

IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1703

STATE OF IOWA,
Petitioner-Appellant,

vs.

IOWA DISTRICT COURT FOR EMMET COUNTY,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR EMMET COUNTY
THE HONORABLE JEFFREY A. NEARY, JUDGE

PETITIONER'S REPLY BRIEF

BRENNA BIRD
Attorney General of Iowa

ZACHARY MILLER
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-8894 (fax)
zachary.miller@ag.iowa.gov

ATTORNEY FOR PETITIONER-APPELLANT

REPLY

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW	4
ARGUMENT	5
I. Reviewing emails seized pursuant to a search warrant for attorney-client privilege is a judicial function, and Digital Intelligence was exercising a judicial function by resolving those claims.	5
A. Determining privilege claims is a judicial—not investigative—function, including determining documents subject to a claim of privilege.....	5
B. Digital Intelligence was exercising judicial authority as it followed the district court’s order to resolve Merrill’s privilege claim.....	8
CONCLUSION	11
CERTIFICATE OF COMPLIANCE	12

TABLE OF AUTHORITIES

Federal Cases

<i>In re Grand Jury Subpoenas</i> , 454 F.3d 511 (6th Cir. 2006)	6, 9, 10
<i>In re Search Warrant Issued June 13, 2019</i> , 942 F.3d 159 (4th Cir. 2019).....	5
<i>United States v. Ritchey</i> , 605 F. Supp. 3d 891 (S.D. Miss. 2022)	10
<i>United States v. Stewart</i> , No. 02 CR. 395 JGK, 2002 WL 1300059 (S.D.N.Y. June 11, 2002).....	6, 9, 10
<i>United States v. Vepuri</i> , 585 F. Supp. 3d 760 (E.D. Pa. 2021)	5, 10

State Cases

<i>People v. Superior Ct. (Laff)</i> , 23 P.3d 563 (Cal. 2001).....	5, 6, 7, 9, 11
<i>State ex rel. Merrell v. Carter</i> , 518 S.W.3d 798 (Mo. 2017)..	6, 9, 10, 11

State Statutes

Iowa Code §§ 808.3, .4, .8	7
----------------------------------	---

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. Reviewing emails seized pursuant to a search warrant for attorney-client privilege is a judicial function, and Digital Intelligence was exercising a judicial function by resolving those claims.**

Authorities

In re Grand Jury Subpoenas, 454 F.3d 511 (6th Cir. 2006)
In re Search Warrant Issued June 13, 2019, 942 F.3d 159
(4th Cir. 2019)
United States v. Ritchey, 605 F. Supp. 3d 891 (S.D. Miss. 2022)
United States v. Stewart, No. 02 CR. 395 JGK,
2002 WL 1300059 (S.D.N.Y. June 11, 2002)
United States v. Vepuri, 585 F. Supp. 3d 760 (E.D. Pa. 2021)
People v. Superior Ct. (Laff), 23 P.3d 563 (Cal. 2001)
State ex rel. Merrell v. Carter, 518 S.W.3d 798 (Mo. 2017)
Iowa Code §§ 808.3, .4, .8

ARGUMENT

I. Reviewing emails seized pursuant to a search warrant for attorney-client privilege is a judicial function, and Digital Intelligence was exercising a judicial function by resolving those claims.

As explained in the State’s opening brief, court costs are taxable only to the extent provided by statute, and no statute authorized the district court to charge the cost of a special master’s review of emails for privilege to the State. State Br. at 10–15. The defendant does not appear to contest either point. *See generally* Def. Br. Instead, the defendant argues that reviewing the emails for privilege is an investigative function and that Digital Intelligence was not engaged in a judicial function. *Id.* at 24–29, 29–38. The State takes each point in turn.

A. Determining privilege claims is a judicial—not investigative—function, including determining documents subject to a claim of privilege.

Determining claims of privilege is a judicial function. *E.g. In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 176 (4th Cir. 2019), as amended (Oct. 31, 2019); *United States v. Vepuri*, 585 F. Supp. 3d 760, 764 (E.D. Pa. 2021); *People v. Superior Ct. (Laff)*, 23 P.3d 563, 587 (Cal. 2001).

Courts extend that principle to determining what documents are subject to a claim of privilege. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 799–800 (Mo. 2017); *Laff*, 23 P.3d at 566–69, 586–89; *see In re Grand Jury Subpoenas*, 454 F.3d 511, 516–17, 524 (6th Cir. 2006) (appointing special master to segregate non-privileged documents from potentially privileged documents as first step in resolving privilege issue). That makes sense because resolving privilege claims takes two steps: (1) determining the documents to which a claim of privilege may apply, and (2) resolving the specific claims of privilege to each document identified. Deciding the documents that could be privileged and segregating them is part of resolving a privilege claim. *See Grand Jury Subpoenas*, 454 F.3d at 516–17, 524; *United States v. Stewart*, No. 02 CR. 395 JGK, 2002 WL 1300059, at *8–9 (S.D.N.Y. June 11, 2002) (appointing special master, in part, to “winnow out ... materials that are responsive to the warrant while still protecting the legitimate privileges of ... third parties”); *Carter*, 518 S.W.3d at 799; *Laff*, 23 P.3d at 586–89. It is judicial.

Moreover, when law enforcement executes a search warrant it is executing that which is approved by judicial power. Judicial officers

approve warrants. *E.g.* Iowa Code §§ 808.3, .4, .8. Materials seized by warrant are not taken by unilateral executive action; instead, they involve the exercise of judicial authority. *Laff*, 23 P.3d at 589 (“The People do not seek to burden the superior court with a responsibility that arises from the People’s unilateral actions, however. The superior court concluded that probable cause existed to believe that the attorneys have engaged in criminal activity, and the court issued a warrant” to search for and seize specified materials). Thus, seizing Merrill’s emails was done subject to an exercise of judicial authority.

The warrant here confirms that Merrill’s emails were seized subject to judicial oversight. A district judge approved the warrant and ordered the sheriff to produce the seized material to the judge. D0002, Search Warrant (SWCR012648) at 2–3; C.App.143–44. The warrant explained that the warrant judge would review the materials for privilege. *Id.* at 3; C.App.144. The warrant judge undertook such privilege review, but needed technological help. Tr. Status Hr’g, 7:19 to 10:16. The facts here, therefore, confirm that review of Merrill’s emails was an exercise of judicial authority.

As a final point, the defendant says that the State sought the warrant as part of its investigation. Def. Br. at 20, 24. True enough.

But privilege review is not part of that investigation. The State cautiously alerted the court to the potential privilege issue, and Merrill asserted privilege, requiring the review. Tr. Status Hr'g, 10:22 to 11:3, 17:17 to 19:1; D0006, Resp. Notice (SWCR012648); App.25; D0008, Order (7/28/2022, SWCR012648) at 1–3; App.33–35. Had he waived any privilege, no review would have been necessary. The privilege review is for Merrill's benefit; it is not part of the investigation.

In sum, the sheriff acted under judicial authority in seizing Merrill's emails. The warrant judge undertook a judicial function in resolving Merrill's claims of attorney-client privilege. The privilege review, therefore, was judicial.

B. Digital Intelligence was exercising judicial authority as it followed the district court's order to resolve Merrill's privilege claim.

The district court appointed Digital Intelligence to segregate Merrill's privileged emails from non-privileged emails. The defendant argues that Digital Intelligence was not a special master because it exercised no judicial function. Def. Br. at 29–38. But Digital Intelligence exercised a judicial function when it segregated privileged emails from non-privileged emails at the court's direction.

Indeed, courts have treated third parties appointed to separate privileged and non-privileged electronic communications as special masters conducting judicial functions. *Carter*, 518 S.W.3d at 798–800; *Laff*, 23 P.3d at 586–89; *Stewart*, 2002 WL 1300059, at *8–9; *see Grand Jury Subpoenas*, 454 F.3d at 516–17, 523–24 (appointing special master to segregate potentially privileged from non-privileged documents by conducting name searches as first step in resolving privilege claim). That is true when the task performed by the master is sorting communications by who participated in the communication. *Grand Jury Subpoenas*, 454 F.3d at 523–24; *Carter*, 518 S.W.3d at 799.

Just as in those cases, Digital Intelligence was exercising a judicial function by segregating Merrill’s emails subject to his attorney-client-privilege claim from those emails uncovered by the claim. The district court appointed Digital Intelligence to step in for the warrant judge when the warrant judge could not successfully segregate the protected emails. D0009, Order (8/8/2022, SWCR012648); App.39. It ordered Digital Intelligence to segregate protected emails and turn over all other emails to the State. *Id.* at 2; App.40. Digital Intelligence, therefore, functionally resolved the

privilege issue by turning over materials to the State without further judicial review. *Id.*; App.40. As the authorities recognize, that is a judicial function. *Vepuri*, 585 F. Supp. 3d at 764 (rejecting a taint team procedure because the team could turn over to prosecuting team documents it deemed non-privileged, which “arrogat[ed to the taint team] the judicial function of deciding what documents are privileged”); *United States v. Ritchey*, 605 F. Supp. 3d 891, 902 (S.D. Miss. 2022) (“[O]nce materials are produced to the prosecution team, a final privilege determination has been made.”).

To the extent a label matters, when a district court appoints a person or entity to assist the court in a particular matter, it is appointing a special master or referee. Master, *Black’s Law Dictionary* (11th ed. 2019) (“A parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings.... **special master.** (1833) A master appointed to assist the court with a particular matter or case.”). In particular, courts recognize that third parties appointed to facilitate resolution of privilege claims of documents seized by warrant are special masters. *Grand Jury Subpoenas*, 454 F.3d at 523–24; *Stewart*, 2002 WL

1300059, at *8–9; *Carter*, 518 S.W.3d at 799; *Laff*, 23 P.3d at 586–89. So too here.

As the State explained in its opening brief, no statute authorized the district court to tax the costs of a special master or other third party engaged in a judicial function to the State. State Br. at 10–15. Because Digital Intelligence was such an entity, the district court acted illegally by ordering the State to pre-pay those costs.

CONCLUSION

The State requests that this Court sustain the writ of certiorari and reverse the district court’s order requiring the State to pre-pay the cost of Digital Intelligence reviewing Merrill’s emails for privilege.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



ZACHARY MILLER
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **1,300** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: December 21, 2023



ZACHARY MILLER

Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
zachary.miller@ag.iowa.gov