STATE OF CONNECTICUT *v.* PATRICK J. LENARZ
(SC 18561)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js.*

Argued October 28, 2010—officially released July 19, 2011

Kevin C. Ferry, with whom, on the brief, were *Monique S. Foley* and *Peter G. Billings*, for the appellant (defendant).

Leon F. Dalbec, Jr., senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Christopher Parakilas*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ROGERS, C. J. The central issue in this case is whether a prosecutor's intrusion into communications between a defendant and his attorney that are subject to the attorney-client privilege requires the dismissal of the criminal charges against the defendant. The defendant, Patrick J. Lenarz, was charged in three informations, each of which charged the defendant with risk of injury to a child in violation of General Statutes § 53-21 (a) (1) and (2), and sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A). Before trial, the prosecutor came into possession of and read certain written materials belonging to the defendant that were subject to the attorney-client privilege. Upon learning this fact, the defendant filed a motion to dismiss the charges against him, which the trial court denied. After a trial, the jury returned a verdict of guilty on one count of risk of injury to a child in violation of § 53-21 (a) (1). The jury found the defendant not guilty of all of the remaining charges, and the trial court rendered judgments in accordance with the verdict. The defendant then appealed,[1] claiming that the trial court improperly denied his motion to dismiss.[2] We conclude that, because the case is irreversibly tainted by the prosecutor's intrusion into the privileged communications, the only available appropriate remedy is dismissal of the charge of which he was convicted. Accordingly, we reverse the judgment of conviction.

The record reveals the following relevant facts and procedural history.[3] The defendant was charged in two informations, each alleging two counts of risk of injury to a child and one count of sexual assault in the fourth degree, in connection with the defendant's alleged conduct toward two children at a karate school in the town of Granby, where the defendant was an instructor (respectively, Docket Nos. H12MCR-03-128673 and H12MCR-03-129740; collectively, Granby cases). Thereafter, the defendant was charged in a third information with two counts of risk of injury to a child and one count of sexual assault in the fourth degree in connection with an incident involving a child at the defendant's residence in Simsbury (Simsbury case). Ultimately, all three cases were consolidated for trial.

As part of its investigation into the incident that formed the basis for the charges in the Simsbury case, the Simsbury police department obtained a search warrant for the defendant's residence. During the search, which took place on November 17, 2004, the police seized a computer, which they sent to the Connecticut Forensic Science Laboratory (state laboratory) to be forensically searched. The next day, at the defendant's arraignment, defense counsel advised the trial court, *Scheinblum*, *J.*, that certain materials in the computer were subject to the attorney-client privilege and asked the court to fashion orders to protect the defendant's

rights. The court ordered that "any communications from [defense counsel] to [the defendant] or from [the defendant] to [defense counsel] remain unpublished [and] unread." The court entered a similar order with respect to communications to and from the defendant's private investigator.

During its examination of the defendant's computer, the state laboratory discovered voluminous written materials containing detailed discussions of the defendant's trial strategy in the Granby cases. The state laboratory read and copied much of this material and transmitted it to the Simsbury police department along with its report. In turn, the Simsbury police department forwarded the materials and the report to the prosecutor. At a meeting between the prosecutor and defense counsel some time in September, 2005, the prosecutor provided defense counsel with a copy of the materials that he had received from the Simsbury police department. Defense counsel immediately requested a meeting with Judge Scheinblum in chambers, at which he advised the judge that the prosecutor had read materials that were subject to the attorney-client privilege. The trial court then ordered the police departments in Simsbury and Granby and the prosecutor to turn over any "questionable material" in their possession to the court and ordered that the material be placed under seal. Although it is unclear from the record how long the prosecutor had been in possession of the privileged communications before the September, 2005 meeting, defense counsel represented at a hearing on a motion to suppress the materials seized under the search warrant that the prosecutor had had the materials for six weeks, and the prosecutor did not dispute this claim.[4]

The defendant then filed a motion to dismiss the informations in the Granby cases[5] on the ground that the state had intentionally invaded the attorney-client privilege, thereby depriving the defendant of his right to counsel under the sixth amendment to the United States constitution.[6] The defendant argued that the intrusion had resulted in substantial prejudice to him because the privileged communications contained detailed trial strategy. The state admitted that the prosecutor had read all of the materials and did not dispute that the documents contained trial strategy, but claimed that, because the prosecutor had not conducted any additional investigation and had not interviewed any additional witnesses as a result of reading the materials, the defendant had suffered no prejudice. In addition, the state claimed that the prosecutor had not wilfully violated the attorney-client privilege, but had obtained the privileged materials in good faith. Accordingly, the state argued that the appropriate remedy for its allegedly unintentional invasion of the attorney-client privilege was the suppression of the privileged communications.

The trial court, *Olear*, *J.*, issued a memorandum of decision on the defendant's motion to dismiss in which it concluded that, because the privileged communications had not been in the form of letters or e-mails between the defendant and his attorney, the state laboratory and the prosecutor had not intentionally violated Judge Scheinblum's order prohibiting the state from publishing or reading any privileged communications. Nevertheless, because the defendant had testified at an ex parte hearing before the trial court that he had in fact delivered the materials to his attorney and had submitted an affidavit to that effect under seal, the trial court concluded that the materials were subject to the attorney-client privilege. Accordingly, the trial court ordered a hearing to determine whether the defendant had been prejudiced by the state's unintentional invasion of the attorney-client privilege and, if so, what was the appropriate remedy.

After an evidentiary hearing, the trial court denied the defendant's motion to dismiss. The court concluded that, because the Simsbury police department had not shared the privileged information with the Granby police department, the defendant had suffered no prejudice in the Granby cases. To ensure a fair trial, however, the trial court ordered that the Simsbury case be tried separately from the Granby cases. The defendant responded that he continued to believe that dismissal was the only appropriate remedy, and that, to avoid further delay in the proceedings, he wanted all of the cases to be tried together. The trial court granted the request to try the cases together.

After a trial, the jury returned a verdict of not guilty on all charges except risk of injury to a child in violation of § 53-21 (a) (1) in Docket No. H12MCR-03-128673, and the trial court rendered judgments in accordance with the verdict. The defendant appealed to the Appellate Court from the judgment of conviction. He then filed a motion for articulation of the trial court's reasons for denying his motion to dismiss, which the trial court granted. In its articulation, the court reiterated that, because none of the privileged documents was "in the form of a 'communication' from the defendant to counsel, but rather [contained] the narrative thoughts, musings and opinions of a layman," on their face, they did not appear to be privileged. Nevertheless, because the defendant had testified that he had communicated the documents to his attorney, the court concluded that the documents were covered by the attorney-client privilege. The court also reiterated that, because the privileged documents had not been given to the Granby police department, the defendant had not been prejudiced in the Granby cases and dismissal of the charges in those cases would have been inappropriate.

Thereafter, the trial court denied the defendant's motion for further articulation. The Appellate Court

then granted the defendant's motion for review of the denial of his motion and ordered the trial court to render a further articulation on the following two questions: (1) "Whether, in denying the defendant's motion to dismiss, the court considered his argument that the [prosecutor] received and reviewed the documents covered by the attorney-client privilege"; and (2) "What prejudice, if any, it found that the defendant suffered as a result of the [prosecutor's] access to those documents." In its further articulation, the trial court stated that "[t]he defendant failed to introduce sufficient credible evidence for the court to make factual findings as to the timing, nature and extent of the receipt, review and possible dissemination by the [prosecutor] of the documents covered by the attorney-client privilege." The trial court further stated that it had denied the defendant's motion to dismiss because he had not presented any evidence to support a showing of prejudice.

The defendant claims on appeal that the trial court improperly denied his motion to dismiss. Specifically, he claims that the trial court's finding that the state had not intentionally invaded the attorney-client privilege when it read the materials taken from his computer was clearly erroneous and that the intentional invasion constituted a per se violation of the sixth amendment right to counsel for which dismissal is the sole appropriate remedy. In addition, the defendant claims that he was irreparably prejudiced by the prosecutor's invasion of the privileged material because it contained trial strategy.[7] The state counters that, because the trial court properly found that the invasion of the privileged documents was unintentional, and because the defendant failed to establish that he was prejudiced by the disclosure, the trial court properly denied the motion to dismiss. The state further contends that, even if the defendant was prejudiced, the appropriate remedy would have been for the trial court to order a prosecutor who had not read the privileged documents to try the case, and the defendant had waived this remedy.

For the reasons that follow, we conclude generally that prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney-client privilege was intentional. We further conclude that the state may rebut that presumption by clear and convincing evidence. Finally, we conclude that, when a prosecutor has intruded into privileged communications containing a defendant's trial strategy and the state has failed to rebut the presumption of prejudice, the court, sua sponte, must immediately provide appropriate relief to prevent prejudice to the defendant.

In the present case we conclude that, because the privileged materials at issue contained the defendant's trial strategy and were disclosed to the prosecutor, the

defendant was presumptively prejudiced by the prosecutor's intrusion into the privileged documents. We further conclude that, because, after reviewing the privileged materials, the prosecutor tried the case to conclusion, the taint caused by the state's intrusion into the privileged communications would be irremediable on retrial and the charge of which the defendant was convicted must be dismissed.

We begin our analysis with a review of the law governing governmental interference with the attorney-client privilege. "Connecticut has a long-standing, strong public policy of protecting attorney-client communications. . . . This privilege was designed, in large part, to encourage full disclosure by a client to his or her attorney so as to facilitate effective legal representation." (Citation omitted; internal quotation marks omitted.) *Gould, Larson, Bennet, Wells & McDonnell, P.C.* v. *Panico*, 273 Conn. 315, 321–22, 869 A.2d 653 (2005); see also *Hutchinson* v. *Farm Family Casualty Ins. Co.*, 273 Conn. 33, 38, 867 A.2d 1 (2005) ("the attorney-client privilege was created to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and administration of justice" [internal quotation marks omitted]).

Several courts have held that the government's intrusion into privileged attorney-client communications constitutes an interference with the defendant's right to assistance of counsel in violation of the sixth amendment only when the intrusion has prejudiced the defendant. See *United States* v. *Costanzo*, 740 F.2d 251, 257 (3d Cir. 1984) (sixth amendment violation follows from finding of prejudice), cert. denied, 472 U.S. 1017, 105 S. Ct. 3477, 87 L. Ed. 2d 613 (1985); *United States* v. *Steele*, 727 F.2d 580, 585–86 (6th Cir.) (when government has intruded into attorney-client relationship, prejudice must be shown before constitutional violation can be found), cert. denied sub nom. *Scarborough* v. *United States*, 467 U.S. 1209, 104 S. Ct. 2396, 81 L. Ed. 2d 353 (1984); *Briggs* v. *Goodwin*, 698 F.2d 486, 495 (government intrusion into privileged information violates sixth amendment when "record suggests a realistic possibility that appellants suffered injury"), vacated on other grounds, 712 F.2d 1444 (D.C. Cir. 1983); see also *Weatherford* v. *Bursey*, 429 U.S. 545, 558, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) (when government intrusion into privileged communications was not purposeful and did not result in tainted evidence or communication of defense strategy to prosecution, sixth amendment was not violated); cf. *United States* v. *Morrison*, 449 U.S. 361, 364, 367, 101 S. Ct. 665, 66 L. Ed. 2d 564 (assuming without deciding that government investigators violated sixth amendment when they met with defendant without knowledge or permission of her attorney, even without showing of prejudice, but concluding that remedy of dismissal was improper when assumed violation had

no adverse impact on criminal proceedings), reh. denied, 450 U.S. 960, 101 S. Ct. 1420, 67 L. Ed. 2d 385 (1981).

A number of courts have held that, when the privileged communication contains details of the defendant's trial strategy, the defendant is not required to prove he was prejudiced by the governmental intrusion, but prejudice may be presumed.[8] In *Briggs* v. *Goodwin*, supra, 698 F.2d 494–95, for example, the court stated that "[t]he prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is inherently detrimental . . . unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice. Further, once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution. Such a presumption merely reflects the normal high level of formal and informal cooperation which exists between the two arms of the executive."[9] (Internal quotation marks omitted.)

Similarly, in *United States* v. *Levy*, 577 F.2d 200, 208 (3d Cir. 1978), the court held that, when the defendant's trial strategy has been disclosed to the government, "there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is." In support of this conclusion, the court reasoned that "it is highly unlikely that a court can . . . arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of trial itself."[10] Id.

Although the dissent disagrees with our reading of *Levy*, it has not cited a single case in which the government unintentionally obtained privileged information relating to trial strategy, the prosecutor had knowledge of the privileged information, and the court held that, under *Levy*, prejudice could not be presumed because the intrusion was not intentional.[11] Indeed, if, as the dissent claims, the intent of the government is the dispositive issue in determining whether prejudice may be presumed when the government has intruded into privileged information relating to trial strategy, we are at a loss to understand why the court in *Levy* discussed

the *nature* of the privileged information that had been intruded upon in that case at such length. See id., 209 ("The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of a defendant's disclosure to counsel must be insulated from the government. 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. In the instant case confidential information was disclosed to the government authorities."). If prejudice may be presumed when the government has intentionally intruded into privileged information containing trial strategy because "advice received as a result of a defendant's disclosure to counsel must be insulated from the government"; id.; and "it is highly unlikely that a court can . . . arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government"; id., 208; prejudice may be presumed *for the same reason* when the intrusion was unintentional. Nowhere does the court in *Levy* suggest that the intent of the government somehow has a bearing on the prejudicial effect of such disclosures, and we cannot imagine how it might.[12]

Finally, a number of courts have held that the defendant is not required to prove that he was prejudiced by the government's intrusion into attorney-client communications when the intrusion was deliberate and was unjustified by any legitimate governmental interest in effective law enforcement. See *Shillinger* v. *Haworth*, 70 F.3d 1132, 1141–42 (10th Cir. 1995); *Morrow* v. *Superior Court*, 30 Cal. App. 4th 1252, 1258, 36 Cal. Rptr. 2d 210 (1994) (when prosecutor intentionally orchestrated eavesdropping on conversation between defendant and attorney, burden fell on state to prove that punitive dismissal was not warranted because defendant had not been prejudiced). The court in *Shillinger* reasoned that "no other standard can adequately deter this sort of misconduct." *Shillinger* v. *Haworth*, supra, 1142.

We agree with the courts that have held that the burden is not on the defendant to establish that he was prejudiced when the prosecutor has intruded on attorney-client communications that contain information concerning the defendant's trial strategy.[13] Rather, because the disclosure of such information is *inherently prejudicial*, prejudice should be presumed, regardless of whether the invasion into the attorney-client privilege was intentional. The subjective intent of the government and the identity of the party responsible for the disclosure simply have no bearing on that question.[14]

We further conclude that the presumption of prejudice when trial strategy has been disclosed to the prosecutor may be rebuttable. For example, the state may be able to show that no person with knowledge of the privileged communications had any involvement in the investigation or prosecution of the case, the privileged communications contained only minimal information or that the state had access to all of the privileged information from other sources. In light of the important constitutional right at issue, however, we conclude that the state must rebut the presumption of prejudice by clear and convincing evidence. Cf. *In re Jeisean M.*, 270 Conn. 382, 394, 852 A.2d 643 (2004) ("protected fundamental right of a parent to make child rearing decisions mandates that where a third party seeks visitation, that third party must allege and prove, by clear and convincing evidence, a relationship with the child that is similar in nature to a parent-child relationship, and that denial of the visitation would cause real and significant harm" [internal quotation marks omitted]); *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 796, 700 A.2d 1108 (1997) ("[c]onsistent with the heavy burden that [the clear and convincing] standard of proof imposes, courts and legislatures have employed it in constitutional . . . contexts involving extremely significant questions of fact"); *State* v. *Jarzbek*, 204 Conn. 683, 704–705, 529 A.2d 1245 (1987) (in light of defendant's constitutional right to confrontation of witnesses, state must prove compelling need to exclude defendant from witness room during videotaping of child's testimony by clear and convincing evidence), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); cf. *Morrow* v. *Superior Court*, supra, 30 Cal. App. 4th 1258 (when state has eavesdropped on privileged communications, burden falls on state to prove that sanctions are not warranted because there was no substantial threat of demonstrable prejudice).

In the present case, even a cursory review of the materials reveals that the defendant was presumptively prejudiced by the prosecutor's intrusion into the privileged communications taken from the defendant's computer because the privileged materials contained a

highly specific and detailed trial strategy. Moreover, because the state's case in Docket No. H12MCR-03-128673 was based entirely on the complainant's account of the defendant's conduct,[15] and because the privileged communications contained highly specific facts relating to the credibility of the complainant and the adequacy of the police investigation in that case, the communications went to the heart of the defense.[16] Finally, the communications contained statements by the defendant of how best to defend the case, as opposed to general trial strategy being conveyed by an attorney to the client. Accordingly, we conclude that, contrary to the trial court's finding, it may be presumed that the prosecutor's intrusion into the communications was highly prejudicial.[17]

In light of this conclusion, we need not address the defendant's claims that the trial court's finding that the prosecutor's intrusion into the privileged materials had not been intentional was clearly erroneous, and that a showing of prejudice is not required when the intrusion was intentional. We must state, however, that we are extremely troubled by the prosecutor's conduct in this case. Although the privileged documents were not in the form of letters or e-mails, it could not have been more obvious on the face of a number of the documents that they were intended to be communications to the defendant's attorney.[18] For example, one of the documents stated near the top of the first page that "[t]he following material is confidential and I would ask that you review it. If this is a case you believe you would have success in defending, I would like to schedule [an] appointment to discuss it." Another document was entitled "Strategy Issues" and stated in the first sentence: "I think that in the short term, especially for the court appearance on June 8, 2004, that our objective should be threefold . . . ." The first two sentences of another document provided: "We were asked by our original attorney . . . to keep a log of any events that we thought might pertain to this case. This document is the result . . . ." Moreover, the prosecutor expressly had been put on notice that there were materials in the defendant's computer that were subject to the attorney-client privilege and had been ordered not to read them. It is clear to us, therefore, that the prosecutor either knew or should have known immediately upon beginning to read these statements that the documents were privileged and that he should have stopped reading at once and notified the defendant and the court immediately that they were in his possession.

Having concluded that the defendant was prejudiced by the prosecutor's intrusion into the privileged communications, we turn to the defendant's claim that the trial court abused its discretion when it denied his motion to dismiss. The United States Supreme Court has held that "[c]ases involving [s]ixth [a]mendment deprivations are subject to the general rule that remedies

should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, supra, 449 U.S. 364. "Our approach has . . . been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial." Id., 365. "More particularly, *absent demonstrable prejudice, or substantial threat thereof*, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." (Emphasis added.) Id.

Thus, when a defendant has been prejudiced by governmental intrusions into privileged communications, the remedy must be tailored to cure the prejudice. It follows that, although dismissal of criminal charges is a drastic remedy; *State* v. *Bergin*, 214 Conn. 657, 672, 574 A.2d 164 (1990); and although the decision to grant or deny a motion to dismiss a criminal charge "rests within the sound discretion of the trial court, and is one that we will not disturb on appeal absent a clear abuse of that discretion"; *State* v. *Kelly*, 256 Conn. 23, 77, 770 A.2d 908 (2001); the remedy of dismissal is required when there is no other way to cure substantial prejudice to the defendant.

Moreover, having concluded that, as a matter of law, the burden is on the state to rebut the presumption of prejudice by clear and convincing evidence, we similarly conclude that, if the state has not met its burden of showing the absence of prejudice, the burden is on the state to prove by clear and convincing evidence that any prejudice to the defendant can be cured by a less drastic remedy than dismissal, such as the appointment of a new prosecutor who has not been exposed to the privileged materials. In addition, when the trial court learns that a government official has obtained knowledge of the defendant's trial strategy, it is incumbent on the court, sua sponte, to require the state to prove by clear and convincing evidence that prejudice to the defendant could be prevented by the proposed remedy and, if the state meets its burden, to order that relief, even in the absence of a request by the defendant. Cf. *State* v. *Gaines*, 257 Conn. 695, 708, 778 A.2d 919 (2001) (when evidence of conflict of interest is sufficient to alert reasonable trial court that defendant's sixth amendment right to effective assistance of counsel is in jeopardy, trial court has duty to inquire into conflict sua sponte).

In the present case, the trial court improperly found that the defendant had not been prejudiced by the prosecutor's intrusion into the privileged communications. Accordingly, it placed no burden on either party to devise an appropriate remedy.[19] Thus, if the trial court and the state had been on notice of the standards for addressing claims involving governmental intrusions into privileged communications that we adopt in this opinion, we would conclude that the trial court abused its discretion in denying the defendant's motion to dismiss. Because we are applying this standard for the first time, however, we recognize that it ordinarily would be appropriate to remand the case to the trial court for a new hearing on the motion to dismiss under the proper standard.

Under the circumstances of the present case, however, we conclude that a remand is not appropriate. Even if we were to assume that the state could have proved before trial that a less drastic remedy than dismissal would have been an adequate remedy,[20] now that the case has been tried by the prosecutor who read the privileged communications, it clearly would be impossible to eliminate the potential for prejudice to the defendant with any other sanction. The prosecutor had had knowledge of the defendant's trial strategy during the one and one-half years preceding trial and, therefore, could use the information in preparing for trial. Indeed, the record strongly suggests that the prosecutor may have revealed the defendant's trial strategy to witnesses and investigators.[21] In addition, consciously or unconsciously, the prosecutor's knowledge of the defendant's trial strategy may have affected his selection and examination of witnesses during trial, which is now a matter of public record. Again, the record strongly suggests that the prosecutor drew on his knowledge of the privileged communications when examining the accusing witness in Docket No. H12MCR-03-128673 to anticipate and thereby neutralize what otherwise might have been a devastating cross-examination of that witness.[22] Even if he did not draw on this knowledge, however, we agree with the court in *Briggs* v. *Goodwin*, supra, 698 F.2d 494–95, that "[m]ere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant." Moreover, the testimony of tainted witnesses at the first trial could be admissible in a second trial as prior inconsistent statements. See *State* v. *Winot*, 294 Conn. 753, 778, 988 A.2d 188 (2010). Finally, as we have indicated, the information in the privileged communications went to the heart of the defense in that case. Accordingly, even if the case were to be retried by a prosecutor who has not read the privileged communications, it would be impossible for the courts or the defendant to have any confidence that a second trial with a new prosecutor would be untainted by the constitutional violation in

the first trial, particularly because the new prosecutor would necessarily have access to the transcript of the original trial. See *United States* v. *Levy*, supra, 577 F.2d 208 (after case has been tried to completion, "a trial court applying an actual prejudice test would face the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way"); id., 210 ("As a result of the district court's decision that no sixth amendment violation occurred, the same strike force group which originally handled the case was allowed to proceed with the trial. The disclosed information is now in the public domain. Any effort to cure the violation by some elaborate scheme, such as by bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected. Even if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses. More important, 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. At least in this case, where the trial has already taken place, we conclude that dismissal of the indictment is the only appropriate remedy.").[23]

Finally, we address the state's claim that the appointment of a new prosecutor would have been an adequate remedy before trial and, because the defendant insisted that dismissal was the only remedy that would prevent prejudice to him, the defendant is now precluded from claiming that he was harmed by the court's failure to impose that remedy. We disagree. The following undisputed facts and procedural history are relevant to our resolution of this claim. The defendant argued to the trial court in his memorandum in support of his motion to dismiss that the appointment of a new prosecutor would not prevent prejudice to him because the privileged communications contained his trial strategy and had been in the possession of the prosecutor for a lengthy period of time.[24] He expressly disavowed any claim that the privileged communications contained anything of inculpatory, as opposed to strategic, value to the state. Accordingly, he argued, suppression of the documents also would not be an appropriate remedy. The state argued in its opposing memorandum that the appointment of a new prosecutor was not necessary because the prosecutor had not wilfully intruded into the privileged communications. At the conclusion of the hearing on the motion to dismiss, the trial court found that the defendant had not been prejudiced, but offered to sever the Granby cases in the apparent belief that any *potential* prejudice to the defendant arose exclusively from the possibility that the communica-

tions contained inculpatory evidence in the Granby cases, or information that could lead to the discovery of inculpatory evidence, and that the Simsbury police department had shared the information in the privileged communications with the Granby police department. The defendant emphatically rejected this proposal, presumably in the belief that the remedy would do nothing to prevent the prejudice to him resulting from the prosecutor's knowledge of his trial strategy in the Granby cases—an assessment with which we agree. Neither the state nor the trial court suggested at that time that the appointment of a new prosecutor would be an appropriate remedy.

We have concluded that, when the trial court becomes aware of a potential sixth amendment violation resulting from an intrusion into privileged communications, it is incumbent on the court, sua sponte, to devise a remedy adequate to cure any prejudice to the defendant. We also have concluded that it was apparent on the face of the privileged communications at issue in the present case that the defendant would be prejudiced by the prosecutor's knowledge of their contents. Accordingly, we conclude that it was incumbent on the trial court to devise an adequate remedy for the sixth amendment violation, even in the absence of any request by the defendant. The fact that the defendant believed that no remedy short of dismissal would be adequate and, accordingly, did not affirmatively seek a lesser remedy did not relieve the trial court of this obligation.[25] In any event, as we have indicated, it is unlikely that the appointment of a new prosecutor would have been an adequate remedy even before trial. See footnote 20 of this opinion. We therefore conclude that the defendant's failure to request that remedy from the trial court does not preclude him from seeking dismissal of the criminal charge of which he was convicted on appeal.

This is a case in which the prosecutor clearly invaded privileged communications that contained a detailed, explicit road map of the defendant's trial strategy. Compounding the problem, the prosecutor not only failed to inform the defendant and the trial court of the invasion immediately, but also continued to handle the case, to meet repeatedly with witnesses and investigators and ultimately to try the case to conclusion more than one year after the invasion occurred. Under these circumstances, any remedy other than the dismissal of the criminal charge of which the defendant was convicted would constitute a miscarriage of justice. Accordingly, we conclude that the charge of risk of injury to a child in violation of § 53-21 (a) (1) in Docket No. H12MCR-03-128673 must be dismissed.[26]

The judgment is reversed only with respect to the defendant's conviction of risk of injury to a child and the case is remanded to the trial court with direction

to grant the defendant's motion to dismiss that charge and to render judgment thereon; the judgments are affirmed in all other respects.

In this opinion NORCOTT, EVELEIGH and VERTEFEUILLE, Js., concurred.

* This appeal was originally argued before a panel of this court consisting of Chief Justice Rogers, and Justices Norcott, Katz, Palmer, Eveleigh and Vertefeuille. Thereafter, Justice Katz resigned from this court and did not participate in the consideration or decision of the case, and Justice Zarella was added to the panel. Justice Zarella has read the record and briefs, listened to a recording of the oral argument and participated in the resolution of this case.

[1] The defendant appealed from the judgment of conviction to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] The defendant also claimed that the trial court improperly excluded testimony by his expert witness concerning the proper protocol for interviewing children who make claims of sexual abuse and the dangers posed by improper interview techniques. Because we reverse the judgment of conviction on other grounds, we need not address this claim.

[3] Because the details of the underlying offenses are not relevant to the claim raised in this appeal, and in light of the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to give a detailed description of those offenses. In addition, we decline to identify the complainants or others through whom their identities may be identified. See General Statutes § 54-86e.

[4] In its memorandum of law in support of its opposition to the defendant's motion to dismiss, the state represented that, after the Simsbury police department gave the seized materials to the state, "[t]he prosecution did review the materials in total. The prosecution provided a copy of all materials to defense counsel on the next scheduled court date." Accordingly, although the record does not reveal the precise dates on which the prosecutor received and read the privileged documents, contrary to the dissent's argument, it is clear that the prosecutor did not read the materials for the first time on the date that he provided copies of them to the defendant.

[5] We presume that the defendant limited his motion to dismiss to the Granby cases because the privileged communications related primarily to the defendant's trial strategy in one of those cases. Because the defendant had been arrested in the Simsbury case on the day after the search, his computer contained no privileged communications relating to that case.

[6] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[7] The defendant claimed in his brief to this court that "[i]n a case, [such] as . . . this one, where the state relied heavily if not entirely on the credibility of the witnesses, the type of material the [prosecutor] read and reviewed would be invaluable. . . . [I]t is simply impossible to determine exactly how this material may have influenced the [prosecutor] in his preparation for trial and specifically how that may have impacted the credibility of the witnesses at trial. To completely disregard such concerns is a complete failure to address the principles that are embodied by the sixth amendment." In addition, the defendant argued to the trial court in his memorandum in support of his motion to dismiss that "[t]he investigating officers had access to the strategy of the defendant and the [prosecutor] admittedly read all of it. The state's promise that it won't act on anything it learned or use it to its advantage is . . . impossible to live up to or monitor and does not remove the taint of what was done. The length of time the material was in the possession of the [prosecutor] . . . in violation of a court order, simply makes this a case of extreme prejudice and harm to [the] defendant. . . . Removal of the [prosecutor] would not cure the harm done . . . ." He further argued that the documents "were detailed, identified key persons with knowledge, involved trial strategy, important details of fact, questions for witnesses, and rebuttals to allegations."

[8] In cases in which the communications do not contain the defendant's trial strategy, the burden is on the defendant to establish a sixth amendment violation by showing that he was prejudiced by the government's intrusion into the communications. See *United States* v. *Steele*, supra, 727 F.2d 586–87 (defendants failed to show sixth amendment violation when they failed to show that government had obtained access to defense strategy or had

obtained tainted evidence); see also *United States* v. *Davis*, 226 F.3d 346, 353 (5th Cir. 2000) (defendant failed to establish that he was prejudiced by government's seizure of privileged documents when documents were not offered as evidence at trial and there was no evidence that they revealed defendant's trial strategy), cert. denied, 531 U.S. 1181, 121 S. Ct. 1161, 148 L. Ed. 2d 1021 (2001); *United States* v. *Irwin*, 612 F.2d 1182, 1189 (9th Cir. 1980) (defendant failed to establish that he was prejudiced by interference in attorney-client relationship when evidence showed that attorney provided vigorous defense); cf. *United States* v. *Morrison*, supra, 449 U.S. 365–66 (no relief available without showing that interference in attorney-client relationship prejudiced defendant); but see *State* v. *Cory*, 62 Wn. 2d 371, 376, 382 P.2d 1019 (1963) (defendant can establish violation of sixth amendment without showing that he was prejudiced by government's intrusion into privileged communications). It is undisputed in the present case that the privileged communications contained trial strategy.

[9] In his dissenting opinion, Justice Palmer argues that *Briggs* v. *Goodwin*, supra, 698 F.2d 486, provides no guidance in the present case because, in *Briggs*, the invasion of the attorney-client privilege was intentional. This fact, however, is unrelated to the court's conclusion in *Briggs* that prejudice may be presumed when the government has knowledge of the defendant's trial strategy because "[it] would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into" the prosecutor's decisions before and during trial. Id., 494.

[10] In his dissenting opinion, Justice Palmer argues that our reliance on *United States* v. *Levy*, supra, 577 F.2d 208, is misplaced because that court concluded only that prejudice may be presumed "[w]here there is a knowing invasion of the attorney-client privilege *and* where confidential information is disclosed to the government." (Emphasis added.) The court in *Levy* later clarified this statement, however, and held that "a sixth amendment violation would be found where, as here, defense strategy was actually disclosed *or* where, as here, the government enforcement officials sought such confidential information." (Emphasis added.) Id., 210. The court's conclusion that dismissal was required was premised on its conclusion that "in this case an actual disclosure of defense strategy occurred," not on its finding that the invasion had been intentional. Id. Accordingly, it is clear to us that the court would have presumed prejudice even in the absence of an intentional invasion.

This reading of *Levy* is supported by *United States* v. *Costanzo*, supra, 740 F.2d 251. In *Costanzo*, which, like *Levy*, was decided by the United States Court of Appeals for the Third Circuit, the court held that, under *Weatherford* v. *Bursey*, supra, 429 U.S. 545, the sixth amendment is violated "when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; *or* (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant." (Emphasis added.) *United States* v. *Costanzo*, supra, 254. The court affirmed the District Court's finding that the government had not intentionally invaded the attorney-client privilege and, therefore, concluded that only the second and third prongs of this test applied. Id., 255. The court ultimately concluded that, because none of the disclosures at issue in that case had involved trial strategy, the "*Levy* rule," that "prejudice, and thus a violation of the sixth amendment, will be presumed to occur when confidential defense strategy is disclosed to the government," did not apply. Id., 257; see also *United States* v. *Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984) ("The Third Circuit and the District of Columbia Circuit have held that disclosure of defense information by itself creates a sufficient showing of prejudice. See *Briggs* v. *Goodwin*, [supra, 698 F.2d 494–95]; *United States* v. *Levy*, [supra, 577 F.2d 200]. The focus in these cases is on the proof of transmission of any information of even the slightest potential strategic value."); *United States* v. *Mastroianni*, supra, 908 n.3 ("the Third Circuit in *Levy* expressly ruled that disclosure of attorney-client confidences conclusively established prejudice"); *United States* v. *Mastroianni*, supra, 907–908 (after defendant proves that confidential communications were conveyed to government as result of presence of government informant at defense meeting, burden shifts to government to show that there has been and will be no prejudice to defendant); *Bishop* v. *Rose*, 701 F.2d 1150, 1156 (6th Cir. 1983) ("The Third Circuit holds that if privileged information obtained by the government's interference with the attorney-client relationship is actually communicated

to prosecution authorities there has been a [s]ixth [a]mendment violation. There is no need to establish the exact degree of prejudice actually suffered. *United States* v. *Levy*, [supra, 209] . . . ."); cf. *United States* v. *Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003) (when defendant establishes that government informant acted affirmatively to intrude into attorney-client relationship and to obtain privileged information, burden shifts to government to show that there has been no prejudice).

The dissenting justice in the present case argues that *Costanzo* lends no support to our analysis. He apparently believes that *Costanzo* is distinguishable because, in that case, the information had been disclosed by an informer while, in the present case, "the prosecutor came into possession of the documents at issue as a result of the proper execution of a duly authorized search warrant . . . ." The dissent further claims that there is no evidence in the present case that the prosecutor "used" the privileged information. The court in *Costanzo* expressly found, however, that the intrusion into the privileged information had not been intentional. *United States* v. *Costanzo*, supra, 740 F.2d 255. We are unable to discern the distinction between privileged information that is unintentionally obtained from a government informer—the employment of which is entirely lawful—and privileged information that is unintentionally obtained pursuant to the execution of a government issued search warrant, especially when the state is on notice that the materials to be seized contain privileged information. If the execution of a search warrant does not constitute affirmative government action, we are hard pressed to know what would. See *United States* v. *Danielson*, supra, 325 F.3d 1071. Moreover, the very reason for the presumption of prejudice recognized in *Levy*, *Briggs* and *Costanzo* is that, when the prosecutor who is prosecuting the case has knowledge of confidential defense strategy, *there is no way that the defendant can know whether the prosecutor has or has not "used" that information.* Thus, the dissent's apparent contention that prejudice can be presumed from such a disclosure only when the defendant has proved that the prosecutor has "used" the information does not withstand scrutiny.

[11] The dissent has cited a number of cases that cite *Levy* for the proposition that intentional intrusions into the attorney-client privilege constitute per se violations of the sixth amendment. See *Shillinger* v. *Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (*Levy* "adopted the rule that intentional intrusions by the prosecution constitute per se violations of the [s]ixth [a]mendment"); *United States* v. *Brugman*, 655 F.2d 540, 545 n.1 (4th Cir. 1981) (characterizing *Levy* as involving deliberate intrusion into attorney-client privilege); *United States* v. *Kember*, 648 F.2d 1354, 1363 (D.C. Cir. 1980) (quoting *Levy* to effect that " '[w]here there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government,' the [s]ixth [a]mendment is violated"); *United States* v. *Davis*, 646 F.2d 1298, 1303 n.8 (8th Cir. 1981) ("where there is gross misconduct on the part of the government no prejudice need be shown"); *United States* v. *Costanzo*, 625 F.2d 465, 469 (3d Cir. 1980) (quoting *Levy* for proposition that sixth amendment is violated when there is knowing invasion of attorney-client relationship and confidential information is disclosed to government); *People* v. *Ervine*, 47 Cal. 4th 745, 766, 220 P.3d 820, 102 Cal. Rptr. 3d 786 (2009) (under *Levy*, there is "per se violation of the [s]ixth [a]mendment once the defendant demonstrates that the prosecution has improperly obtained information concerning confidential defense strategy"), cert. denied, U.S. , 131 S. Ct. 96, 178 L. Ed. 2d 60 (2010); *Scott* v. *State*, 310 Md. 277, 301 n.2, 529 A.2d 340 (1987) (characterizing *Levy* as involving prosecutorial misconduct); *State* v. *Sugar*, 100 N.J. 214, 228, 495 A.2d 90 (1985) (under *Levy*, "[c]ertain governmental intrusions on attorney-client relations, even when no severe prejudice to the defendant is apparent, must be dealt with in a manner that denies all effect to the illegal activity"); *Reeves* v. *State*, 969 S.W.2d 471, 492 (Tex. App. 1998) ("[t]he [holding] in *Levy* . . . turn[ed] on whether or not the intrusion was unlawful and for the sole purpose of determining defense strategy" [internal quotation marks omitted]), cert. denied, 526 U.S. 1068, 119 S. Ct. 1462, 143 L. Ed. 2d 547 (1999). We agree that *Levy* supports the proposition that the government's intentional invasion of the attorney-client privilege violates the sixth amendment. It does not follow that *Levy* does *not* support the proposition that the *unintentional* invasion of privileged materials containing trial strategy violates the sixth amendment. Because none of these cases involved the unintentional disclosure of privileged information relating to trial strategy, they are of little persuasive value. See *Shillinger* v. *Haworth*, supra, 1135 (prosecutor's knowledge of privileged information was "acquired through a conversation

with the deputy that was initiated by the prosecutor"); *United States* v. *Brugman*, supra, 546 (trial strategy was not disclosed to government); *United States* v. *Kember*, supra, 1364 ("[u]nlike the situation in *Levy*, the [g]overnment is not intruding upon confidential communications between attorney and client"); *United States* v. *Davis*, supra, 1303 (no evidence helpful to prosecution was disclosed); *United States* v. *Costanzo*, supra, 625 F.2d 470 (remanding case for determination of nature of communications that were disclosed); *People* v. *Ervine*, supra, 767 (defendant made no showing that confidential communications had been disclosed to government); *Scott* v. *State*, supra, 300–301 (defendant sought dismissal when state had violated gag order); *State* v. *Sugar*, supra, 229 (government had obtained privileged information in manner that was "offensive and illegal"); *Reeves* v. *State*, supra, 492 (government obtained no confidential information).

The other cases cited by the dissent in which prejudice was not presumed also do not involve intrusions by a prosecutor into privileged information concerning trial strategy. See *United States* v. *Aulicino*, 44 F.3d 1102, 1117 (2d Cir. 1995) (defendants presented no evidence that informant had revealed privileged information to government); *United States* v. *Schwimmer*, 924 F.2d 443, 445 (2d Cir.) (government obtained information from defendant's accountant regarding allocation of commissions), cert. denied, 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed. 2d 31 (1991); *United States* v. *Ginsberg*, 758 F.2d 823, 833–34 (2d Cir. 1985) (mere presence of government informant at conferences between defendant and counsel does not violate sixth amendment); *United States* v. *Morales*, 635 F.2d 177, 179 (2d Cir. 1980) (reversal of convictions not warranted when defendants made no showing that government had breached confidences between defendants and their attorneys); *United States* v. *Irwin*, 612 F.2d 1182, 1188–89 (9th Cir. 1980) (prejudice was not presumed when government agent contacted defendant without knowledge of defense counsel); *United States* v. *Gartner*, 518 F.2d 633, 637 (2d Cir.) (government did not violate sixth amendment by taping meeting between defendant and attorney when third person was present at meeting), cert. denied, 423 U.S. 915, 96 S. Ct. 222, 46 L. Ed. 2d 144 (1975); *United States* v. *Rosner*, 485 F.2d 1213, 1225 (2d Cir. 1973) (defendant was not prejudiced when government informant who sat in on meetings between defendant and attorney had had no contact with government after he had agreed to cooperate with government and informant had been warned not to disclose defense strategy to prosecutors), cert. denied, 417 U.S. 950, 94 S. Ct. 3080, 41 L. Ed. 2d 672 (1974); *Lakin* v. *Stine*, United States Court of Appeals, Docket No. 99-1529, 2000 WL 1256900 (6th Cir. July 13, 2000) (denial of request for substitute counsel did not violate sixth amendment); *United States* v. *Shreck*, United States District Court, Docket No. 03-CR-0043-CVE (N.D. Okla. May 23, 2006) (government plan to control defense counsel's access to illegal Internet cites in course of preparing defense did not violate sixth amendment); *United States* v. *Marlinga*, United States District Court, Docket No. 04-80372 (E.D. Mich. February 28, 2005) (government's passive receipt of privileged information regarding inculpatory evidence did not constitute fifth amendment violation); *United States* v. *Sattar*, United States District Court, Docket No. 02 Cr. 395 (JGK) (S.D.N.Y. August 6, 2002) (when defendants sought order requiring government to provide assurance that it was not monitoring attorney-client communications, and government had represented that screening processes were in place to ensure that any interceptions were not used against defendants, defendants had not established potential sixth amendment violation); *United States* v. *Pelullo*, 917 F. Sup. 1065, 1078 (D.N.J. 1995) (no sixth amendment violation when defendant failed to establish that government had access to privileged documents); *State* v. *Webbe*, 122 Wn. App. 683, 696–97, 94 P.3d 994 (2004) (no evidence that case involved intrusion into privileged information concerning trial strategy); *State* v. *Garza*, 99 Wn. App. 291, 300–301, 994 P.2d 868 (when jail officers read privileged documents containing confidential trial strategy, prejudice could not be presumed unless intrusion was intentional), review denied, 141 Wn. 2d 1014, 10 P.3d 1072 (2000); cf. *United States* v. *Singer*, 785 F.2d 228, 235 (8th Cir.) (finding sixth amendment violation when government knowingly intruded into confidential trial strategy), cert. denied, 479 U.S. 883, 107 S. Ct. 273, 93 L. Ed. 2d 249 (1986); *Sanborn* v. *Parker*, United States District Court, Docket No. 99-6780-C (W.D. Ky. February 14, 2007) (finding sixth amendment violation when government agent questioned defendant about trial strategy); *United States* v. *Horn*, 811 F. Sup. 739, 750–51 (D.N.H. 1992) (sixth amendment was violated when government improperly intruded into privileged information regarding defense strategy).

The dissent also contends that *Levy* was overruled by *United States* v.

Voigt, 89 F.3d 1050 (3d Cir. 1996). *Voigt* did not, however, involve a claim that confidential trial strategy had been disclosed to the prosecutor. The defendant in that case sought to dismiss the charges against him on the ground of outrageous government conduct because his attorney was a government informant. Id., 1063. The court concluded that he had failed to demonstrate the prejudice prong of his claim because he had failed to show that the attorney had provided any privileged information to the government. Id., 1070. The court then noted that the defendant was claiming, under *Levy*, that the intrusion into the attorney-client relationship itself was prejudicial, even without a showing that confidences had been revealed. Id. The court distinguished *Levy* because: (1) unlike the case before it, *Levy* involved a sixth amendment claim; and (2) *Levy* "concerned the government's deliberate intrusion into a defendant's attorney-client relationship in order to gain access to confidential defense strategy." Id., 1070–71. The court also stated that, "to the extent that *Levy* can be read as holding that certain government conduct is per se prejudicial, we note that the [United States] Supreme Court has since held to [the] contrary. *United States* v. *Morrison*, [supra, 449 U.S. 365–66] (even where government conduct is deliberate, defendant must demonstrate prejudice to obtain a remedy)." *United States* v. *Voigt*, supra, 1071 n.9. Because neither *Morrison* nor *Voigt*, involved a claim that confidential trial strategy had been disclosed to the prosecutor; see *United States* v. *Morrison*, supra, 362 (defendant claimed sixth amendment violation when government agents met with her while she was represented by private counsel and urged her to obtain different counsel); we conclude that neither case supports the proposition that prejudice cannot be presumed when confidential defense strategy *has* been disclosed.

[12] The dissent argues that, "if the government is the cause of any harm that potentially may befall the defendant due to an intentional breach of the attorney-client relationship, any difficulty in discerning whether the defendant actually was prejudiced by the breach should be borne by the government," and when a government intrusion into the attorney-client privilege was not intentional, "there simply is no justification for shifting the burden to the government to disprove prejudice." Although we agree with the dissent that, when an intrusion has been intentional, shifting the burden to the state may be justified, it does not follow that, when an intrusion is *not* intentional, there can be *no* justification for shifting the burden to the state. As *Levy* and *Briggs* make clear, when privileged information containing defense strategy has been disclosed to the prosecutor, the justification for shifting the burden of proof is that the disclosure is inherently prejudicial and the state is in the best position to rebut the inference of prejudice.

[13] Justice Palmer contends that we are addressing a claim that was not raised on appeal. A fair reading of the defendant's brief to this court and his memorandum in support of his motion to dismiss reveals, however, that he argued both to this court and to the trial court that the disclosure of the privileged materials was inherently prejudicial because the materials contained trial strategy. See footnote 7 of this opinion. The arguments made by the defendant were essentially the same as those made by the courts that have found that the disclosure of privileged information relating to trial strategy is inherently prejudicial. Indeed, the Appellate Court apparently was concerned that the mere disclosure of the privileged documents to the prosecutor could be inherently prejudicial because it ordered the trial court to articulate: (1) whether it had "considered [the defendant's] argument that the [prosecutor] received and reviewed the documents covered by the attorney-client privilege"; and (2) "[w]hat prejudice, if any, it found that the defendant suffered as a result." Despite the fact that the prosecutor had admitted that he had read the privileged documents in their entirety, the trial court indicated in its response to the order for articulation that it could not answer these questions because "[t]he defendant failed to introduce sufficient credible evidence . . . as to the timing, nature and extent of the receipt [and] review . . . by the [prosecutor] of the documents covered by the attorney-client privilege." The defendant cannot be blamed for the fact that the trial court did not meaningfully respond to the order for articulation of its finding that, *even though the prosecutor had read the privileged documents*, the defendant had suffered no prejudice.

The dissent insists, however, that nothing in the defendant's arguments "even remotely resembles a claim that an unintentional violation of the attorney-client relationship gives rise to a presumption of prejudice," and that our reliance on the language of the defendant's brief to this court arguing that he was prejudiced is misplaced because it was contained in a

section entitled "Requested Relief." We can only reiterate that the clear import of the defendant's arguments is that the prosecutor's knowledge of his trial strategy was inherently prejudicial. The prosecutor's intent or lack of intent, and the title of the section of the brief in which the defendant's argument is set forth, have no bearing on that question. Indeed, at oral argument before this court, the defendant agreed that this court could dismiss the charge against him if it found that the intrusion was prejudicial, even if the intrusion was not intentional. Moreover, although the defendant did not expressly argue to the trial court or in his brief to this court that a prejudicial intrusion into the attorney-client relationship violates the sixth amendment even in the absence of intent, the dissent does not dispute that intrusions into the attorney-client privilege can violate the sixth amendment if they are prejudicial, even if they are not intentional. Thus, the dissent apparently believes that, even if the defendant is correct that intrusions into privileged information containing trial strategy are inherently prejudicial, and even if other courts correctly have held that prejudicial intrusions into privileged materials violate the sixth amendment, we cannot connect these ideas and draw the conclusion in the present case that the prosecutor's unintentional intrusion into privileged materials containing trial strategy presumptively violated the sixth amendment because the defendant did not make that connection and that precise claim. We decline to put so fine a point on the defendant's argument.

[14] We emphasize that we do not conclude that the mere unintentional intrusion into privileged information containing trial strategy automatically constitutes a sixth amendment violation. For example, if the government can establish that it notified the defendant and the court immediately of the intrusion, that it ensured that no government official with knowledge of the information had any contact with witnesses or investigators and that it ensured that no such person was involved in the prosecution of the case, the disclosure could well be harmless. We do not believe that it imposes an unreasonable burden on the state to take steps to insulate a prosecutor who has knowledge of the defendant's confidential trial strategy from involvement in the case. See *United States* v. *Danielson*, 325 F.2d 1054, 1072 (9th Cir. 2003) (prosecution can avoid burden of proving nonuse of privileged information by "insulating itself from privileged trial strategy information"); id., 1072–73 (discussing government policies and procedures for insulating prosecutor from privileged trial strategy information). If the government made no such efforts, its conduct can hardly be characterized as blameless.

In the present case, although the record does not reveal precisely how long the prosecutor was in possession of the privileged documents, contrary to the dissent's suggestion, it is clear that he did not notify the defendant and trial court immediately upon reading them. See footnote 4 of this opinion. It is also clear that, even after the defendant informed the trial court that the prosecutor was in possession of privileged materials and the trial court ordered the documents to be placed under seal, thereby unequivocally putting the state on notice that it would be improper for the prosecutor to use the information in the documents in preparing the case for trial, the prosecutor made no efforts to discontinue his discussions with the witnesses and investigators or to insulate himself in any manner from the prosecution of the case. Rather, he tried the case to conclusion. In any event, even if we were to assume that the government's conduct was entirely blameless, that would not prevent the disclosure of the privileged information to the prosecutor who actually tried the case from being presumptively prejudicial. See *United States* v. *Levy*, supra, 577 F.2d 209 ("[w]e 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").

[15] The state presented no physical evidence or eyewitness testimony to corroborate the complainant's account.

[16] The state represented at oral argument before this court that the prosecutor believed that his knowledge of the defendant's trial strategy gave him no advantage because the strategy was one that any defendant would have developed. Upon review of the privileged materials, we cannot agree. Although the strategy involved common defense tactics, such as casting doubt on the credibility of state witnesses, the state could not have predicted the very specific manner in which the defendant intended to do so without having knowledge of the privileged materials. Cf. *United States* v. *Levy*, supra, 577 F.2d 208 (government's knowledge of specific defense strategy to discredit certain state witnesses "would permit it not only to anticipate

and counter such an attack . . . but also to select jurors who would be more receptive to [those witnesses]"). Our review of the record strongly suggests that the prosecutor did, in fact, use the materials to anticipate and forestall the defendant's defense strategy. See footnotes 21 and 22 of this opinion.

[17] We do not address at this point in our analysis the question of whether the state rebutted this presumption of prejudice because the state was not on notice that it was required to do so. We note, however, that the only information presented by the state that was relevant to the question of prejudice was the prosecutor's conclusory and unsworn representation that he had not commenced any further investigation, had not interviewed any additional witnesses and had not requested anything further from the defense by way of discovery after he had read the privileged materials. Even if the prosecutor did not use his knowledge of the privileged communications to develop *new evidence* against the defendant, however, the prosecutor made no representations at the time of the hearing on the motion to dismiss, which took place more than one year after the prosecutor revealed that he had read the documents, that his knowledge of the defendant's trial strategy had not affected and would not affect his trial preparations, including discussions with witnesses and investigators, or his decisions on jury selection, witness selection, examination of witnesses, or any of the other innumerable decisions that he was required to make in preparation for and during trial. Even if we assume that the state could have presented additional evidence to rebut the presumption of prejudice before trial, however, as we discuss more fully later in this opinion, we conclude that it would be impossible for the state in this case to establish by clear and convincing evidence that the prejudice resulting from the prosecutor's intrusion into the privileged materials would be remediable now that the case has been tried to conclusion.

[18] To the extent that the state claims that a document is not subject to the attorney-client privilege unless it actually has been communicated from a client to an attorney, we strongly disagree. The Court of Appeals of Washington addressed a similar claim in *State* v. *Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010), a case with remarkable similarities to the present case. In *Perrow*, the defendant was under investigation for the alleged sexual abuse of his daughter. Id., 325. The police obtained a search warrant for the defendant's residence and, during the course of the search, seized a number of documents. Id., 326. The defendant immediately called his attorney and informed him that the police had seized materials that he had prepared for the attorney. Id. The attorney advised the defendant to inform the police that the documents were covered by the attorney-client privilege, which the defendant did. Id. Nevertheless, the police removed the documents from the defendant's residence, read them, analyzed them and sent the written analysis to the prosecutor. Id. When the state brought criminal charges, the defendant filed a motion to dismiss the charges against him on the ground that the state had violated the statutorily protected attorney-client privilege and engaged in prejudicial misconduct. Id., 327. The trial court granted the motion, and the state appealed. Id. On appeal, the state claimed that the documents were not privileged because, among other reasons, the defendant had not shown that they were intended for his attorney. Id. The Court of Appeals concluded that, because the defendant had prepared the documents "to obtain legal advice, outline strategy and prepare a defense"; id., 330; and because the materials were intended for his attorney and were not intended to be disclosed; id., they were covered by the attorney-client privilege. Id. We agree with this conclusion. If a person creates a document with the intent to communicate it to an attorney for the purpose of facilitating the attorney's representation of that person, it would be entirely inconsistent with the purpose of the attorney-client privilege to allow third parties to obtain access to the document up to the time that the person actually communicates it to the attorney.

In his dissenting opinion, Justice Palmer places great weight on the trial court's finding that the prosecutor's invasion of the attorney-client privilege was not intentional. That finding, however, was premised on the court's conclusion that the prosecutor could not have known that the documents at issue were privileged because they were not formatted as e-mails or letters to an attorney and, therefore, he could not have known that they were "communications." As we have indicated, it is crystal clear on the face of a number of the documents that they were intended to be communications to the defendant's attorney, notwithstanding the fact that they were not formatted as letters or e-mails. We also have concluded as a matter of law

that documents that are intended to be communicated to an attorney are subject to the attorney-client privilege regardless of their format or whether they have actually been provided to the attorney. Thus, in finding that the invasion was unintentional because the documents were not formatted as e-mails or letters, even though they clearly were intended to be communicated to the defendant's attorney, the trial court applied an incorrect legal standard. We simply find it incredible that a trained attorney, who was on notice that the seized documents could contain privileged materials, would fail to recognize that, at the very least, it was highly probable that these documents were privileged. As we have indicated, however, because we conclude that the prejudice to the defendant cannot be cured by any remedy less than dismissal, we need not decide whether the invasion was intentional.

[19] The trial court offered to sever the Granby cases "to avoid the appearance of a taint of prejudice," not because it believed that the defendant actually had been prejudiced.

[20] We note, however, that this seems highly unlikely. The record reveals that the prosecutor had known the substance of the privileged communications for approximately one and one-half years before the trial court ruled on the motion to dismiss on the eve of trial. It is reasonable to conclude that, during that period, wittingly or unwittingly, the prosecutor revealed the strategy to witnesses and investigators to whom the new prosecutor necessarily would have access. Cf. *Briggs* v. *Goodwin*, supra, 698 F.2d 494–95 (sharing of information between investigators and prosecutors may be presumed). Indeed, the record supports such a conclusion. See footnotes 21 and 22 of this opinion.

[21] In one of the privileged communications, the defendant stated that "Captain [Kevin] Bennett from the Granby police department," who had interviewed the complainant in Docket No. H12MCR-03-128673 after she made the accusations against the defendant, had given a presentation regarding child abuse at a Granby church. According to the defendant, Bennett stated during the presentation that, when child abuse is suspected, it is important for the police to arrange for a single interview of the child by a specially trained interviewer to make sure that the child is not picking up clues about what the investigators are looking for. The defendant also stated that the Granby police department had not followed this procedure with the complainant. Rather, it was the defendant's understanding that she had been interviewed multiple times by untrained interviewers, and the interviews had not been recorded. At trial, the prosecutor asked David Watkins, the chief of the Granby police department, if he had given any instructions to the complainant's parents after they complained to the police about the defendant's conduct. He responded that he had instructed them that they should not interview the complainant or engage her in any conversation about the defendant. The prosecutor also asked Bennett if he had given any instructions to the complainant's parents. He indicated that he told them that they should not discuss the incident with her. The prosecutor also asked the complainant's mother if she had asked "about what was to happen next" after she reported the defendant's conduct to the police. She responded that she had been "given instructions as to what would happen next." When the prosecutor asked what the instructions were, the complainant's mother responded that she had been told not to speak to the complainant about what had happened. The complainant's father gave similar testimony when the prosecutor asked him if he had been told what would happen next after they reported the defendant's conduct to the police. The fact that both of the complainant's parents gave the same specific answer to the prosecutor's open-ended question as to whether they had been informed by the Granby police department as to what would happen next suggests that the prosecutor had discussed with these witnesses the importance of persuading the jury that the complainant's account of the defendant's conduct had not been tainted by multiple interviews.

The dissent points out that defense counsel had argued during pretrial negotiations that the videotaped forensic interviews had little evidentiary value because of the methods used by the interviewer and argues that this shows that defense counsel had "made no secret of the fact that he intended to challenge the credibility of the alleged victim on the basis of the nature of the questioning to which the victim had been subjected." The fact that the state knew that the defendant intended to challenge the methods used by the forensic interviewer does not mean, however, that it knew that the defendant intended to argue that the complainant's account of the defendant's conduct had been tainted by repeated conversations with members of her family and investigators.

[22] In one of the privileged communications, the defendant suggested that the complainant in Docket No. H12MCR-03-128673 had disliked attending karate classes because she had been falling behind her classmates in her karate skills. He also implied that she may have lied about the defendant's conduct so that she would no longer have to attend the classes. At trial, the prosecutor asked the complainant whether she had been able to keep up with her peers in the karate classes, and she responded, "Yes." Indicating that this was not the answer that he had expected, the prosecutor then rephrased the question and asked the complainant if she had ever fallen behind. Again, she said, "Yes." The prosecutor then asked the complainant why that had happened, and she replied that she had traveled a lot with her mother. Later, the prosecutor asked the complainant whether the reason that she had not wanted to go to karate was because of the defendant's conduct, and she agreed. The complainant also agreed with the prosecutor when asked whether they had met "a lot of times" before trial to discuss the case. Thus, contrary to Justice Palmer's assertion in his dissenting opinion, we do not conclude that the prosecutor imparted knowledge to this witness merely by asking her questions at trial. Of course, there is no way of knowing whether there were questions that the prosecutor decided *not* to ask as the result of his knowledge of the defendant's trial strategy.

The dissent states that this information was contained in a document that "bears no indication of any kind that it is intended to be a privileged communication from the defendant to his attorney" and "is an e-mail from the defendant to his wife, and makes no reference to the defendant's attorney . . . ." The document in question is entitled "Strategy and Questioning." It contains numerous references to the defendant's trial strategy, such as "[w]hen we are questioning [the complainant]"; "[w]e should be able to exploit this at all levels during testimony at the trial"; "[w]e . . . need to lay the groundwork for this by asking [police captain Kevin Bennett] what a police officer's job is"; "[n]ow is where we can start questioning [Bennett's] integrity and duty"; "[w]e need to point out to the jury that [the investigator's] job is to investigate"; "[w]e need to lead her to a statement that her job is to conduct unbiased interviews"; "we need to get [the investigator] to define for the jury exactly what a pedophile is"; and "[w]e want to hammer this point over and over in front of the jury." It is perfectly clear that the reference to "we" in these statements is a reference to the defendant and his attorney. The fact that a handwritten note on the first page of the document indicates that the defendant had sent it by e-mail to his wife—a note that could not have been on the document when it was seized from the defendant's computer—has no bearing on the question of whether it is privileged. In any event, even if the prosecutor could not have known that this document was privileged when he read it, we would still conclude that the defendant was prejudiced by his knowledge of its contents.

The dissent also claims that "*even on appeal*, the defendant has not alluded to anything that occurred during the trial that would tend to implicate the proposed strategy contained in the privileged documents. Thus, the majority's references to the record are not based on any argument that the defendant has *ever* made . . . ." (Emphasis added.) As the dissent acknowledges, however, the defendant argued at oral argument to this court that the prosecutor may have asked the complainant about her spotty attendance at karate classes because he had read the privileged materials.

[23] See also *State* v. *Cory*, 62 Wn. 2d 371, 377, 382 P.2d 1019 (1963) ("If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy."); cf. *Lykins* v. *State*, 288 Md. 71, 73, 85, 415 A.2d 1113 (1980) (when prosecutor previously had represented defendant but record showed no actual conflict of interest or improper motive for bringing prosecution, proper remedy was to disqualify prosecutor, not to dismiss charges); but see *People* v. *Pobliner*, 32 N.Y.2d 356, 362, 368–69, 298 N.E.2d 637, 345 N.Y.S.2d 482 (1973) (when state intercepted conversations between defendant and attorney that involved defendant's plans for investigation and possible witnesses, but defendant failed to show that defense had been affected by interception, dismissal was not required),

cert. denied, 416 U.S. 905, 94 S. Ct. 1609, 40 L. Ed. 2d 110 (1974).

[24] See footnote 7 of this opinion.

[25] If the trial court had offered an adequate remedy short of dismissal and the defendant had expressly rejected it, our conclusion might be different. We hold only that the defendant was not required to devise and request a less drastic remedy than dismissal when he believed that dismissal was the sole means of curing the prejudice against him.

[26] In his dissenting opinion, Justice Palmer contends that our decision is "radical and wholly unjustifiable," "unprecedented [and] deeply flawed," "completely at odds with sixth amendment jurisprudence" and based on "speculation." An objective review of the basic facts of the case, however, shows that the prosecutor had been warned that the defendant's computer contained privileged documents and had been ordered not to review them; the prosecutor read in their entirety documents that clearly were privileged on their face; the privileged documents went to the heart of the defense; the prosecutor failed to notify the defendant and the trial court immediately that he had read the documents; the prosecutor had knowledge of the contents of the privileged documents for well over one year before trial, during which time he discussed the case repeatedly with state witnesses; and the prosecutor's questions to various witnesses at trial strongly support the conclusion that the prosecutor had discussed the contents of the privileged documents with the witnesses before trial. Thus, contrary to Justice Palmer's contention, our conclusion is not based on speculation, and it is the dissenting justice who ignores the import of the evidence in the record and speculates that all of this conduct somehow could be harmless. See *United States* v. *Levy*, supra, 577 F.2d 208 (prejudice is presumed when prosecutor learns of defendant's trial strategy because court can only speculate as to absence of prejudice).