No. 19-1045

IN THE

SUPREME COURT OF THE UNITED STATES

RAMINDER KAUR,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN E. FROSH
Attorney General of Maryland

CARRIE J. WILLIAMS*
CATHLEEN C. BROCKMEYER
VIRGINIA S. HOVERMILL
Assistant Attorneys General

Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422
cwilliams@oag.state.md.us

Attorneys for Respondent,
State of Maryland

Counsel of Record

QUESTION PRESENTED

Did the Maryland Court of Special Appeals correctly conclude, in an unreported opinion, that Kaur was not entitled to a presumption of prejudice and, in fact was not prejudiced, by the disclosure of her attorney/client-privileged information in the course of an ineffective assistance of counsel proceeding?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

FACTUAL AND PROCEDURAL HISTORY 7

A. Kaur's motion for new trial. 8

B. Facts established at Kaur's second trial. 11

C. Kaur's appeal. 14

REASONS FOR DENYING THE PETITION 16

I. **THIS CASE IS NOT AN APPROPRIATE VEHICLE TO CONSIDER THE QUESTION KAUR PRESENTS TO THE COURT.** 16

A. The court's opinion is unreported and has no precedential value. 17

B. The public way Kaur initiated and litigated her ineffective assistance of counsel claim means the Court will have to answer fact-based questions on an undeveloped record. 19

C. The unique procedural posture of this case left the State with little choice but to have the same team of prosecutors prosecute both trials and litigate Kaur's new trial motion. 20

II. **CASES REGULATING THE GOVERNMENT'S WRONGFUL PRE-TRIAL INTRUSION ON THE ATTORNEY-CLIENT PRIVILEGE DO NOT APPLY IN AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.** 23

A. The Court of Special Appeals correctly looked to ineffective assistance of counsel cases to address Kaur's disclosure of attorney-client privileged information. 23

B. Cases that regulate the government's improper acquisition of privileged information prior to trial do not apply, and reflect no true split of authority in any event. 25

CONCLUSION 34

TABLE OF AUTHORITIES

Page

Cases

Bishop v. Rose,
701 F.2d 1150 (6th Cir. 1983) 27

Bittaker v. Woodford,
331 F.3d 715 (9th Cir. 2003) .....23, *passim*

Board of Educ. of Rogers, Ark. v. McCluskey,
458 U.S. 966 (1982) 18

Comm. v. Flor,
136 A.3d 150 (Pa. 2016) 24

Mosley v. State,
378 Md. 548 (2003) 21

Patrick v. City of Chicago,
154 F. Supp.3d 705 (N.D. Ill. 2015) 24

State v. Bain,
872 N.W.2d 777 (Neb. 2016) 25, 30, 33

State v. Lenarz,
22 A.3d 536 (Conn. 2011) 33

State v. Robinson,
209 A.3d 25 (Del. 2019) (en banc 27, 29

State v. Toney,
315 Md. 122 (1989) 21

Taneja v. State,
231 Md. App. 1 (2016) 8

United States v. Boffa,
89 F.R.D. 523 (D. Del. 1981) 32

United States v. Levy,
577 F.2d 200 (3d Cir. 1978) 31, 32, 33

United States v. Mastroianni,
749 F.2d 900 (1st Cir. 1984) 27, 32

United States v. Morrison,
449 U.S. 361 (1981) 23, 32

United States v. Pinson,
584 F.3d 972 (10th Cir. 2009) 24

United States v. Voigt,
89 F.3d 1050 (3d Cir. 1996) 32

Weatherford v. Bursey,
429 U.S. 545 (1977) .....25, *passim*

Constitutional Provision

U.S. Const., Amend. VI..... 6, 23, 33

Rule

Md. Rule 1-104 17

Other Authorities

Dan Morse, *Washington Post*, "Maryland public defender's office says retrial is needed in Montgomery County murder case." (September 23, 2014) 9

Dan Morse, *Washington Post*, "New trial ordered in Maryland murder case with overburdened public defender[.]", published November 23, 2015..... 10

Address of Chief Justice Vinson before the American Bar Association, September 7, 1949)..... 18

STATEMENT

The State's case against Raminder Kaur was premised on the theory that in 2013, she and her husband, Baldeo Taneja, murdered Taneja's ex-wife, Preeta Gabba. In 2014, a jury sitting in the Circuit Court of Montgomery County, Maryland, found Kaur guilty of first-degree murder and related offenses, including conspiring to murder Gabba. Within days of being found guilty, Kaur filed a motion for new trial alleging ineffective assistance of her trial counsel, the District Public Defender for Montgomery County. The motion was filed by an Assistant Public Defender, who had served as a consultant on Kaur's trial team. Supporting the motion was a 13-page hand-written affidavit, prepared by the Assistant Public Defender and signed by Kaur and her trial counsel.[1]

---

[1] Kaur has been represented by several different attorneys over the course of these proceedings: the District Public Defender, who was her lead counsel in the first trial; the Assistant Public Defender, who filed the motion for new trial and prepared the hand-written affidavit; the counsel who represented her during the litigation of the motion for new trial; and, retrial counsel who represented Kaur at her second trial.

The affidavit identified many instances of counsel's alleged ineffectiveness and, as described by the Maryland Court of Special Appeals, "contained substantive information about privileged conversations between Ms. Kaur and [her trial counsel, the District Public Defender] regarding her case, as well as references to trial strategy decisions and other attorney work-product." Pet. App. 45a-46a. Though the Maryland Rules allowed Kaur to request that the affidavit be protected from public inspection, Pet. App. 17a & n.2, she did not do so, and the affidavit's contents were "made public by a subsequent article in the *Washington Post*." Pet. App. 46a.

In response to Kaur's motion, the State subpoenaed the files maintained by Kaur's trial counsel and the Office of the Public Defender. After a hearing on the scope of the request, the circuit court ordered Kaur's trial team to produce its entire defense file. Pet. App. 18a. According to the court, the breadth of Kaur's ineffective assistance claims "opened the door to everything that [her] attorney did and didn't do in preparing her defense[.]" Pet. App. 18a (internal quotations omitted). The court instructed Kaur's motion-for-new-trial counsel that Kaur "could file a motion

for a protective order" if there were any documents in the files not relevant to Kaur's ineffective assistance of counsel claims. Pet. App. 19a. Kaur did not move for a protective order during the course of the discovery or litigation of her new trial motion.[2]

Kaur was granted a new trial in November 2015. *See* Dkt. No. 444, Circuit Court for Montgomery County, Case No. 123592. In February 2016, Kaur's counsel for her retrial moved to disqualify the prosecution team who had litigated her new trial motion, on the ground that "the State ha[d] an obligation to show that there ha[d] been no derivative use of the privileged materials" acquired during the motion for new trial proceedings. Pet. App. 20a. In denying Kaur's motion, the circuit court cited the passage

---

[2] In its opinion, the Court of Special Appeals noted that Kaur filed "a motion to seal a transcript from the last day of the post-conviction hearing" and later "requested, and the court granted, her motion to seal the court's ruling on her motion for a protective order." Pet. App. 19a n.3. To be clear, she did not make these requests until months after the court granted her new trial motion. *See* Dkt. Nos. 466 & 469, Circuit Court for Montgomery County, Case No. 123592. Thus, the *Washington Post* was able to cover the hearings on her motion for new trial because no protective order had been requested and none was issued until after the conclusion of those proceedings. *See* Dan Morse, *Washington Post*, "New trial ordered in Maryland murder case with overburdened public defender," published November 23, 2015.

of time between the trial strategy disclosed during the new trial proceedings and Kaur's retrial, and the fact that Kaur's trial strategy would have to be disclosed to the State in any event if current counsel were to pursue the same strategy with an expert witness. Pet. App. 109a-110a. The court reasoned that in light of both the age of the strategy and its eventual inevitable disclosure to the State in advance of Kaur's retrial, there was "little to no evidence that [Kaur] [wa]s suffering or ha[d] suffered from the disclosure of a two and a half year old strategy that was crafted for a very different procedural circumstance out of a joint trial." Pet. App. 110a. However, the court ordered the State not to use any attorney-client communications provided in discovery, or "any testimony relating to any attorney[-]client communication" that was presented at the hearings on Kaur's new trial motion. Pet. App. 110a-111a.

At the conclusion of her retrial, Kaur was again found guilty of first-degree murder and related offenses, including conspiring to murder Gabba. On appeal, Kaur argued that the trial court erred in denying her motion to disqualify the prosecution team because the court should have presumed that she would be prejudiced if

the same prosecutors who litigated her ineffective assistance of counsel claim also prosecuted her retrial. Pet. App. 28a. Alternatively, Kaur argued that even if she was required to show prejudice, she had done so because the record showed that the prosecutors used information gained from the ineffective assistance of counsel proceedings at her retrial. Pet. App. 28a, 58a.

In an unreported opinion—which, under the Maryland Rules, cannot be cited in subsequent cases and carries no precedential value—the Court of Special Appeals disagreed and held that Kaur was not entitled to a presumption that she had been prejudiced by the prosecution team viewing the defense files. Pet. App. 55a-56a. And, after scrutinizing the records of Kaur's first and second trials, the intermediate appellate court further held that Kaur, in fact, was not prejudiced by the disclosure of her privileged information during her ineffective assistance of counsel proceedings because nothing about the prosecutors' access to the privileged information altered the course of the second trial or her ability to defend herself. Pet. App. 60a-81a.

Maryland's highest court, the Court of Appeals, denied Kaur's petition for certiorari review of the intermediate appellate

court's unreported opinion. Kaur, claiming there is a split of authority over whether a court should presume prejudice after the government has acquired a defendant's privileged information, now seeks certiorari review from this Court. But this case does not present a good vehicle for the Court's consideration of the question presented by Kaur.

First, the Court of Special Appeals' opinion is unreported and has no precedential value. Kaur's argument that the "rule" Maryland has adopted is contrary to the majority of other courts and will undermine the Sixth Amendment is fundamentally flawed. The court's decision created no Maryland law; it announced no "rule" that can be applied to cases going forward. The decision affects no one but Kaur herself, and her request for review by this Court is a request for error correction.

Second, even if this case had precedential value, fact-bound issues concerning the state of the record nonetheless make it a bad vehicle for addressing the question presented. For example, the parties dispute whether Kaur's waiver was express or implied, given the circumstances surrounding her initiation and litigation

of her ineffective assistance of counsel claim, and the record is not sufficiently developed to allow the Court to resolve that dispute.

Third, after a thorough review of both trial records, the Maryland appellate court found that Kaur was not prejudiced by the prosecution team's access to her privileged information. Consequently, even if she were entitled to a presumption of prejudice, she could not prevail on this record.

Finally, the cases Kaur points to as indicating a split of authority do not concern disclosure of attorney-client privileged material in a post-trial setting, and the Court of Special Appeals correctly declined to apply them. To the extent that body of law could conceivably affect Kaur's case, there is no split in any event.

FACTUAL AND PROCEDURAL HISTORY

On October 12, 2013, at approximately 8:00 a.m., Preeta Gabba was shot three times while walking near her home in Germantown, Montgomery County, Maryland. She died as a result of her injuries. (Tr. 11/2/16 at 10; Tr. 11/4/16 at 138-43, 242-44). The murder weapon was found in an automobile that Raminder Kaur and her husband, Baldeo Taneja, were riding in when they

were arrested the next day near their home in Nashville, Tennessee.[3] Pet. App. 10a.

A. Kaur's motion for new trial.

After a jury found Kaur guilty of first-degree murder and related charges in 2014, she filed her new trial motion alleging that her trial counsel was ineffective. The motion was accompanied by a 13-page handwritten affidavit, signed by Kaur and her trial counsel, and included a detailed account of specific instances of counsel's alleged ineffectiveness. Kaur alleged in the motion that her counsel "failed to prepare for trial, and had incorrectly advised [her] that the trial court would not permit her to testify in her own defense." Pet. App. 16a-17a. In the accompanying affidavit, Kaur alleged that her counsel failed to (1) meet with her at "crucial times leading up to trial," (2) "raise the issue of [her] competency" to stand trial, (3) give "timely notice of two expert witnesses," resulting in them not testifying; and (4) "disclose and/or call

---

[3] For a summary of the evidence presented at Kaur's first trial, see *Taneja v. State*, 231 Md. App. 1 (2016), *cert. denied*, 452 Md. 549 (2017).

character witnesses to testify as to [her] character traits, religious and cultural beliefs, and her relationship with" her husband Taneja. Pet. App. 17a-18a. The contents of the affidavit were the subject of extensive reporting by the *Washington Post*. *See, e.g.*, Dan Morse, *Washington Post*, "M[aryland] public defender's office says retrial is needed in Montgomery County murder case." (September 23, 2014).

In response to Kaur's motion, the State subpoenaed all of the defense files and, over a defense objection to the scope of the State's request for discovery, the circuit court ordered full disclosure of the files because Kaur's claim was so broad that it "opened the door to everything . . . [her] attorney did and didn't do in preparing her defense in this case." Pet. App. 18a (internal quotations omitted). At the same time, the court told Kaur's counsel on the motion for new trial that Kaur "could file a motion for a protective order" for any document that was "irrelevant to the issues" Kaur raised in her new trial motion. Pet. App. 19a. A motion for protective order was not filed until months later. *See* note 2, *supra*.

In a multi-day hearing on her motion, Kaur called several witnesses to testify about the allegations of counsel's

ineffectiveness included in her affidavit. On the final hearing date, the court heard arguments of counsel and issued its ruling from the bench. Pet. App. 19a. At the time, Kaur made no request to seal any of the testimony or the court's ruling. In the absence of any sealing or other protective order, the Washington Post continued to publish articles about Kaur's ineffective assistance of counsel claim, quoting extensively from the circuit court's ruling granting Kaur a new trial. *See* Dan Morse, *Washington Post*, "New trial ordered in Maryland murder case with overburdened public defender[.]", published November 23, 2015.

In advance of Kaur's retrial, her counsel moved to disqualify the prosecutors who had litigated the new trial motion and for an order "barring the evidentiary use of [her] privileged disclosures" as well as other relief not relevant here. Pet. App. 20a. The court denied Kaur's motion. While expressing its view that Kaur had expressly waived her attorney-client privilege, the court sought to "avoid another round of post-conviction hearings" by "craft[ing] a remedy as though it were an implied waiver," and ordered the prosecutors not to use any information obtained from Kaur's

affidavit or the new trial proceedings at Kaur's second trial. Pet. App.105a, 110a-111a.

B. Facts established at Kaur's second trial.

Gabba and Taneja were married and living in India when Taneja moved to the United States. Gabba remained in India, and Taneja began a relationship with Kaur. (Tr. 11/3/16 at 153-58).

By 2011, Gabba had also moved to the United States and she and Taneja became embroiled in "very contentious" divorce proceedings after Gabba learned of Taneja's relationship with Kaur. (Tr. 11/1/16 at 93). In April 2013, Gabba initiated contempt proceedings after Taneja stopped making alimony payments earlier that year; a hearing in the contempt proceedings was scheduled for October 10, 2013. (Tr. 11/1/16 at 107-10).

In September 2013, Taneja and Kaur were living in Nashville, Tennessee. (Tr. 11/2/16 at 88). On September 28th, Taneja and Kaur were captured on store video purchasing two handguns, a Ruger GP100 and a Ruger LCR; Taneja completed the paperwork for the purchase. (Tr. 11/1/16 at 179-83). They also purchased a cleaning cloth, a gun rod, a bottle of cleaning oil,

pepper spray, a pocket holster and two boxes of ammunition. (Tr. 11/1/16 at 185). That same day, they traveled to a costume store and purchased a wig. (Tr. 11/2/16 at 92-93; Tr. 11/4/16 at 123-26).

On October 4th, they traveled to Rockville, Maryland and stayed at a Red Roof Inn. (Tr. 11/1/16 at 228-31). They paid cash for the room and left the next day. (Tr. 11/1/16 at 231). According to GPS data, their trip included a late-night stop on a road that ran parallel to Gabba's apartment complex. (Tr. 11/2/16 at 107; Tr. 11/4/16 at 242).

They returned to the Red Roof Inn a week later on October 11, 2013. (Tr. 11/1/16 at 232). The following morning, GPS records showed that they left the Red Roof Inn at approximately 10:00 a.m.; they made a brief stop and, a little over an hour later, arrived at an Amway conference being held at a hotel in Washington, D.C. (Tr. 11/2/16 at 145-50). They left the conference a short time later after meeting with another couple and after texting a colleague that Kaur "was not feeling well." (Tr. 11/2/16 at 154). They then drove approximately twelve hours to near Farragut, Tennessee. (Tr. 11/2/16 at 154-58).

The following morning, they were arrested for Gabba's murder as they were driving away from their Nashville residence. (Tr. 11/3/16 (Ruvin) at 11). When stopped, Kaur told the officers, who had not identified themselves as Maryland police, that she knew why they were there because she heard "about what had happened in Maryland." (Tr. 11/3/16 (Ruvin) at 11). A search of the vehicle resulted in the seizure of two handguns, including the murder weapon, a backpack containing a wig, black hair dye, and a note found in Kaur's purse in her handwriting that read: "Calm you down," "we're now in TN . . . in the car, my home." (Tr. 11/3/16 (Ruvin) at 24-27). Police also recovered their cellphones, a Garmin GPS, Kaur's purse containing $2,800, and Taneja's wallet containing $800. (Tr. 11/3/16 at 221-27). In Taneja's wallet was a card with Gabba's address (written by Kaur) and labeled "Dragon." (Tr. 11/3/16 at 221-27). Other relevant writings were found in Kaur's residence. (Tr. 11/3/16 at 221-27). Web browsing history from Kaur's cellphone showed a download of a stress management video on October 13th. (Tr. 11/2/16 at 159-60).

C. Kaur's appeal.

On appeal, the Court of Special Appeals acknowledged "some merit" in the State's and the trial court's view that Kaur had expressly waived her privilege, given the public way she litigated the motion for new trial, but the intermediate appellate court ultimately concluded that the waiver was best viewed as implied. Pet. App. 46a, 43a. Citing the circuit court's order as to the scope of the State's discovery request, and sharing the circuit court's concern that "treating the filing of the affidavit . . . as a comprehensive waiver" of Kaur's privilege "might well result in another round of post-conviction proceedings," the appellate court held that Kaur's waiver was limited to the pursuit of her ineffective assistance of counsel claim. Pet. App. 47a n.10.

However, the Court of Special Appeals declined to presume that Kaur was prejudiced when the same prosecutors who litigated the new trial motion also prosecuted her retrial. After a thorough review of both trial records, the court concluded that Kaur was not prejudiced at her retrial by the disclosure of privileged information to the prosecution team during the litigation of her ineffective assistance of counsel claim. In so ruling, the court addressed each

instance Kaur identified as showing she was prejudiced and found that none of the cited examples demonstrated that she had been prejudiced by the prosecutors' access to her privileged information.

For example, Kaur claimed that the prosecutors' access to her privileged communications enabled them to anticipate her defense trial strategy, which was to rely on "cultural norms" to paint her as subservient to Taneja. The court debunked that assertion by pointing out that this strategy was first put forth by Kaur's counsel in his opening statement at Kaur's first trial. Pet. App. 61a. The court further rejected Kaur's claim that the prosecutors would have had an "unfair advantage in cross-examining" her at her retrial, finding that it was rendered moot by Kaur's choice not to testify. Pet. App. 63a, 66a. The court also rejected Kaur's claim that the record showed the prosecutors had an "unfair insight into" divergent defense strategies that her first trial counsel considered, i.e., whether to argue that Taneja or a third person was the shooter. Based on its review of both trial records, the court concluded that, "[i]n reality" the strategy at "both trials was the same"—that Taneja "was responsible for Ms. Gabba's death." Pet. App. 72a.

The court also analyzed in detail Kaur's claims about differences in prosecutors' approach to two items of evidence at the two trials: (1) a bag, found in the back seat of Taneja's and Kaur's car when they were arrested, and (2) the murder weapon, which had Kaur's DNA on it. The court found that new testimony about the wig at Kaur's retrial actually *helped* her case,[4] and the State's theory that Taneja had cleaned the gun after murdering Gabba remained consistent throughout both trials.[5] Pet. App. 66a-81a.

REASONS FOR DENYING THE PETITION

I.

THIS CASE IS NOT AN APPROPRIATE VEHICLE TO CONSIDER THE QUESTION KAUR PRESENTS TO THE COURT.

For at least three reasons, this case is not an appropriate vehicle to resolve whether a court should presume prejudice when

---

[4] The new State witness at Kaur's retrial testified that the bag was for a missing wig that was intended for use by a man. Pet. App. 71a.

[5] The court's review of the record led it to find that "[t]hroughout both trials the [p]rosecution [t]eam alleged that Taneja had cleaned the murder weapon after murdering Ms. Gabba." Pet. App. 77a.

the government lawfully acquires a defendant's attorney-client privileged information during the litigation of an ineffective assistance of counsel claim: (1) the challenged decision is unreported and could never serve as precedent; (2) deciding the question presented would require this Court to resolve factual issues as to which the record is underdeveloped; and (3) the record that does exist amply confirms that Kaur suffered no prejudice.

A. The court's opinion is unreported and has no precedential value.

First, Kaur challenges an unreported opinion from Maryland's intermediate appellate court. Under the Maryland Rules, the unreported opinion has no precedential value, even in trial courts. *See* Md. Rule 1-104 (providing that "[a]n unreported opinion of the Court of Special Appeals . . . is neither precedent within the rule of stare decisis nor persuasive authority"); Pet. App. 3a-4a. (opinion states that "it may not be cited in any paper, brief, motion, or other document filed in [the Court of Special Appeals] or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority."). If, in another case, the same issue comes before a Maryland trial court or a

different appellate panel, the result could be entirely different. Any decision would be subject to review in the Court of Appeals of Maryland which, as the opinion in this case recognizes, has not yet addressed whether prejudice is presumed under these circumstances. Pet. App. 28a.

The decision thus affects no one beyond the parties to the case. *See Board of Educ. of Rogers, Ark. v. McCluskey*, 458 U.S. 966, 971 (1982) (Stevens, J., dissenting) ("'To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.'" (quoting Address of Chief Justice Vinson before the American Bar Association, September 7, 1949)). Therefore, Kaur is wrong in suggesting that the unreported decision here creates a split in authority between Maryland and other jurisdictions. There is no Maryland precedent addressing prejudice when the State acquires privileged information within the context of an ineffective assistance of counsel claim. Pet. 2-4, 8-9. Hence, this case presents no occasion for this Court to reconcile a divergence of precedents in the lower courts.

B. The public way Kaur initiated and litigated her ineffective assistance of counsel claim means the Court will have to answer fact-based questions on an undeveloped record.

Second, the Maryland Court of Special Appeals' opinion also recognizes the legitimate and complicating question as to the nature of Kaur's waiver in light of the circumstances surrounding the initiation and litigation of her ineffective assistance of counsel claims. Pet. App. 46a-47a & n.10. Through no fault of the State, Kaur's "attorney-client privilege is currently in tatters." Pet. App. 7a n.1. The appellate record explains why this is so, but not at whose direction it occurred—that is, the extent to which responsibility for the waiver of the privilege lies with Kaur, rather than her counsel. These circumstances beget the question whether Kaur's waiver should be deemed express or implied.

Both the circuit court and the Court of Special Appeals considered that Kaur may have expressly waived her privilege, but determined to treat her waiver as an implied waiver and further limited it to encompass only litigation of her ineffective assistance of counsel claims. Both courts saw the merit in doing so, to avoid the need for further litigation that might otherwise ensue. Pet.

App. 23a n.5, 47a n.10. But to answer the question posed by petitioner's argument—whether the circuit court was required to presume prejudice attributable to the prosecution team's acquisition of privileged information—first requires a determination whether Kaur, by her actions, expressly waived her right to assert any privilege concerning the acquired information.

Because this alternative ground for affirmance is logically antecedent to the prejudice issue, it cannot be avoided if this Court grants review. The need to address this first-level, fact-bound, express versus implied issue, on a record that has not been developed on this point, because the Maryland courts *assumed* an implied waiver, provides yet another reason why the petition should be denied.

C. The unique procedural posture of this case left the State with little choice but to have the same team of prosecutors prosecute both trials and litigate Kaur's new trial motion.

Kaur and her team of attorneys chose to litigate her ineffective assistance of counsel claim before her first trial was

even concluded.[6] The Assistant State's Attorneys who prosecuted Kaur's first trial were best suited to litigate her ineffective assistance of counsel claim when the claim was filed almost immediately after the conclusion of the guilt/innocence phase of Kaur's trial. They were also best suited to retry the case after Kaur was granted a new trial. Indeed, these experienced prosecutors were indispensable, given the nature of the charges and the complexity of the prosecution, which necessitated obtaining and presenting evidence from two states and a foreign country, and included DNA and GPS data experts. Prosecutors in Maryland are not fungible, do not easily trade serious cases, and "the State's interest in maintaining prosecutorial continuity is . . . significant[.]" *State v. Toney*, 315 Md. 122, 132 (1989).

Kaur, having chosen when and how to litigate her ineffective assistance of counsel claim, asked the court for an extraordinary remedy: a prohibition on the State's use of her privileged

---

[6] In Maryland, ineffective assistance of counsel claims are typically deferred for collateral review after the direct appeal process. *See Mosley v. State*, 378 Md. 548, 558-59 (2003)). ("[G]enerally a post-conviction proceeding is the 'most appropriate' way to raise a claim of ineffective assistance of counsel[.]").

information and the exclusion of the prosecution team based on a presumption of prejudice. The circuit court granted her the former and denied her the latter and, on this record, even if Kaur were entitled to a presumption of prejudice, that presumption has been rebutted. More important, giving her the windfall of a third trial based on a presumption of prejudice would be inappropriate after the Court of Special Appeals has specifically found that she was not prejudiced by the prosecution team's familiarity with her privileged information. Because it would not serve the proper administration of justice to grant Kaur a new trial based on a presumption of prejudice after the Court of Special Appeals thoroughly reviewed this record and, in fact, found no prejudice, this case is not a proper vehicle to consider the question presented in Kaur's petition.

II.

CASES REGULATING THE GOVERNMENT'S WRONGFUL PRE-TRIAL INTRUSION ON THE ATTORNEY-CLIENT PRIVILEGE DO NOT APPLY IN AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

A. The Court of Special Appeals correctly looked to ineffective assistance of counsel cases to address Kaur's disclosure of attorney-client privileged information.

Broadly speaking, "cases involving Sixth Amendment 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*, 449 U.S. 361, 364 (1981). Kaur raises a Sixth Amendment claim, but the cases she cites in her petition concern a different branch of the Sixth Amendment tree than this case.

The Court of Special Appeals turned to *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc), which, like this case, addressed disclosure of attorney-client privileged information in an ineffective assistance of counsel claim. *Bittaker* held that the defendant impliedly waived the privilege for purposes of litigating

that claim only, so it limited use of privileged material to the post-conviction proceeding.[7] Other jurisdictions have looked to *Bittaker* to define how a court should limit use of privileged materials.[8] Where a defendant has not sought the court's intervention to receive protection, she affirmatively waives the privilege.[9]

---

[7] Because the court affirmed the district court's preemptive protection of the materials, there was no suggestion that Bittaker suffered prejudice and no need to decide whether the court should impose any presumption of prejudice. Post-conviction cases typically do not present the problem Kaur created here with her preemptive disclosure, and are not about how to *remedy* disclosure of privileged material, but whether privileged materials should be disclosed in the first place.

[8] *See, e.g.*, *United States v. Pinson*, 584 F.3d 972, 979 (10th Cir. 2009) (holding that, where government sought affidavit from Pinson's attorney, district court did not abuse discretion in ordering counsel to provide one, because Pinson's challenges to adequacy of representation waived privilege); *Comm. v. Flor*, 136 A.3d 150, 161 (Pa. 2016) (holding that trial court was required to determine, upon State's motion for production of documents in ineffective assistance claim, what portions of trial counsel's file were privileged before requiring defense counsel to deliver entire file to prosecutors).

[9] *See Patrick v. City of Chicago*, 154 F. Supp.3d 705 (N.D. Ill. 2015) (deeming defendant to have waived privilege, where he filed post-conviction petition alleging ineffective assistance counsel that included affidavit discussing privileged communications, and did not seek a protective order limiting its use until decades later).

Here, the Court of Special Appeals applied *Bittaker* and concluded that Kaur's initiation of an ineffective assistance of counsel claim impliedly waived her attorney-client privilege, but it limited that waiver to the new trial proceedings. Pet. App. 45a-47a. The circuit court did not initially limit the State's use of Kaur's privileged information to her new trial motion (because Kaur did not ask for that limitation), but the court's later order, issued in response to her request long after the new trial proceedings had concluded, comports with *Bittaker*'s mandate limiting an implied waiver to the proceedings challenging counsel's effectiveness. *See* Pet. App. 43a.

B. Cases that regulate the government's improper acquisition of privileged information prior to trial do not apply, and reflect no true split of authority in any event.

The Court of Special Appeals rejected Kaur's effort to apply decisions, starting with *Weatherford v. Bursey*, 429 U.S. 545 (1977), and including *State v. Bain*, 872 N.W.2d 777 (Neb. 2016) (which Kaur discusses at length), that consider whether to disqualify particular prosecutors before a defendant's criminal

trial. Kaur continues to argue that these decisions required the court to presume that she was prejudiced by the State's access to her defense files and, thus, to disqualify the initial prosecution team from prosecuting her retrial, because they also litigated her new trial motion. However, she is wrong in suggesting a need for this Court to provide direction based on her mischaracterization of the Maryland intermediate appellate court's unreported opinion as a "stark outlier" in the development of cases that followed *Weatherford*. Pet. 16.

Weatherford regulates the government's use of privileged information acquired in a context that differs from *Bittaker* and this case. Under *Weatherford*, when the government obtains privileged information prior to trial, by stealth or inadvertence,, a court must ensure that it does not benefit from that knowledge at trial. Therefore, a court will occasionally presume prejudice to the defendant, which in turn can lead to remedies ranging from affirmance (where the government rebuts a prima facie showing of

prejudice), to reversal and disqualification of a prosecution team.[10] These remedies reflect the purpose of sanctioning the government for subterfuge or improper use of accidentally-acquired privileged information where the privilege has not been waived.[11]

That body of law does not apply in a case like this, which involves a defendant's intentional disclosure of privileged information and resulting waiver, albeit possibly implied, of the attorney-client privilege. The government's acquisition of privileged material here was initiated *by Kaur* when she filed the

---

[10] *See United States v. Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984) (affirming conviction, where informant participated in meetings between defendant and later met with government agents, and holding that government successfully rebutted defendant's prima facie showing of prejudice by showing that it never used the information); *State v. Robinson*, 209 A.3d 25, 59-60 (Del. 2019) (en banc) (finding that defendant suffered actual prejudice as a result of prosecutors seeing privileged communications after search and seizure of prison cell, and declining to dismiss indictment, but disqualifying prosecutors from participating in retrial).

[11] *See, e.g., Bishop v. Rose*, 701 F.2d 1150, 1157 (6th Cir. 1983) (holding that prosecutor's impeachment of defendant at trial with his 14-page handwritten statement to his attorney, which had been seized during search of cell, did *in fact* prejudice Bishop's case and violate his right to counsel).

new trial motion. She disclosed privileged information in two ways: first in her detailed affidavit, and later in response to a court order, after which the defense sought only limited protection from future disclosure.[12] *Weatherford* does not apply on these facts, and the Court has no reason to revisit the state of the law in an area that is, at most, tangentially related to this case.

The Court of Special Appeals appropriately rejected Kaur's request that it presume she had suffered prejudice as a result of the disclosure of the defense files and, from there, disqualify the prosecution team. As it noted, no court has applied the *Weatherford* remedies in the post-conviction forum. Pet. App. 50a & n.11. That is because the "presumption of prejudice" operates in a different context: when the government interferes with privileged communications prior to trial, thereby obtaining

---

[12] Kaur repeatedly uses phrases that obscure her own role in the disclosure, couching the prosecutors' review of the materials as an "intrusion" and stating that the privileged information "was disclosed" to the government. Pet. 3. She fails to mention that she first disclosed privileged information by filing the affidavit without seeking to limit public inspection of it, and that she never sought the court's protection in connection with the defense files, even though the court told the parties that they should return to the court if they could not work out details of disclosure. Pet. App. 19a.

information that it then seeks to use at a later proceeding. Such a sanction would be inappropriate when the disclosure here was justified, and prosecutors were serving the "legitimate state motivation" of defending a post-conviction claim. *State v. Robinson*, 209 A.3d 25, 59-60 (Del. 2019) (internal quotations omitted).

The Maryland appellate court identified another feature differentiating this case. Where government intrudes by, for example, searching a defendant's jail cell pursuant to a warrant and then using privileged documents it obtains in the course of the search, or using an undercover agent who is privy to a defendant's meeting with her attorney, a defendant has not waived the attorney-client privilege or consented to the government's acquisition of the material. *See, e.g.*, Pet. App. 50a (explaining that "there is nothing in [*Bain*] that suggests that Bain either expressly or impliedly waived his privilege"). Here, on the other hand, there was no question that Kaur waived her attorney-client privilege, either expressly (as the circuit court believed she did) or impliedly (as the Court of Special Appeals held). Whichever the waiver type, this case is outside the *Weatherford* framework. Pet. App. 55a-56a.

Kaur argues that the Court of Special Appeals did not just reject the idea of presuming prejudice to a defendant (as in *Bain*), but actually reversed the standard so that a defendant must affirmatively prove prejudice. According to Kaur, this standard unfairly requires that a defendant demonstrate "that a prosecutor's review of privileged defense strategy . . . caused a seismic shift in trial strategy and tactics." Pet. 14. The Maryland appellate court did not reject *Bain* or impose such a standard, but merely observed that *Bain* was unpersuasive as "factually distinguishable," Pet. App. 48a, for the simple reason that unsanctioned government acquisition of privileged materials of the sort condemned in *Bain* is entirely different from the government using documents turned over to it for the legitimate purpose of defending an ineffective assistance claim as happened here.

Beyond that, *Bain* pointed out that "a defendant cannot know how the prosecution could have used confidential information in its possession." 872 N.W.2d at 791. That may be the case where, as in *Bain* and other governmental intrusion cases, the prosecution obtains privileged information before the initial trial takes place. However, when, as here, the information is obtained

after the initial prosecution, a "seismic shift" in trial strategy—as demonstrated by, for example, prosecutors changing the theory of the case, or calling different witnesses in a retrial—would serve as strong evidence of prejudice stemming from the disclosure. On the other hand, a defendant can be reasonably assured that the disclosure did not operate to her detriment if a subsequent prosecution tracks the initial prosecution (as the Court of Special Appeals determined here that it did). Kaur's inability to identify any shift in the prosecutorial strategy between her first and second trials is not a basis for presuming that she suffered prejudice; to the contrary, it serves as potent proof that she did not.

Kaur also suggests that courts in different jurisdictions have taken "varied approaches" to determining whether to presume prejudice in the context of governmental intrusion. Pet. 16. Any "variation" originated with the decision of the United States Circuit Court for the Third Circuit in *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978) (dismissing drug distribution conviction where government's undercover agent was privy to conversations between defendant and his counsel).

Any divergence is minor and does not require this Court's intervention to resolve—least of all through this case, which does not involve government intrusion. The Court of Special Appeals correctly declined to employ the presumption of prejudice because the line of cases that Kaur continually raises involves illegitimate governmental intrusion with no legitimate state motivation, rather than regulation of privileged information in an ineffective assistance claim. Thus, the Court of Special Appeals declined to apply *Weatherford*, such that *Levy* is beside the point, and *Kaur* is not the "outlier" that Kaur claims it is. Pet. 16.

Even the Third Circuit has retreated from *Levy*—a retreat that other jurisdictions have also perceived.[13] Thus, the two cases

---

[13] *See United States v. Voigt*, 89 F.3d 1050, 1071 n.9 (3d Cir. 1996) (noting that "to the extent that *Levy* can be read as holding that certain government conduct is per se prejudicial, we note that the Supreme Court has since held to the contrary" (citing *Morrison*, 449 U.S. at 365-66)); *see also United States v. Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984) (rejecting the *Levy* presumption of prejudice standard); *United States v. Boffa*, 89 F.R.D. 523, 533 (D. Del. 1981) (noting that *Morrison* "effectively repudiated" the line of cases, including *Levy*, that "established a per se rule of prejudice").

that applied *Levy* that Kaur cites are the "outliers" in any event,[14] and the question about whether, or when, a court can or should presume prejudice is not the split that Kaur suggests.

Any variation in the actual prejudice standard does not apply here. *Levy* involved pre-trial prosecutorial conduct that impliedly stopped just short of nefarious and therefore warranted punishment—hardly appropriate here, where the government did not violate any order or obtain any documents without Kaur's knowledge. The only common thread between the cases Kaur cites and this case is the existence of a Sixth Amendment right, and that gives this Court no reason to grant the Petition.

---

[14] *See* Pet. 11-12 (citing *Bain*, 872 N.W.2d at 793, and *State v. Lenarz*, 22 A.3d 536 (Conn. 2011)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 12, 2020

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Carrie J. Williams

CARRIE J. WILLIAMS*
CATHLEEN C. BROCKMEYER
VIRGINIA S. HOVERMILL
Assistant Attorneys General

Attorneys for Respondent,
State of Maryland

* *Counsel of Record*