

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Plaintiff,

v.

IOWA DISTRICT COURT FOR
EMMETT COUNTY,

Defendant.

Emmett County No.
FECR012349, SWCR012648

SUPREME COURT 22-1703

CERTIORARI FROM THE IOWA DISTRICT COURT
FOR EMMETT COUNTY
HONORABLE JEFFREY A. NEARY, JUDGE

DEFENDANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The district court did not act illegally. The government, the party who sought the search warrant, bears the cost of its investigation which includes a review for privileged material.

Authorities

State v. Iowa Dist. Ct., 902 N.W.2d 811, 814 (Iowa 2017)

Iowa R. App. 1.107(1)

Ary v. Iowa Dist. Ct., 735 N.W.2d 621, 624 (Iowa 2007)

Christensen v. Iowa Dist. Ct., 578 N.W.2d 675, 678
(Iowa 1998)

Amro v. Iowa Dist. Ct., 429 N.W.2d 135, 138 (Iowa 1988)

The background of law enforcement's investigation

Ordinarily, a county investigates criminal offenses and prosecutes in the name of the State of Iowa.

Iowa Code § 331.652 (2023)

Iowa Code § 331.756(1) (2023)

Iowa Code § 602.816(1)(a) (2023)

Iowa Code § 331.434(6) (2023)

Iowa Code § 331.652(3) (2023)

Iowa Code § 80.5 (2023)

Iowa Code § 331.754 (2023)

Iowa Const. art. III, § 16

Iowa Code §§ 3.12-3.14 (2023)

Iowa Code § 331.754(6) (2023)

Iowa Code § 602.11101(1)(a) (2023)

Iowa Code § 602.8106(1)(a) (2023)

Iowa Code § 815.13 (2023)

Iowa Code § 625.1 (2023)

Iowa Code § 602.8102(99) (2023)

Iowa Code § 625.8 (2023)

Iowa Code § 321J.2(13)(b) (2023)

The Attorney General undertook the prosecution of the alleged criminal offenses charged in this case.

Iowa Code § 331.754(6) (2023)

Iowa Code § 331.434(6) (2023)

Iowa Const. art. III, § 16

Iowa Code §§ 3.12-3.14 (2023)

The sheriff and the Department of Public Safety are responsible for investigation costs.

Iowa Code § 808.2(4) (2023)

Iowa Code § 808.13 (2023)

Iowa Code § 602.8106(1)(a) (2023)

Iowa Code § 602.8102(99) (2023)

Iowa Code § 625.8 (2023)

Iowa Code § 321J.2(13)(b) (2023)

A criminal defendant is not responsible for the costs associated with the government's investigation.

Iowa R. Crim. P. 2.5(6)

Digital Intelligence is not a “special-master.”

Iowa Code § 602.1508 (2023)

Iowa Code § 602.6602 (2023)

Black's Law Dictionary (11th ed. 2019) (“Special Master”)

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People v. Superior Court (Laff), 23 P.3d 563, 566-67 (Cal. 2001)

Relator Brief, State ex rel. Merrell v. Carter, No. SC95932, 2016 WL 8114714, at *7 (Mo. Dec. 12, 2016)

United States v. Vepuri, 585 F.Supp.3d 760, 764 (E.D. Penn. 2021)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa and presents a substantial question of enunciating or changing legal principles. Iowa Rs. App. P. 6.903(2)(d), 6.1101(2)(c) and 6.1101(2)(f). Specifically, this case involves the question of who must pay the cost of segregating privileged attorney-client communication from an email account seized by warrant requested by the State and granted by the court. Disputes regarding payment of expert services are increasing. *See e.g., K.C. v. Iowa District Court for Polk County*, # 23-0214 (Juvenile court's denial of a motion for adequate expert fees); *State Public Defender v. Iowa District Court for Dallas County*, # 23-0744 (State Public Defender ordered to pay one half of an expert fee for a competency determination).

STATEMENT OF THE CASE

Nature of the Case: The Supreme Court granted the State's petition for writ of certiorari to review the district court's order requiring the State to pay the fee charged by Digital Intelligence to conduct an attorney-client privilege review of Craig Merrill's emails obtained by search warrant.

Course of Proceeding and Disposition Below: After a multi-year investigation into alleged wrong-doing, Craig Merrill was charged with criminal offenses. (FECR012349 Dkt. 1, Trial Information (2/11/21); FECR012349 Dkt. 2, Minutes, p. 2)(App. pp. 4-10; Conf.App. p. 6). On October 18, 2021, approximately eight months later, the Emmett County Sheriff applied for a search warrant for Merrill's email account. (SWCR012648 Dkt. 1, Search Warrant Application¹)(Conf.App. pp. 54-141). At the time of the warrant request, the State was aware the emails likely contained privileged attorney-client

¹ Many filings regarding the dispute over the cost are filed in both SWCR012648 and FECR012349. (7/22/22 Status Tr. p 19L16-p. 20L10). Because the dispute arose in the search warrant case, references are to the SWCR012648 docket.

communication. (7/22/22 Status Tr. p.10L18-2)
(SWCR012648 Dkt. 2, Search Warrant, p. 3)(Conf.App. p.
144). The warrant authorized seizure of the information but
prohibited law enforcement from viewing the material. The
district court intended to review the material to ensure that no
attorney-client privileged material was produced to the State.
(SWCR012648 Dkt. 2, Search Warrant, pp. 2-3)(Conf.App. pp.
23-24).

On November 11, 2021, upon receipt of the seized
external hard drive containing the emails, the court ordered
Merrill's attorney to provide a statement which identified the
general date range and associated email addresses for
communications which were privileged. (SWCR012648 Dkt. 4,
Notice & Order, p. 1)(App. p. 23). Defense counsel complied by
providing the information. (SWCR012648 Dkt. 6, Response to
Notice)(App. pp. 25-26). The State asserted that the email
account was used for government work, and therefore, Merrill
had no reasonable expectation of privacy in the

communications. However, the State exercised “its discretion to not seek the production of emails” between Merrill and his attorneys. (original emphasis)(SWCR012648 Dkt. 7, Response to Statement of Privilege, p. 1)(App. p. 27).

The warrant judge encountered difficulties that made the process of review “pretty arduous” because the hard drive’s system was not compatible with the state computer system. (7/22/22 Status Tr. p. 5L2-17, p. 7L19-p, 10L10). The assigned district court judge opined there was a need for a different process to conduct the privilege review. (7/22/22 Status Tr. p. 4L9-13). Both the State and defense counsel were uncomfortable with the other side conducting the review. (7/22/22 Status Tr. p.11L8-15). The parties agreed that the seized materials should be reviewed by an independent IT third-party. The only disagreement was regarding which party was responsible for payment of the costs. The State offered to equally split the cost with the defendant. Defense counsel asserted the cost should be borne by the government because

Merrill should not have to pay for the government's search warrant. (7/22/22 Status Tr. p. 11L25-p. 12L22).

On August 8, 2022, the district court entered an order providing that a copy of the disk be delivered to Digital Intelligence, the agreed upon vendor, to perform the task of segregating the privileged emails. The unsegregated emails were to be provided to the lawyers and the segregated emails were to be provided to the district court. The court ordered the parties to file a statement addressing who should bear the costs of review. (SWCR012648 Dkt. 9, Order Re: Seized Evidence)(App. pp. 39-42).

The parties complied with the court's order and submitted statements. Merrill asserted that the State, as the party who sought the search warrant, should bear the cost. (SWCR012648 Dkt. 10, Defendant's Statement Re Costs of Seized Evidence)(App. pp. 43-44). The State asserted the Judicial Branch should bear the costs. In the alternative, the

defendant should bear the entire cost. (SWCR0126648 Dkt.11, Statement Re: Costs)(App. pp. 45-50).

The district court ordered the State to pay the costs of Digital Intelligence's privilege review of the seized material. The court reserved the issue of whether those costs may be assessed against Merrill until the conclusion of the case. (SWCR012648 Dkt.14, Order Re Payment of Costs for Third-Party Vendor Privilege Review of Computer Hard Drive)(App. pp. 51-52).

The State sought review of the order and was granted a writ of certiorari.

STATEMENT OF THE FACTS

Relevant facts of the criminal case in FECR012349 will be mentioned in the argument.

ARGUMENT

The district court did not act illegally. The government, the party who sought the search warrant, bears the cost of its investigation which includes a review for privileged material.

Preservation of Error.

Merrill does not contest error preservation.

Standard of Review.

Certiorari actions are reviewed for correction of errors at law. *State v. Iowa Dist. Ct.*, 902 N.W.2d 811, 814 (Iowa 2017). A writ of certiorari is applicable where a party claims a district court judge exceeded the judge's jurisdiction or otherwise acted illegally. Iowa R. App. 1.107(1). In the review of a certiorari action, the Court "can only examine "the jurisdiction of the district court and the legality of its actions."” *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007)(quoting *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998)). “When the court’s findings of fact are not supported by substantial evidence, or when the court has not applied the

law properly, an illegality exists.” *Id.* (citing *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 138 (Iowa 1988)).

Discussion.

The background of law enforcement’s investigation

Law enforcement conducted a multi-year investigation into alleged criminal activity by Merrill while he was an employee of the City of Armstrong. The State contended as part of this investigation, law enforcement issued subpoenas for documents, conducted interviews, and obtained search warrants which were executed. (FECR012349 Dkt. 2, Minutes, pp. 2, 6)(Conf.App. pp. 6, 10). By March 2021, DCI Agent Thompson purportedly spent at least 2,166 hours investigating the charged offenses. (FECR012349 Dkt. 20, 1st Additional Minutes, p. 3)(Conf.App. p. 41). The State anticipated Sheriff Martens would testify this was the most complex and time-consuming investigation he had ever directed over the course of his 38-year career. Martens and other investigators interviewed witnesses, issued search

warrants and subpoenas, reviewed financial and governmental records, and investigated leads. In March 2021, some leads remained under investigation. (FECR012349 Dkt. 20, 1st Add. Minutes, pp. 3-4)(Conf.App. pp. 41-42).

In April 2021, the State asserted its investigation continued. (FECR012349 Dkt. 32, 2nd Motion to Amend Trial Information, p. 3)(App. p. 13). Law enforcement obtained a search warrant for the contents of the City of Armstrong's email account. In October 2021, law enforcement executed a search warrant at Armstrong City Hall. (FECR012349 Dkt. 53, 3rd Additional Minutes, p. 4, 5, 6)(Conf.App. pp. 47-49).

In the application for the SWCR012648 search warrant, Sheriff Martens averred that Merrill's email account contained evidence of criminal activity, including but not limited to the already charged offenses. Martens contended such evidence was relevant and material in a criminal prosecution or investigation. (SWCR012648 Dkt. 1, Search Warrant Application p. 8 (Attach A))(Conf.App. p. 61). At the time of

filing the proof brief, the State has not noticed any information gleaned from the search of Merrill's email account in the criminal case.

Ordinarily, a county investigates criminal offenses and prosecutes in the name of the State of Iowa.

It is the duty of elected county officials to investigate, charge and prosecute alleged criminal conduct. Iowa Code § 331.652 (2023) (sheriff); Iowa Code § 331.756(1) (2023) (county attorney); Iowa Code § 602.816(1)(a) (2023) (county to pay criminal case filing fee). The county board of supervisors appropriates funds for each county office. Iowa Code § 331.434(6) (2023). Therefore, the cost of investigation and limited costs of prosecution of alleged criminal offenses ordinarily falls on the county.

The county sheriff may use the services of the department of public safety in the apprehension of criminals and the detection of crime. Iowa Code § 331.652(3) (2023). *See also* Iowa Code § 80.5 (2023) (DPS Duties). The county attorney may request the attorney general act as county

attorney in a criminal proceeding on behalf of the state. Iowa Code § 331.754 (2023). The Iowa General Assembly is constitutionally and statutorily authorized, subject to the governor's approval, to appropriation funds to state governmental departments. Iowa Const. art. III, § 16; Iowa Code §§ 3.12-3.14 (2023). Ordinarily, the costs of executing the duties of the attorney general and the department of public safety are borne by the state. *But see* Iowa Code § 331.754(6) (2023) (providing that a temporary or acting county attorney shall receive reasonable compensation which comes from the county attorney budget).

As of October 1, 1983, the state assumed “the responsibility for and the costs of jury fees and mileage” and “the responsibility for and the costs of prosecution witness fees and mileage and other witness fees and mileage assessed against the prosecution in criminal actions prosecuted under state law.” Iowa Code § 602.11101(1)(a) (2023). Upon conviction, if authorized by statute, some costs may be

recouped from the offender. *See e.g.*, Iowa Code § 602.8106(1)(a) (2023) (filing fee paid by county); Iowa Code § 815.13 (2023) (specific costs and fees are recoverable unless defendant found not guilty or the case is dismissed); Iowa Code § 625.1 (2023) (cost recoverable by successful party); Iowa Code § 602.8102(99) (2023) (clerk collects jury fees and court reporter fees); Iowa Code § 625.8 (2023) (jury and reporter fees); Iowa Code § 321J.2(13)(b) (2023) (restitution paid to any public agency for costs of the emergency response).

The Attorney General undertook the prosecution of the alleged criminal offenses charged in this case.

The Attorney General filed the Trial Information in FECR012349. (FECR012349 Dkt. 1, Trial Information)(App. pp 4-9). The record does not specifically disclose why or when the Attorney General became involved in the matter. The costs of prosecution are borne by the government, the county and/or the State of Iowa. Iowa Code § 331.754(6) (2023) (reasonable payment for an acting county attorney); Iowa Code §

331.434(6) (2023) (county funds for sheriff); Iowa Const. art. III, § 16; Iowa Code §§ 3.12-3.14 (2023) (state funds for Attorney General and DPS).

The sheriff and the Department of Public Safety are responsible for investigation costs.

The application and execution of the search warrant for Merrill's email account was for investigative purposes. In this Certiorari action, the State concedes the warrant was obtained during the "investigation." St. Proof Br. p. 7. This concession is supported by the record.

Sheriff Martens applied for the search warrant for Merrill's email account. (SWCR012648 Dkt. 1, Search Warrant Application pp. 2-3)(Conf.App. pp. 55-56). The abstract of testimony indicates that the magistrate considered only the Martens' affidavit and the other documents attached to the application. (SWCR012648 Dkt. 1, Search Warrant Application p. 3 (Endorsement))(Conf.App. p. 56). However, the record shows that a prosecutor also had a conversation with the magistrate regarding the warrant request. (7/22/22 Status Tr.

p. 10L22-p. 11L2, p. 17L17-p. 19L1). While the prosecution was involved in the warrant application process, the application was filed in a new case separate from the existing criminal case. (7/22/22 Status Tr. p. 19L16-p. 20L10). Search warrants are issued for investigative purposes. See Iowa Code § 808.2(4) (2023) (stating a warrant may be issued for property relevant and material as evidence in a criminal prosecution). Until the warrant is executed and a return is made, all matters connected to the warrant are confidential and remain sealed. Iowa Code § 808.13 (2023). The notice alerting Merrill of the seizure of the emails, some of which were likely privileged, was not filed until after the Return was filed on November 11, 2021. (SWCR012648 Dkt. 3, Search Warrant Execution; SWCR012648 Dkt. 4, Notice & Order)(App. pp. 22-24). Additionally, the assigned judge in FECR012349 was unaware of the search warrant and attempt to segregate privileged emails until May 2022. (7/22/22 Status Tr. p. 19L16-p. 20L2).

The orders issued in regard to the segregation of the attorney-client privileged emails correctly characterize the search warrant process as investigation. The Notice regarding the need for a privilege review directed the sheriff to provide warranted materials to the court for “en camera review before reviewing the materials for *investigation...*” (SWCR012648 Dkt. 4, Notice & Order)(emphasis added)(App. pp. 23-24). Likewise, the district court recognized the warrant was for investigative purposes. The district court stated the goal was to resolve the segregation as soon as possible so the matter could be advance, “the information examined as part of the *investigation* where allowed,” while protecting the privileged information. (SWCR012648 Dkt. 8, Ruling re search warrant as to Claim of Marital Privilege p. 2)(emphasis added)(App. p. 34). The district court’s ruling also highlights that the emails between Merrill and his wife may be examined as part of the *investigation* because spousal privilege, unlike attorney-client privilege, is only a testimonial privilege. (SWCR012648 Dkt. 8,

Ruling re search warrant as to Claim of Marital Privilege p. 4) (emphasis added)(App. p. 36).

Investigative costs are not court costs. Court costs are defined in statute. Iowa Code § 602.8106(1)(a) (2023) (filing fee paid by county); Iowa Code § 602.8102(99) (2023) (clerk collects jury fees and court reporter fees); Iowa Code § 625.8 (2023) (jury and reporter fees). Only one Iowa statute permits reimbursement of the costs of a law enforcement function by a convicted offender in the form of restitution. Iowa Code § 321J.2(13)(b) (2023) (restitution paid to any public agency for costs of the emergency response).

A criminal defendant is not responsible for the costs associated with the government's investigation.

The court lacks statutory authority to require Merrill to pay the cost of the digital segregation performed by Digital Intelligence. The privilege review is for law enforcement's benefit. The privilege review is a prerequisite in order for law enforcement to obtain and view the emails seized pursuant to the search warrant. (SWCR012648 Dkt. 2, Search Warrant, p.

3)(Conf.App. p. 143). The State did not seek to review the privileged emails. (SWCR012648 Dkt. 7, Response to Statement Re: Privilege p. 1)(App. p. 27).

This Court should reject the State's argument that if the government had issued a subpoena for the emails Merrill would have borne the cost of a privilege review and therefore, he should pay the Digital Intelligence fee. Law enforcement, with the knowledge of the prosecutor from the Attorney General's Office, chose to seek a search warrant. The prosecution did not utilize its option for a county attorney subpoena. Iowa R. Crim. P. 2.5(6) (Investigation by prosecuting attorney). The privilege review is an investigation cost; not a litigation cost that must be paid by Merrill.

The predictability of the seized communication containing privileged information was no less than that of warranted seizures of material from a law office. Prior to the application for the search warrant, Merrill retained counsel for the pending criminal case. (FECR012349 Dkt. 8, Appearance).

The government knew Merrill's emails likely would contain privileged communication. (7/22/22 Status Tr. p.10L18-2) (SWCR012648 Dkt. 2, Search Warrant, p. 3)(Conf.App. p. 144).

Digital Intelligence is not a "special-master."

Merrill disagrees the cost for the third-party privilege review are "prosecution costs." (SWCR012648 Dkt. 14, Order Re Payment of Costs for Third-Party Vendor Privilege Review of Computer Hard Drive)(App. pp. 51-52). Nevertheless, the district court was correct to reject the proposition that a criminal defendant must pay for the costs of the government's investigation of alleged wrong-doing. The State must pay for the costs of Digital Intelligence. Digital Intelligence is not a "special master."

The term "special master" is mentioned two times in the Code. Iowa Code § 602.1508 (2023) ("Referees and other persons referred to in section 602.6602 shall receive a salary or other compensation as set by the supreme court."); Iowa

Code § 602.6602 (2023) (“A person who is appointed as a referee or special master, or who otherwise is appointed by a court pursuant to law or court rule to exercise a judicial function, is subject to the supervision of the judicial officer making the appointment.”). “Special master” is not defined in the Code. Black’s Law Dictionary points to two definitions which are instructive to this case. Black’s Law Dictionary (11th ed. 2019) (“Special Master”). A “master” is defined as

A parajudicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings. • A master may take testimony, hear and rule on discovery disputes, enter temporary orders, and handle other pretrial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles, and the like — usu. with a written report to the court. Fed. R. Civ. P. 53. — Also termed (in sense 2) special master.

- **special master.** (1833) A master appointed to assist the court with a particular matter or case.

Black’s Law Dictionary (11th ed. 2019) (“Master” (2)) (bold in original). A “judicial officer” is “[a] person, usu. an attorney, who serves in an appointive capacity at the pleasure of an appointing judge, and whose actions and decisions are

reviewed by that judge. — Also termed *magistrate; referee; special master; commissioner; hearing officer.*” Black’s Law Dictionary (11th ed. 2019) (“Officer” “judicial officer” (3)).

Similarly, the Iowa Rules of Civil Procedure address the appointment of a “master” which is defined to include “referee, auditor or examiner.” Iowa R. Civ. P. 1.935. The powers of a special master appointed pursuant to Iowa Rule of Civil Procedure 1.935 demonstrate that such masters exercise limited parajudicial functions. Iowa R. Civ. P. 1.937 (stating “the master shall have and exercise power to regulate all proceedings before the master; to administer oaths and to do all acts and take all measures appropriate for the efficient performance of the master’s duties; to compel production before the master of any witness or party whom the master may examine, or of any evidence on any matters embraced in the reference, and to rule on admissibility of evidence.”).

The Iowa rules related to “special masters” are “largely based” on Federal Rule of Civil Procedure 53. Iowa R. Civ. P.

1.935 cmt. The appointment of a master involves judicial functions. Fed. R. Civ. P. 35(a). The Advisory Committee Notes related to the 1983 Amendment of Federal Rule 53 acknowledged that “the creation of full-time magistrates, who serve at government expense and have no nonjudicial duties competing for their time, eliminates the need to appoint standing masters.” The Committee noted “[a]lthough the existence of magistrates may make the appointment of outside masters unnecessary in many instances, [] such masters may prove useful when some special expertise is desired or when a magistrate is unavailable for lengthy and detailed supervision of a case.” Fed. R. Civ. P. 53, 1983 Amend. note (a).

The task of segregating privileged emails is not a judicial function. Unlike the in-camera review of confidential medical records, a reviewer (likely a computer algorithm or program) will not examine the content of the email but only the names of the sender or recipient and the email address. *Compare* Iowa Code § 622.10(4)(a)((2)(b) (2023) (stating “the court shall

conduct an in camera review of such records to determine whether exculpatory information is contained in such records.”).

The State’s offer to use a taint-team to conduct the review for privileged emails demonstrates it did not view this activity as a judicial function. The Attorney Generals’ support staff purportedly would have segregated the privileged emails without reviewing the content. (SWCR012648 Dkt. 11, Statement Re: Costs, p. 1)(App. p. 45). This is a similar process as Digital Intelligence would utilize. Digital Intelligence is not tasked with determining if the emails between Merrill and his lawyers are protected by attorney-client privilege; it is merely separating the emails from the others which are not attorney-client communication.

In *State ex rel. Merrell v. Carter* , a criminal defendant moved to disqualify the prosecutor alleging he had obtained and disclosed confidential calls made to his attorneys from the jail. The trial court determined the prosecutor had not listened

to or reviewed the phone calls. The court denied the defendant's motion to disqualify the prosecutor. The trial court then appointed a special master to review the jail calls and any subsequent jail calls. The special master carried out this task and filed a report with the court. The court then ordered the county to pay the costs of the special master. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 799 (Mo. 2017). Finding that there were no rules or statutes which authorized the assessment of costs against the county, the Missouri Supreme Court issued a permanent writ of prohibition. *Id.* at 800.

In *People v. Superior Court (Laff)*, law enforcement seized numerous documents from two attorneys suspected of criminal conduct. The attorneys (Laff) requested that the superior court conduct an in camera hearing² to determine whether any of the seized documents were privileged. The court sealed the documents and refused to proceed with the hearing unless the People agreed to pay one-half the cost of

² *Bauman & Rose* hearing. See *People v. Superior Court (Bauman & Rose)*, 44 Cal. Rptr.2d 734 (Cal. Ct. App. 1995).

the services of a special master to review the documents. *People v. Superior Court (Laff)*, 23 P.3d 563, 566-67 (Cal. 2001). The California Supreme Court concluded that the superior court had the obligation to determine the claims of privilege regarding the materials seized from attorneys whether or not they were suspected of criminal activity and the court may conduct a hearing to make such a determination. *Id.* at 567. The special master's determination of privilege was subject to review and final approval by the superior court. *Id.* at 586. The California Supreme Court determined that no statute permitted the superior court to require the parties to pay the fees of a referee or special master in a privilege review proceeding, and that the superior court also lacked the inherent authority to do so. *Id.* at 586.

State ex rel. Merrell v. Carter and *People v. Superior Court (Laff)* are distinguishable from the present case. The special master in both cases were performing a judicial function. In *State ex rel. Merrell v. Carter*, the special master was ordered to

segregate the recordings which were subject to attorney-client privilege and determine whether the calls were privileged.

Relator Brief, State ex rel. Merrell v. Carter, No. SC95932, 2016 WL 8114714, at *7 (Mo. Dec. 12, 2016) (In its brief, the prosecutor asserted the special master failed to make a finding as to whether the calls were privileged as directed). Likewise, in *People v. Superior Court (Laff)* the special master was performing a judicial function. The California Supreme Court concluded:

that the court in *Bauman & Rose* correctly held that the superior court has an obligation to consider and determine claims that materials seized pursuant to a search warrant, from attorneys suspected of criminal activity and before charges have been filed, are protected by the attorney-client privilege or work-product doctrine and thus should not be inspected by or disclosed to law enforcement authorities.

People v. Superior Court (Laff), 23 P.3d at 575.

A federal district court also made the distinction between performing a judicial function and merely the process of

segregating privileged material obtained by a search warrant.

In *United States v. Vepuri*, the federal district court found that:

The Government's proposed procedure here is fatally flawed insofar as the filter team is permitted to provide to the prosecution team all materials it deems not to be privileged without any opportunity for the defendant to mount a challenge. In this respect, the filter team, as part of the executive branch of government, would be arrogating to itself the judicial function of deciding what documents are privileged and what documents are not privileged. The authority to determine issues of privilege belongs to the courts and the courts alone.

United States v. Vepuri, 585 F.Supp.3d 760, 764 (E.D. Penn.

2021). The court modified the procedure and appointed a special master, at the government's expense, to review the remaining materials in which a dispute as to privilege still existed. *Id.* at 765.

In the present case, Digital Intelligence is not tasked with a judicial function. Digital Intelligence is not tasked with determining anything other than the email communications between Merrill and his attorneys; it is not ordered to make a legal determination related to attorney-client privilege. The

magistrate and the district court already determined that the law enforcement was not entitled to view the seized privileged communication between Merrill and his attorneys.

(SWCR012648 Dkt. 2, Search Warrant, p. 3)(Conf. App. p. 144) (SWCR012648 Dkt. 4, Notice & Order, p. 1; SWCR012648; Dkt. 9, Order Re: Seized Evidence)(App. p. 23; pp. 39-42). The court's order merely designated Digital Intelligence to perform the digital task of segregating the emails to and from Merrill's attorneys and providing the segregated emails to only the court.³ This process permits law enforcement to view only what the magistrate had authorized in the search warrant.

The expense for Digital Intelligence is not materially different than any other computer or forensic expert law enforcement may employ when additional expertise is required. Digital Intelligence is not performing a judicial

³ If a dispute regarding whether the segregated emails are privileged arises, the district court will fulfill its judicial duty and determine the legal question.

function. The cost of the digital segregation of the privileged emails is properly assessed to the state or the county as it is a law enforcement investigation expense.

CONCLUSION

Craig Merrill respectfully requests this Court affirm the district court's order requiring the government to pay the cost of Digital Intelligence. The writ should be annulled.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

Counsel hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$2.36, and that amount has been paid in full by the Office of the Appellate Defender.

Martha J. Lucey
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