prosecution made of the documents, whether the prosecution's interference with petitioner's right to counsel was deliberate, whether the State "benefited in any way" from the prosecution's unauthorized acts and, of course, "whether defendant was, in fact, prejudiced." *Id.* at 129, 722 P.2d at 297.

The superior court may exercise its discretion to establish any prehearing disclosure or discovery procedures it deems appropriate. By this order, we do not mean to require the superior court to take further evidence with respect to facts

established by the report of the Clerk of the Court and/or Judge Mackey's order. Rather, as in *Warner*, the hearing on remand shall be directed to facts relevant to the court's consideration of the appropriate remedy, if any, required by the acts detailed in the report and Judge Mackey's order.

/s/
Diane M. Johnsen, Presiding Judge