STATE OF MINNESOTA

IN SUPREME COURT

A21-1523

Court of Appeals Anderson, J.

In re State of Minnesota, Petitioner,

State of Minnesota,

Respondent,

vs. Filed: March 15, 2023
Office of Appellate Courts

Brian Lee Flowers,

Appellant.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Bradford Colbert, Legal Assistance to Minnesota Prisoners, Saint Paul, Minnesota; and

Perry L. Moriearty, Child Advocacy and Juvenile Justice Clinic, Cole Benson, Julia Brady, Kaitlyn Falk, Avery Katz, Eleanor Khirallah, Certified Student Attorneys, Minneapolis, Minnesota, for appellant.

Clare Diegel, Daniel R. Shulman, Teresa Nelson, American Civil Liberties Union of Minnesota, Minneapolis, Minnesota;

Trisha Trigilio, American Civil Liberties Union, New York, New York; and

Corene Kendrick, American Civil Liberties Union, San Francisco, California, for amici curiae American Civil Liberties Union of Minnesota and American Civil Liberties Union.

Robert Small, Executive Director, Minnesota County Attorneys' Association, Saint Paul, Minnesota;

Kevin A. Hill, Assistant Carver County Attorney, Chaska, Minnesota;

Robert I. Yount, Assistant Anoka County Attorney, Anoka, Minnesota; and

Richard D. Hodsdon, Minnesota Sheriffs' Association, Saint Paul, Minnesota, for amici curiae Minnesota County Attorneys' Association and Minnesota Sheriffs' Association.

S Y L L A B U S

1. The Sixth Amendment right to counsel is not implicated when the State provides a process for an incarcerated defendant to communicate with counsel on an unrecorded phone line, and the defendant instead chooses to communicate with counsel or share defense strategies with a third party by a method the defendant knows is recorded.

2. The court of appeals properly granted the State's petition for a writ of prohibition because the district court was unauthorized by law to order the State to implement a taint team when the Sixth Amendment was not implicated and enforcement of the district court's order would result in injury to the State for which there would be no adequate remedy.

Affirmed.

O P I N I O N

ANDERSON, Justice.

The government provided appellant Brian Lee Flowers a process for communicating with counsel on an unrecorded phone line while he was incarcerated. Nevertheless, Flowers chose to communicate with counsel and share defense strategies with a third party by a method that he knew was recorded. Concluding that the Sixth Amendment right to counsel was implicated, the district court ordered the State to use a taint team to review the recorded calls for attorney-client communications.[1] The State filed a petition for a writ prohibiting the district court from enforcing the taint-team order. The court of appeals granted the petition. Because the district court erroneously concluded that the Sixth Amendment was implicated here, and because the State would be injured and without any adequate remedy to correct the unauthorized action of the court, we affirm.

FACTS

In 2009, Flowers—a juvenile at the time of his offense—was convicted of two counts of first-degree premeditated murder in connection with the deaths of Katricia Daniels and her son Robert. The district court imposed two consecutive sentences of life without the possibility of release as required by then-existing law. We affirmed his convictions. *State v. Flowers*, 788 N.W.2d 120, 134 (Minn. 2010). Following the United

[1] A "taint team" or "filter team" is a group of attorneys or investigators unassociated with the prosecution that is used to review evidence in possession of the government to protect attorney-client privilege. *See* Gretchen C.F. Shappert & Christopher J. Costantini, *Recent Case Law Developments Involving the Crime-Fraud Exception: The Attorney-Client Privilege, Filter Team Protocols, and Other Privileges*, 69 DOJ J. Fed. L. & Prac., May 2021, at 289, 329.

States Supreme Court decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole for those who were under 18 at the time of their crimes was unconstitutional), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016) (holding that *Miller* announced a new substantive rule that is retroactive in cases on state collateral review), the district court resentenced Flowers to two sentences of life with the possibility of release. The district court, however, had these sentences run concurrently, concluding that our decision in *Jackson v. State*, 883 N.W.2d 272 (Minn. 2016), precluded consecutive sentences. We reversed, holding that *Jackson* did not preclude consecutive sentences, and remanded to allow the district court to exercise its discretion in determining whether consecutive or concurrent sentences are appropriate, consistent with the requirements of *State v. Warren*, 592 N.W.2d 440 (Minn. 1999). *Flowers v. State*, 907 N.W.2d 901, 907 (Minn. 2018).

The resentencing hearing for Flowers was scheduled to begin in May 2021. In preparation for the anticipated testimony of Flowers and the investigation into the potential testimony of a rebuttal witness, the State requested copies of the recorded calls made by Flowers while he was incarcerated in the Minnesota Correctional Facility at Rush City ("MCF-Rush City") and the Hennepin County jail. To fully understand the events that followed the request, a brief discussion of the communication options available to Flowers at each place of incarceration is required.[2]

[2] Details of the inmate communication procedures are set out in the affidavits provided by the State supporting the State's petition for a writ of prohibition.

As an inmate at MCF-Rush City, Flowers could communicate through two types of phone calls: (1) a "legal" phone call, which is not recorded, and (2) a "recorded/monitored" call. Inmates are provided written notification upon intake of communication monitoring policies and the facility posts notifications by each phone. A legal phone call is available to an inmate when legal deadlines require expedited communication.[3] The call is set up by the inmate's attorney, limited to 30 minutes, and is expected to be requested days in advance. Flowers made at least 20 legal calls at MCF-Rush City between January 2020 and October 2021. A recorded/monitored phone call is available to an inmate for other calls. During recorded/monitored calls, an inmate is prohibited from making third-party calls, conference calls, or forwarded calls. Flowers made over 700 recorded/monitored calls between May 2020 and July 2021.[4]

As an inmate at the Hennepin County jail, Flowers could communicate through two types of phone calls: (1) a "legal" phone call, which is not recorded, and (2) a "social" call, which begins with a notification that the call is recorded and may be monitored. To make a legal phone call, the inmate must first add the attorney's phone number to a list of private numbers; that number is then confirmed by jail staff as assigned to an attorney for the inmate. Calls to private (legal) numbers are not recorded. Calls to non-private numbers

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[3] When expedited communication is not required, attorneys must communicate with clients through the mail.

[4] In addition to making calls, inmates at MCF-Rush City may have in-person visits with their attorneys. Between March 2020 and April 2021, in-person legal visits were suspended due to the COVID-19 shutdown. After the shutdown was lifted, in-person legal visits resumed through bulletproof glass via a phone in a small cubicle limited to, at most, two attorneys.

are recorded and preceding the call, a recorded message warns, "This call is not private. It will be recorded and may be monitored. If you believe this should be a private call, please hang up and follow facility instructions to register this number as a private number. To consent to this recorded call, press . . . ." The system also provides an option for all outbound inmate calls that allows the inmate to indicate his belief that he is calling a private number. If the inmate dials an outbound call and indicates that the call should be private and unrecorded it will be completed only if it is to a private number. Flowers made 172 calls while at Hennepin County jail, and none were marked as private.

The State received copies of the recorded calls and disclosed the recordings to defense counsel. Prosecutors listened to recorded calls Flowers made while he was detained at the Hennepin County jail and disclosed the calls to defense counsel. Additionally, the State obtained recorded calls made by Flowers while incarcerated at MCF-Rush City and disclosed these calls to defense counsel. In total, the State received and disclosed over 900 recorded calls to defense counsel.

Defense counsel notified the district court about the State acquiring and listening to the recorded calls. Defense counsel also raised concerns about discussions of defense strategy during the calls and the possibility that recordings were made of communications between Flowers and his defense counsel. The district court, concerned about the State potentially listening to privileged communications, issued an interim order prohibiting the State from listening to the recordings until a taint team was established and asked the State to submit a taint-team proposal. Instead of submitting a taint-team proposal, the State filed a motion to reconsider and argued a taint team was unnecessary. The court denied the

motion to reconsider. The State continued to contest the order. The State acknowledged that although representatives of the State listened to three calls in which Flowers called his then-fiancée, who connected a member of the defense team to the call, none of the three calls were privileged.

The district court determined that "[t]he Sixth Amendment right to effective counsel is violated when a prosecutor intentionally listens to communications between the defendant and his defense team on recorded jail calls." Based on this legal conclusion, the district court issued a taint-team order on October 7, 2021, which required the following actions:

> 1. The Defense shall disclose to the State by October 15, 2021, a list of all members of the "defense team" (attorneys, support staff, other) from January 1, 2020 to the present.
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> 2. The State shall disclose by October 22, 2021, all calls in which the attorneys or investigators working on this re-sentencing listened to conversations between Mr. Flowers and a member of his defense team.
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> 3. At no point will the attorneys or investigators prosecuting this re-sentencing listen to conversations between Mr. Flowers and his defense team.
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> 4. If the State wishes to have others with the Hennepin County Attorney's Office or a law enforcement agency review these recorded calls, those individuals shall not communicate to those prosecuting or investigating this re-sentencing the substance of any communication between Mr. Flowers and a member of his defense team. Further, any review of these recorded calls must result in a log to be simultaneously provided to both Parties and the court to assist in the efficient examination of this potential evidence and timely disposition of this re-sentencing. Any log shall contain the following information: call identification information, date of call, time of call, length of call, number called, parties on the call, a summary of the portion of the call not involving a member of the defense team, and a notation if any member of the defense team was involved with the call.

5. If either Party wishes for the court to establish a different taint-team process, the Party may submit a proposal no later than October 22, 2021.

In response to the taint-team order, the State petitioned the court of appeals for a writ of prohibition under Minn. R. Civ. App. P. 120.01. In the petition, the State sought an order prohibiting the district court from enforcing the taint-team order.

The court of appeals granted the petition. *State v. Flowers*, No. A21-1523, Order at 8 (Minn. App. filed Dec. 16, 2021). According to the court, no Sixth Amendment violation occurs unless the attorney-client communication intruded upon by the State is protected by the attorney-client privilege, and the burden to establish the privilege lies with the party asserting the privilege. *Id.* at 5. After reviewing the record, the court concluded that Flowers failed to meet his burden of proving the applicability of the attorney-client privilege with respect to any of the recordings in the State's possession, and therefore the district court erred as a matter of law in concluding that a violation of the Sixth Amendment right to counsel occurs if the prosecutors listened to the recorded calls. *Id.* at 7. Based on the district court's error of law and the injury that would result from impeding the State's investigation, the court of appeals concluded that a writ of prohibition was warranted here. *Id.* at 8.

We granted Flowers's petition for review.[5]

[5] The parties do not ask us to address constitutional issues associated with the general use of taint teams. Although the State argues the use of a taint team in this instance may have violated the separation-of-powers doctrine, it does not make any arguments about the constitutionality of taint teams generally. The United States Department of Justice has

ANALYSIS

Flowers contends the court of appeals erred in issuing the writ prohibiting the district court from enforcing the taint-team order. We disagree.

The court of appeals may issue a writ of prohibition if the following three requirements are met: "(1) an inferior court or tribunal must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) the exercise of such power must result in injury for which there is no adequate remedy." *Minneapolis Star & Trib. Co. v. Schumacher*, 392 N.W.2d 197, 208 (Minn. 1986). This dispute focuses on the second and third requirements. We consider each requirement in turn.

I.

The issue of whether the Sixth Amendment right to counsel is implicated by the facts of this case presents a question of law, which we review de novo.[6] *State v. Andersen*,

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encouraged the use of taint teams since at least 1995. *See* Christina M. Frohock, *Special Matters: Filtering Privileged Materials in Federal Prosecutions*, 49 Am. J. Crim. L. 63, 69 (2021). Some federal courts have shown discomfort with taint teams despite federal prosecutors routinely using the practice. *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (noting that "the government's fox is left in charge of the appellants' henhouse" when the government uses taint teams). We express no opinion on those issues here.

[6] Although Flowers cites to Article I, Section 6 of the Minnesota Constitution in his brief to our court, he did not raise it in the district court nor in his response to the State's petition for a writ of prohibition to the court of appeals. As a result, Flowers has forfeited his argument under the Minnesota Constitution. *See State v. Ali*, 855 N.W.2d 235, 261 (Minn. 2014) ("[W]e will not decide issues that were not raised before the district court, even when criminal defendants raise constitutional claims for the first time on appeal."); *see also Nelson v. State*, 947 N.W.2d 31, 40–41 (Minn. 2020) (dismissing the defendant's

871 N.W.2d 910, 916 (Minn. 2015); *In re Leslie v. Emerson*, 889 N.W.2d 13, 14 (Minn. 2017).

Flowers argues his Sixth Amendment right to counsel is implicated here because the State intentionally intruded upon the attorney-client relationship by obtaining and transcribing confidential information involving defense strategy and planned to use the information to his detriment.[7] In contrast, the State argues the Sixth Amendment right to counsel is not implicated because the recorded calls do not contain any confidential or privileged attorney-client communications.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." Additionally, "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The government can violate a defendant's Sixth Amendment right to counsel in a variety of ways. "The Sixth Amendment guarantees the accused . . . the right to rely on counsel as a 'medium' between him and the State. . . . [T]his guarantee includes the State's affirmative obligation not to act in a manner that

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argument regarding the Minnesota Constitution because he raised the issue for the first time in his brief to our court and thus forfeited it).

[7] Flowers and amici raise concerns that the policies of the Minnesota Department of Corrections on attorney-client communications did not provide sufficient or effective means for Flowers to communicate confidentially with his lawyers. Those issues are not before us, and we express no opinion on the adequacy of the procedures.

circumvents the protections accorded the accused by invoking this right."[8] *Maine v. Moulton*, 474 U.S. 159, 176 (1985); *see also id.* at 177 (determining that the State violated the defendant's right to counsel by arranging an undercover informant to record conversations with the defendant about defense strategy).

Both the United States Supreme Court and our court have recognized that "in some situations government interference with the confidential relationship between a defendant and his counsel may implicate the constitutional right to counsel." *State v. Andersen*, 784 N.W.2d 320, 333 (Minn. 2010) (citing *Weatherford v. Bursey*, 429 U.S. 545 (1977)). In *Andersen*, we also recognized that "the United States Supreme Court [has] held that an intrusion into the attorney-client relationship, standing alone, does not, as a matter of law, constitute a violation of the Sixth Amendment." *Id.* (citing *Weatherford*, 429 U.S at 558). We have expressly declined, however, to articulate a standard as to when such interference or intrusion amounts to a violation of the right to counsel. *Id.* at 334; *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015).

First, in *Andersen*, we expressly declined to "articulate a standard that a defendant, or the State, must show to prevail on a claim that an intrusion into the attorney-client

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[8] The circumstances presented here involve the State passively receiving communications by way of routinely recorded means. *See, e.g.*, *People v. Johnson*, 51 N.E.3d 545, 549 (N.Y. 2016) ("[D]efendant made the telephone calls aware that he was being recorded, and the mere act of recording is no different from an informer sitting mute, not provoking or prompting conversation but merely listening to a statement freely made."). Consequently, it is unlike disputes involving deliberate actions of the government seeking to elicit information from a defendant or surreptitiously intruding upon the attorney-client relationship. *See United States v. Danielson*, 325 F.3d 1054, 1068 (9th Cir. 2003) (noting that the prosecution team was on notice of a potential Sixth Amendment violation once an informant could be said to be acting on behalf of the government).

relationship amounted to a violation of the right to counsel." *Andersen*, 784 N.W.2d at 334. Instead, we recognized four factors the United States Supreme Court in *Weatherford* pointed out that the allegedly aggrieved party had failed to show:

> [T]hat (1) evidence used at trial was produced directly or indirectly by the intrusion, (2) the intrusion by the government was intentional, (3) the prosecution received otherwise confidential information about trial preparations or defense strategy as a result of the intrusion, or (4) the overheard conversations and other information were used in any way to the substantial detriment of the claimant.

Id. at 333. Moreover, we noted that federal courts of appeals have differing views on the factors required to show a violation of the right to counsel in the context at issue. *Id.* We then affirmed the district court without articulating a standard regarding government intrusion on the right to counsel, concluding that there was "no indication that the intrusions were intentional, that evidence presented at trial was produced by the intrusions, that the prosecution received confidential information about trial preparations or defense strategy, or that any information in the calls was used in any way to [defendant]'s detriment." *Id.* at 334.

Five years later, in *Taylor*, we considered a claim that the district court improperly admitted a handwritten note recovered from the defendant's jail cell alleged to be protected by attorney-client privilege. 869 N.W.2d at 21. In analyzing the alleged violation, we again declined to announce a standard for showing governmental intrusion upon the attorney-client relationship violated the right to counsel, stating that "[w]e need not announce such a standard in this case, as the jail cell note was not protected by attorney-client privilege." *Id.* As part of our analysis, we observed that "[t]he

attorney-client privilege protects from disclosure 'communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client . . . unless the privilege is waived.' " *Id.* (alteration in original) (quoting *Nat'l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895 (Minn. 1979)). The district court had found that "the note did not communicate anything to defense counsel regarding the case," and we did not find the district court's factual finding that "the note did not seek to elicit legal advice from defense counsel" to be clearly erroneous. *Id.* at 21–22.

There is significant disagreement between the parties on the import of the decisions discussed above. First, the parties disagree on the meaning of *Weatherford* and *Andersen*. Flowers argues *Weatherford* and *Andersen* show that his Sixth Amendment claim is heavily dependent on the circumstances surrounding his claim, and courts must consider the four factors noted in *Weatherford* regardless of privilege. In contrast, the State argues confidentiality and privilege are the key considerations. Second, the parties disagree on our holding in *Taylor*. Flowers argues that *Taylor* should be interpreted as holding the note was not an attorney-client communication and simply stands for the principle that there must be some attempted communication with an attorney before addressing the Sixth Amendment, not necessarily that the communication must be privileged. In contrast, the State argues that *Taylor* focused on the element of confidentiality and "held that a Sixth Amendment violation is predicated on the State's receipt of confidential or privileged attorney-client communications." For the reasons that follow, we conclude the State's argument is more compelling.

The right to counsel is a constitutional right under the Sixth Amendment of the United States Constitution. *Taylor*, 869 N.W.2d at 21. And although the attorney-client privilege is instead a statutory right codified under Minn. Stat. § 595.02, subd. 1(b) (2022), *see Andersen*, 784 N.W.2d at 333, it is relevant to a Sixth Amendment right-to-counsel analysis, *see Bassett v. State*, 895 N.E.2d 1201, 1206 (Ind. 2008) (explaining that the Sixth Amendment right to counsel overlaps with the attorney-client privilege). As we noted in *Taylor*, "[t]he attorney-client privilege protects from disclosure 'communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client . . . unless the privilege is waived.' " 869 N.W.2d at 21 (alteration in original) (quoting *Hymes*, 282 N.W.2d at 895). The party asserting the attorney-client privilege must prove the existence of the privilege. *Id.*

Here, the hallmark as to when interference with the attorney-client relationship may amount to a violation of the right to counsel—the intrusion upon confidential and privileged attorney-client communications—is absent. In the district court, Flowers failed to show he made *any* of the recorded calls in confidence. He knew the "social" and "recorded/monitored" calls were routinely recorded. Flowers had the option to confidentially communicate with his attorneys on an unrecorded phone line, and he used that option, making at least 20 confidential legal calls from MCF-Rush City that are not at issue here. In fact, Flowers seemed to concede during district court hearings that some of the calls were not privileged communications because the calls were made on recorded lines or made to a third party. Flowers admitted at oral argument that he is not currently making a privilege claim.

Given this record, as in *Andersen* and *Taylor*, it is unnecessary here to fully define the contours of a Sixth Amendment violation based on claims of intrusion into the attorney-client relationship. Rather, we hold that the Sixth Amendment right to counsel is not implicated when the State provides an incarcerated defendant a process for communicating with counsel on an unrecorded phone line, and the defendant instead chooses to communicate with counsel or share defense strategies with a third party by a method the defendant knows is recorded. For this reason, based on the facts and arguments before us, the district court was not authorized by law to order a taint team.[9]

II.

Having clarified the law regarding the Sixth Amendment right to counsel in these circumstances, we turn next to whether the court of appeals erred in granting the State's petition for a writ prohibiting the district court from enforcing the taint-team order. As mentioned earlier, the court of appeals may issue a writ of prohibition only when three specific requirements are met. *See Schumacher*, 392 N.W.2d at 208. Given that it is uncontested that the district court's taint-team order is an exercise of its judicial power, and given also our finding that the district court lacks the authority to issue such an order here,

[9] Flowers also argues that the district court had "inherent authority" to order the taint team to protect his constitutional rights and administer justice. We have acknowledged that "a court has inherent judicial authority to engage in activities that are (1) necessary (2) to achieve a unique judicial function (3) without infringing on equally important legislative or executive functions." *State v. Chauvin*, 723 N.W.2d 20, 24 (Minn. 2006). But based on the specific facts here, we conclude that the exercise of such inherent authority is not warranted. Finally, we emphasize that our opinion does not address the admissibility of the recorded calls at resentencing or in other proceedings or the admissibility of other communications between Flowers and his attorney.

we turn our attention to the issue of whether enforcement of the taint-team order will result in injury for which there is no adequate remedy. *See id.* As we have explained, "[t]he writ is not one of right but of discretion and issues 'only in extreme cases where the law affords no other adequate remedy by motion, trial, appeal, certiorari, or otherwise.' " *Id.* (quoting *Wasmund v. Nunamaker*, 151 N.W.2d 577, 579 (Minn. 1967)). We have also stated that a writ of prohibition may issue "to correct an error of law in the lower court where no other adequate remedy is available to the petitioner and enforcement of the trial court's order would result in irremediable harm." *State v. Turner*, 550 N.W.2d 622, 626 (Minn. 1996).

The State argues it lacks an adequate remedy here. According to the State, the typical appeal is not available to the State because, unlike a pretrial order that has a critical impact on the State's ability to prosecute its case for resentencing or an order imposing a sentence, the taint-team order is not one for which the prosecutor may appeal as a matter of right. *See* Minn. R. Crim. P. 28.04, subds. 1–2; *State v. Zais*, 805 N.W.2d 32, 35–36 (Minn. 2011); *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009) ("We strictly construe the rules governing appeals by the State in criminal cases because such appeals are not favored.").

Flowers does not dispute that the State lacks an adequate remedy. Nevertheless, he argues the State failed to demonstrate a "sufficient" injury. We disagree. Although the State has not provided an estimate of the financial costs of forming a taint team, there will undoubtedly be costs associated with forming a team unassociated with the prosecution that is qualified to review the more than 900 calls for issues of attorney-client privilege. Moreover, enforcement of the taint-team order will impede the State's investigation. There

is certainly some harm caused by the district court ordering a taint team, and we have previously granted a petition for writ of prohibition without a definitive showing of the harm. *See Emerson*, 889 N.W.2d at 17 (concluding that there was an injury when the district court issued an order "restraining the Sheriff from complying with the DNA-collection statute without giving him notice and an opportunity to be heard"). We conclude that based on the specific facts of this case, the enforcement of the taint-team order will cause injury to the State, and the State is without an adequate remedy. Consequently, the court of appeals did not err when it granted the State's petition for a writ of prohibition.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.