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 APPEALS OF MARYLAND

REPLY BRIEF FOR THE PETITIONER

SAMUEL BRYANT DAVIDOFF
Counsel of Record
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
sdavidoff@wc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other authorities:

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Raminder Kaur was tried by the same prosecutors who had subpoenaed and reviewed her original trial counsel's defense file. The State cites no authority that permits this result. Nor, then, any supporting the test the Maryland court applied in blessing this result—namely, that a defendant suffers prejudice from a tainted trial only where the defendant's privileged disclosures resulted in a case-altering change in the prosecution's strategy. The decision the State defends is without precedent and contradicts the federal courts of appeals and other state

courts of last resort, which have held a prosecutor's knowledge of privileged defense trial strategy renders the ensuing conviction a Sixth Amendment violation. Far from seeking a "windfall" (Br. in Opp. 22), Ms. Kaur seeks only what she is entitled to: one fair trial.

A. The State Ignores the Maryland Court's Departure From Decisions of the Federal Courts of Appeals and State Courts of Last Resort

1. The State cites no federal court of appeals or state court of last resort that has ever suggested that the Constitution permits trial by prosecutors who accessed and reviewed defense counsel's complete file, which contained reams of privileged trial strategy communications and work product.[1] As the lead prosecutor on Ms. Kaur's retrial admitted, "I have all the [privileged] information in my head . . . . I can't, none of us can ever take out what's in our head." T.(11/01/16) 11:1–11.

Nor does the State cite any authority sanctioning a retrospective review to determine whether the prosecutors' trial actions might have been different but for their exposure to the defense's privileged communications and trial strategy, let alone authority supporting the standard the court imposed here—making a finding of a Sixth Amendment violation contingent on a

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[1] The files Ms. Kaur was ordered to produce to the State included: (1) extensive written correspondence from Ms. Kaur to her counsel regarding the charges against her; (2) written summaries of meetings between Ms. Kaur and her counsel; (3) notes Ms. Kaur exchanged with her counsel during her trial; (4) e-mails between Ms. Kaur's attorneys discussing trial strategy; and (5) various memoranda and e-mails regarding the defense's factual investigations. Pet. 6.

showing that receipt of the privileged information caused a seismic shift in the government's trial strategy and tactics.[2] And the State makes no effort to defend placing such a burden on the defendant—who has no insight into the bases for the prosecution's investigative and trial strategies.

2. The State's principal response to those authorities is to contrast circumstances where the government obtained privileged defense information through a "wrongful pre-trial intrusion" with those where, as here, the government obtained the privileged information through lawful subpoena. Br. in Opp. 23. This is a distinction without a difference: Ms. Kaur's Sixth Amendment right does not turn on how the prosecution became tainted.

The cases on which the State relies in the ineffective-assistance context (*see* Br. in Opp. 24 n.8) only highlight the error in the court's decision below. To be clear, Ms. Kaur does not dispute that by asserting an ineffective assistance claim, she waived privilege for the purposes of the proceeding challenging the constitutionality of her first trial. The law is clear that an implied waiver attaches in the ineffective-assistance context, to permit the government discovery to test the defendant's claims.[3] The much broader proposition advanced by the State,

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[2] The Court reasoned that Ms. Kaur was not prejudiced because "[t]he State's theory of the case did not change between trials": "In each, the State theorized that [the] murderer could have been either [petitioner or her husband], but that it was more likely [petitioner]." Pet. App. 68a–69a.

[3] Thus the cases the State cites as following *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003), for this proposition (Br. in Opp. 24 & n.8), have no bearing on Ms. Kaur's petition.

however—that Ms. Kaur was required to do more than resist the subpoenas to preserve her privilege for purposes of a retrial (Br. in Opp. 24)—is without support.[4] As this Court made clear in *Simmons v. United States*, 390 U.S. 377, 393-94 (1968), it is "intolerable that one constitutional right should have to be surrendered in order to assert another." The State relies on *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (Br. in Opp. 23-25), but that decision only supports Ms. Kaur: there, the court observed that the trial court would have abused its discretion had it not imposed restrictions on later use of the defense file (*id.* at 728), and cautioned that allowing the retrial prosecutors access to the defense file would "immediately and perversely skew the second trial in the prosecution's favor." 331 F.3d at 722.

The cases outside the ineffective-assistance context likewise confirm the prejudice to a defendant that would result from trial by tainted prosecutors. The State misses the point in its focus on a presumption of prejudice: some courts have held a defendant is presumptively prejudiced where the prosecution receives privileged trial strategy, and other courts have allowed the government to *disprove* any prejudice in those circumstances. Pet. 8-13. But no court has sanctioned what the court did here, placing the burden on the defendant to show a change in trial strategy at the most fundamental level. Pet. 14. Far from an "extraordinary remedy" (Br. in Opp. 21), appointment of

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[4] The State contends that Ms. Kaur was required to seek "the Court's intervention to receive protection." Br. in Opp. 24. She did so, by resisting the subpoenas in the first instance, and then, later, when a new trial was awarded, by immediately moving to bar the State from using her privileged materials, either expressly through introduction into evidence or implicitly through prosecution by tainted prosecutors.

an untainted prosecution team is precisely what was required under these circumstances.

The State's opposition also attempts to make a temporal distinction between pre-trial and post-trial intrusions into a defendant's privileged information. Br. in Opp. 30-31. Any such distinction is not only unsupported by the case law (the State cites none), but also defies logic: the State had the chance to appoint untainted prosecutors *before* the retrial (indeed, Ms. Kaur moved for an order requiring it to do so), and so could have avoided tainting the trial. The contention that Ms. Kaur should bear the burden of demonstrating prejudice because she can compare her second trial to her first fails to acknowledge the key principle underlying this Court's precedent and the decisions of the federal courts of appeals and state courts of last resort: it is impossible to know, especially after the fact, how the prosecution's access to the privileged defense materials shaped its strategy. Pet. 12, 14.

3. The State distracts from the question presented in its focus on whether Ms. Kaur may be faulted for failing to earlier raise to the State that any retrial would require untainted prosecutors. The State subpoenaed Ms. Kaur's entire defense file, and the court (over Ms. Kaur's objection) ordered it produced. The State chose to litigate the ineffective-assistance proceeding with the same prosecution team who handled the first trial, and then chose (again over Ms. Kaur's objection) to use those tainted prosecutors to retry Ms. Kaur. As the Court of Special Appeals noted, "[t]hroughout the post-conviction proceedings, Kaur and her defense team made it clear that they intended to waive the attorney-client privilege only for the purposes of those proceedings." Pet. App. 43a. Citing *Bittaker v. Woodward*, 331 F.3d 715 (9th Cir.

2003), the court rejected as "unreasonable" the State's argument that "Ms. Kaur's claim of ineffective assistance of counsel [should be treated] as constituting a comprehensive waiver of attorney-client privilege and work product for all purposes." Pet. App. 43a.

Further, the State's focus on the unsealed affidavit filed in support of Ms. Kaur's ineffective-assistance challenge (Br. in Opp. 2, 9, 28 n.12) ignores both the context in which it was disclosed—a proceeding that by its nature required Ms. Kaur to challenge her counsel's conduct—and also that the vast majority of Ms. Kaur's privileged information was disclosed to the State not through Ms. Kaur's affidavit but in response to the State's own subpoenas for the defense's "entire" trial and investigative file.[5] Any request by Ms. Kaur to seal the proceedings would not have shielded those materials *from the State*, and it is the *State's* access that required the appointment of an untainted prosecution team for the retrial.[6]

The lone authority the State cites in support of its argument that Ms. Kaur's privilege waiver should extend to the retrial is *Patrick v. City of Chicago*, 154 F. Supp. 3d 705 (N.D. Ill. 2015). But *Patrick* is readily distinguishable

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[5] The State confuses the record in its suggestion that the trial court invited Ms. Kaur to seek a protective order in connection with the State's subpoenas (Br. in Opp. 2-3, 9): the trial court determined that the entire file was *presumptively relevant* because the ineffective assistance claim "opened the door to everything that [her] attorney did and didn't do in preparing her defense" and invited Ms. Kaur to seek further relief only if her defense counsel's files included documents that were "irrelevant to" Ms. Kaur's ineffective assistance of counsel claims. Pet. App. 18a-19a.

[6] For that reason, the coverage by the Washington Post (Br. in Opp. 2, 3, 9, 10) is irrelevant.

as it does not even arise in the retrial context; rather, there the court declined to extend *Bittaker* to protect a plaintiff in a civil § 1983 lawsuit. *Id.* at 712-13.

B. The Decision Below Is a Proper Vehicle For Addressing the Important Question Presented

For all of the reasons above, this case presents an opportunity for this Court to correct the Maryland court's departure from the holdings of the other federal and state courts regarding the Sixth Amendment's protection of the attorney-client privilege and defense trial strategy. In arguing that this case is not the right vehicle to decide this important constitutional question, the State ignores its public importance, and focuses instead on irrelevant facts and other red herrings.

1. The lack of precedential value of the decision below does not detract from the importance of the question presented and appropriateness of Ms. Kaur's case as a vehicle for answering it. The question presented was squarely before the Maryland courts below—it was fully briefed and was one of two issues the Court of Special Appeals decided in its sixty-page opinion—and its answer is important to criminal defendants beyond just Ms. Kaur. A decision from this Court would confirm the importance of the Sixth Amendment, a right this Court has held "fundamental to our system of justice" and "meant to assure fairness in the adversary criminal process." *United States v. Morrison*, 449 U.S. 361, 364 (1981). The issue affects all criminal defendants as they consider whether to assert ineffective assistance of counsel claims, and whether it is safe to confide in their attorneys in the first place.

The unreported nature of the decision below is of no consequence to this Court's decision whether to grant

review. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). This Court regularly grants certiorari to review unpublished opinions. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015); *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Old Chief v. United States*, 519 U.S. 172, 177 (1997). Review is particularly appropriate here where the length of the opinion—sixty pages, with 43 pages devoted to the Sixth Amendment issue—suggests that the Court of Special Appeals chose not to publish the opinion as a means to avoid binding law and potential review. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (Mem.) (2015) (Thomas, J., dissenting from denial of certiorari) ("[T]he decision below is unpublished and therefore lacks precedential force . . . . But that in itself is yet another disturbing aspect of the [decision], and yet another reason to grant review. The Court of Appeals had full briefing and argument . . . . It analyzed the claim in a 39–page opinion . . . ."); *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review.").

2. The State is wrong that this Court would have to resolve disputed factual questions were it to grant certiorari. For all the reasons noted above (pp. 5-6), the State's arguments regarding waiver are a distraction. The State provides no authority or reasoning in support of its suggestion that whether there was an express waiver may turn on whether "the responsibility for the waiver of privilege lies with Kaur" or "her counsel." Br. in Opp. 19. Nor does the State identify any other area where further factual development is needed.

3. The State's contention that Ms. Kaur "left the State with little choice" but to retry her with tainted prosecutors (Br. in Opp. 20) should be dismissed out of hand, and certainly does not weigh against this Court's review. If anything, the procedural posture of this case reveals the importance of ensuring the Sixth Amendment's protections, so that defendants may freely confide in their counsel without fear that those communications will be used against them should that counsel prove constitutionally deficient.

Certainly Ms. Kaur should not be penalized for immediately bringing to the attention of the judicial system the error in her first trial. It was apparent by the end of Ms. Kaur's trial that she had not received the effective assistance of counsel guaranteed by the Sixth Amendment. As was her right under Md. Rule 4-331(a), Ms. Kaur moved for a new trial within the ten-day period proscribed in the Maryland Rules. Ms. Kaur was entitled to seek that relief (just as the State was entitled to oppose the relief, and to seek discovery into her privileged files). Ultimately, Ms. Kaur succeeded in convincing the same judge who had presided over her trial that she had been denied the effective assistance of counsel. In short, the notion that Ms. Kaur should have *delayed* raising her *successful* constitutional challenge is absurd.[7] The State,

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[7] The costs of failing to raise ineffective assistance of counsel claims at the trial stage are well documented. *See, e.g.*, Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, Crim. Just. Fall 2009 at 6, 7 (because of delays, resulting investigative difficulties, and a lack of constitutional right to post-conviction review counsel, "[r]equiring defendants to raise ineffectiveness claims at the state postconviction stage . . . comes at a high price"); *id.* (noting that failing to raise ineffective assistance of counsel in a motion for a new trial makes it impossible to do so on

and the public, have every interest in ensuring that the constitutional rights of criminal defendants are enforced.

The State's argument that Ms. Kaur is responsible for how the State chooses to staff its cases fares no better. No doubt it was more efficient for the same prosecutors who were steeped in Ms. Kaur's privileged information to prosecute her retrial, but the additional expense of appointing untainted prosecutors cannot trump Ms. Kaur's constitutional rights. As the court below noted, "To be sure, [the appointment of new prosecutors] would have resulted in additional expense to the State, but such a remedy is hardly unprecedented in Maryland." Pet. App. 56a n.13.

For these reasons, the State's opposition takes nothing away from the importance of the underlying question. The petition for a writ of certiorari should be granted.

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The petition for a writ of certiorari should be granted.

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direct appeal); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims,* 92 Cornell L. Rev. 679, 680 (2007) (explaining that waiting until the conclusion of direct appeal to pursue an ineffective assistance claim on postconviction review "often takes four years or more").

Respectfully submitted,

SAMUEL BRYANT DAVIDOFF
COLETTE T. CONNOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
sdavidoff@wc.com

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