No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTT SVOBODA,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant is denied his right to the effective assistance of counsel when the prosecutor purposely interferes with the attorney-client relationship when it confiscates and reviews legal paperwork from the accused's jail cell which contains attorney-client privileged communications and trial strategy.

LIST OF PARTIES

1. Scott Svoboda, Petitioner

2. State of Ohio, Respondent

RELATED PROCEEDINGS

1. *State of Ohio v. Scott Svoboda,* 1st Dist. Hamilton No. C-190752, 2021-Ohio-4197 (December 1, 2021)

2. *State of Ohio v. Svoboda,* 3/29/2022 Case Announcements, 2022-0050 (March 29, 2022)

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PETITION FOR WRIT OF CERTIORARI

Scott Svoboda, an inmate currently incarcerated at the Warren Correctional Institution in Lebanon, Ohio, by and through his attorney, Bryan R. Perkins, respectfully petitions this Court for a writ of certiorari to review the judgment of the First District Court of Appeals in Hamilton County, Ohio.

OPINIONS BELOW

The decision by the Ohio First District Court of Appeals denying Svoboda's direct appeal is reported as *State v. Svoboda*, 1st Dist. Hamilton No. C-190752, 2021-Ohio-4197 and appears in Appendix A to this Petition. The Ohio Supreme Court denied Svoboda's petition for hearing on March 29, 2022, is reported in *State of Ohio v. Svoboda,* 3/29/2022 Case Announcements, 2022-0050 (March 29, 2022), and appears in Appendix B, C.

JURISDICTION

Svoboda's jurisdictional memorandum was denied in the Ohio Supreme Court on March 29, 2022. Svoboda invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the Ohio Supreme Court's judgment

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The right to counsel exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 368, 113 S.Ct. 838 (1993). The right to counsel is so fundamental that its denial also results in a due process violation pursuant to the Fourteenth Amendment. *Glasser v. United States,* 315 U.S. 60, 70, 62 S.Ct. 457 (1942).

This case presents the question of whether an accused is denied his or her right to the effective assistance of counsel when the prosecutor purposely interferes with the attorney-client relationship when it confiscates and reviews legal paperwork from the accused's jail cell which contains attorney-client privileged communications and trial strategy.

1. The confiscation of Svoboda's legal paperwork

Scott Svoboda was incarcerated in the Hamilton County Justice Center in Cincinnati, Ohio, awaiting trial on charges of Rape, Sexual Battery, and Gross Sexual Imposition. Svoboda actively assisted his defense counsel prepare his case for trial. Svoboda took extensive notes of every meeting he had with his attorney, always summarizing the content of his frequent confidential attorney-client communications. Svoboda also prepared detailed notes regarding planned questions for direct and cross-examination, as well as trial preparation notes and planned defense strategies. To protect these sensitive documents, Svoboda clearly marked all his legal documents and notes by writing "LEGAL" on them in bold print.

Prior to trial, the prosecuting attorney suspected that Svoboda had possession of a document that was provided to his legal counsel but was not supposed to be turned over to Svoboda. The document was a transcription of an interview by a social worker with the alleged victim at Children's Hospital marked "for counsel only."

Without alerting the trial court of her suspicions or obtaining a search warrant, the prosecuting attorney directed a Sheriff's deputy to enter Svoboda's jail cell, and using the ruse of searching for contraband, the deputy confiscated all of Svoboda's legal paperwork. The prosecuting attorney then met with the Sheriff's deputy in an office in the jail, where the prosecuting attorney went through and reviewed all Svoboda's confidential legal paperwork. Svoboda's paperwork was eventually returned to his cell. As it turns out, Svoboda never had possession of the transcript

as suspected by the prosecuting attorney. Nevertheless, Svoboda's entire trial strategy and confidential communications were compromised.

At the next court hearing, the prosecuting attorney did not readily admit to the invasion and attempted to deflect blame by accusing defense counsel of providing Svoboda with the transcript marked "for counsel only"—which he had not done as verified by the fact the transcript was not found among Svoboda's paperwork.

Eventually, a supervisor of the assistant prosecuting attorney, who was not present when the legal paperwork was confiscated and reviewed, admitted that Svoboda's paperwork had been taken and reviewed by the assistant prosecuting attorney. The supervisor made unsworn self-serving statements that nothing of any significance was reviewed by the assistant prosecuting attorney. The offending assistant prosecuting attorney provided an affidavit explaining why she confiscated and reviewed the paperwork but never addressed what was seen and what may have been learned about Svoboda's trial strategy.

The offending prosecuting attorney was removed from the case and a so-called special prosecutor was appointed. This special prosecutor was hardly independent. This prosecutor was a former Hamilton County Assistant Prosecuting Attorney of 20-years now working one county over, but still living in Hamilton County and the elected mayor of a city in Hamilton County. Despite the special prosecutor's close relationship with the Hamilton County Prosecutor, the special prosecutor's unsworn self-serving claim that he knew nothing about what may have been seen or learned about Svoboda's trial strategy by reviewing his legal paperwork was accepted by the

trial court. The trial court also precluded Svoboda from obtaining the surveillance videos from the jail showing the confiscation of his legal paperwork.

Svoboda's motion to dismiss for this violation was denied. Svoboda proceeded to a jury trial where he was found guilty and sentenced to life in prison without the possibility of parole.

2. Direct Appeal

On direct appeal, Svoboda renewed his argument that his right to counsel had been violated by the prosecutor's interference in his attorney-client relationship by confiscating and reviewing his confidential legal paperwork.

In deciding Svoboda's appeal, the Ohio First District Court of Appeals remarked: "We must pause and state that we do not condone the assistant prosecutor's reckless misguided action in any way. How she or her supervisor could believe that searching Svoboda's private legal paperwork was the right way to handle her suspicion that defense counsel violated Crim. R. 16(C) is beyond this court's comprehension." *State v. Svoboda*, 1st Dist. Hamilton No. C1900752, 2021-Ohio-4197, ¶ 69. However, despite this criticism, the court of appeals did not rectify the error and took no action to deter such misconduct in the future. Instead, the court of appeals concluded that "dismissal of the indictments in this case would be too extreme of a sanction in light of the special prosecutor's representation to the court." *Id.* at ¶ 69.

Svoboda filed a petition for hearing before the Ohio Supreme Court, renewing his arguments that his constitutional right to the effective assistance of counsel was violated. The Ohio Supreme Court denied the petition on March 29, 2022. Justices

Stewart and Brunner dissented and would have accepted Svoboda's appeal on this issue.

REASONS FOR GRANTING THE PETITION

A. The Constitutional Right to Counsel and the State's Interference in the Attorney-Client Relationship

The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary government power. *Glasser v. United States,* 315 U.S. 60, 69, 62 S.Ct. 457 (1942). The attorney-client privilege is "the oldest of privileges for confidential communications known at common law." *Upjohn v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677 (1981). This Court has declared that the sacred relationship between an attorney and client is worthy of "unceasing protection." *Lanza v. New York*, 370 U.S. 139, 143-144, 82 S.Ct. 1218 (1962). This Court has also "made it clear, that at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton*, 474 U.S. 159, 171, 106 S.Ct. 477 (1985).

The constitutional right to counsel embraces several protections, not the least of which is the right to be free from state agents interfering in the attorney-client relationship. See, U.S. Const., amend. VI, XIV. The right to counsel exists "in order to protect the fundamental right to a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 368, 113 S.Ct. 838 (1993). The right to counsel is so fundamental that its denial also results in a due process violation pursuant to the Fourteenth Amendment. *Glasser*,

315 U.S. at 70; *Strickland v. Washington*, 466 U.S. 688, 684-685, 104 S.Ct. 2052 (1982).

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837 (1977) is this Court's landmark decision on Sixth Amendment interference with counsel claims, however, *Weatherford* does not adequately address the important constitutional issues that are present in this case.

Weatherford was a co-defendant of Bursey. Weatherford was also acting as an undercover informant. Weatherford met with Bursey and his attorney, took part in, and overheard conversations between Bursey and his legal counsel. *Id.,* 429 U.S. at 548. Bursey claimed that Weatherford's conduct amounted to an unconstitutional invasion of his attorney-client relationship. This Court rejected this argument and concluded that there was no Sixth Amendment violation. This Court reasoned:

> There being no tainted evidence in this case, no communication of defense strategy to prosecution and no purposeful intrusion by Weatherford, there was no violation of Sixth Amendment insofar as it is applicable to the States by virtue of the Fourteenth Amendment.

Id., 429 U.S. at 548.

In *Weatherford*, this Court looked to several factors to determine if there was a Sixth Amendment violation. These factors being: (1) whether the government deliberately intruded in order to obtain confidential and privileged information; (2) whether the government obtained directly or indirectly any evidence which was or could be used at trial as a result of the intrusion; (3) whether any information was or could be used in any manner detrimental to the defendant, and (4) whether details about trial preparation were learned by the government. *Id.,* 429 U.S. at 554-558.

While *Weatherford* is this Court's most significant decision on interference with counsel claims, it does not adequately address the issues presented here where the accused's entire trial strategy and confidential communications were compromised by the purposeful actions of the prosecuting attorney. It is important for this Court accept this case, expand upon *Weatherford*, and protect the sacred relationship between any attorney and client.

1. A Purposeful Intrusion

In concluding there was not a Sixth Amendment violation in *Weatherford*, this Court concluded that there was no purposeful intrusion into the attorney-client relationships by the government. This Court specifically pointed out that Weatherford had not sought to attend these meetings but was invited by Bursey and his attorney. Weatherford was invited "apparently not for his benefit but for the benefit of Bursey and his lawyer." *Id.* at 557. In Svoboda's case, to the contrary, there was a purposeful and uninvited intrusion by the prosecutor. By its own admission, the prosecution was looking for information that was possibly communicated from defense counsel to Svoboda. This Court should accept this case to directly address the situation where the prosecution purposefully violated the sanctity of the attorney-client relationship.

2. Confidential Information Communicated to Prosecutor

Also, in *Weatherford*, in deciding that there was no constitutional violation, this Court specifically pointed out that there was "no communication of defense strategy to the prosecution." *Id.* at 558. This Court was careful to note that at no time

did Weatherford "discuss or pass to his superiors or the prosecuting attorney or any of the attorney's staff" any of the privileged information he learned at the meetings. *Id.* Unlike *Weatherford*, the privileged information in Svoboda's case was not only passed onto the prosecutor—it was obtained directly by the prosecutor—who had unfettered access to this confidential information.

On this point, in *Weatherford* this Court concluded that "had the prosecutor learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case." *Id.* at 554. Svoboda's is that "much stronger case" that should be addressed by this Court. In this case it was the prosecution itself that committed the invasion and as such the distinction of the information being communicated to the prosecution is satisfied in this case.

3. The Additional Problem of Compromised Trial Strategy

Weatherford is also inadequate for dealing with the unique problems created when defense strategy is actually compromised by a prosecutor's intrusion into the attorney-client relationship. In finding no prejudice in *Weatherford*, this Court was confident that no "tainted evidence" had been introduced at trial. However, compromised trial strategy presents a much more problematic situation. Trial strategy has the potential to be much more pervasive than a distinct piece of evidence. When defense strategy is compromised, the danger to the defense is more subtle, but potentially much more devastating.

The difficulty of dealing with the problematic nature of compromised defense strategy was discussed in *State v. Sugar,* 84 N.J. 1, 417 A.2d 474 (1980). In *Sugar,* the New Jersey Supreme Court was confronted with a Sixth Amendment violation where law enforcement officers had intentionally eavesdropped on conversations between a criminal defendant and his attorney. In deciding the case, the *Sugar* Court discussed the significance of trial strategy and the problematic nature of dealing with its improper disclosure.

> [A]ny disclosure of trial counsel's strategy puts the defense at an immeasurable disadvantage. An accusatorial system of criminal justice requires that defense counsel's strategic discussion take place in secret. Premature disclosure of trial strategy upsets the presumed balance of advocacy that lies at the heart of a fair trial. In either case, official intrusion would prevent defense counsel from providing constitutionally effective assistance. Because these more egregious violations do not involve the disclosure of evidence, an exclusionary remedy would be insufficient to vindicate the defendant's right, deter official misconduct or maintain judicial integrity. A dismissal of the prosecution would thus be necessary as the only means to avoid the denial of one of the fundamental requirements of due process of law.

Id., 84 N.J. at 19.

In deciding that dismissal was not the appropriate remedy in *Sugar*, the Supreme Court of New Jersey concluded that no trial strategy had been compromised. However, the *Sugar* Court noted that had trial strategy been revealed "dismissal of the prosecution would be required." *Id.* at 22. In Svoboda's case, trial strategy was certainly compromised when the prosecutor confiscated and reviewed his legal paperwork which contained extensive notes regarding attorney-client communications and trial strategy.

Similarly, in *Briggs v. Goodwin,* 698 F.2d 486, 495 (D.C. Cir. 1983), the D.C. Circuit stated: "Mere possession by the prosecution of otherwise confidential knowledge about defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is 'inherently detrimental, . . . unfairly advantages the prosecution, and threatens to subvert the adversary system of justice."

Thus, when it is defense strategy that is compromised, the issue becomes much more complicated, because the error cannot be corrected by simply excluding the improper evidence from trial.

B. Conflicting Approaches by Lower Courts

In analyzing interference with counsel claims, lower courts have adopted three differing frameworks for determining when reversal is appropriate. These being: (1) requiring the defendant to prove prejudice; (2) finding prejudice per se; and (3) a burden shifting analysis. It is important for this Court to establish a uniform framework for analyzing such constitutional violations.

1. Requiring the Defendant to Prove Prejudice: Harmless Error

Some courts have tasked the defendant with proving prejudice as a result of interference with counsel claim. "Even when there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted." *United States v. Steele*, 727 F.2d. 580 (6th Cir. 1984). Similarly, in *Chittick v. Laffler*, 514 Fed. Appx. 614, 617 (6th Cir. 2013), the Sixth Circuit found no prejudice because defendant failed to identify any aspect of

the trial affected by the prosecutor's review of privileged documents, and the prosecutor did not introduce any evidence at trial that was improperly obtained.

Requiring the defendant to prove prejudice as a result of the government's intrusion into an attorney-client relationship is a nearly impossible task, and more so when the violation involves access to defendant's trial strategy. The application of the harmless error standard in cases where the attorney-client relationship has been compromised is fundamentally unfair. As this Court noted: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457 (1942).

Similarly, in *Coplon v. United States,* 191 F.2d 749 (D.C. Cir. 1951), the circuit court rejected the harmless error standard and established a prophylactic rule against government interception of attorney-client communications. The D.C. Circuit refused to consider whether there was prejudice to the defendant and concluded that the improper surveillance alone violated the Fifth and Sixth Amendments. The *Coplon* Court reasoned:

> We think it is further true that the right to have assistance of counsel is so fundamental and absolute that its denial invalidates the trial at which it occurred and requires a verdict of guilty therein to be set aside, regardless of whether prejudice was shown to have resulted from the denial.

Id. at 759.

To effectively protect the constitutional right to counsel and the integrity of the attorney-client relationship, this Court must speak out against the application of the

harmless error standard in cases where the prosecution has purposefully interfered with the attorney-client relationship and improperly gained access to the defendant's trial strategy. To impose the impossible burden of proving prejudice under such circumstances makes a mockery of the attorney-client relationship and the fundamental principles of our system of justice.

2. Rejection of Harmless Error: Finding Prejudice Per Se

Recognizing the fundamental unfairness of requiring the defendant to prove prejudice, other courts have properly rejected the harmless error standard. *See Coplon, supra.* Similarly, in *United States v. Levy,* 577 F.2d 200 (3rd Cir. 1978), the Third Circuit stated:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the Sixth Amendment violation by weighing how prejudicial to the defense the disclosure is. * * * It is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors, or in the dynamics of the trial itself.

Id., at 208.

> The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself. Even guilty individuals are entitled to be advised of strategies for their defense. In order for the adversary system to function properly, any advice received as a result of defendant's disclosure to counsel must be insulated from the government. No severe definition of prejudice, such as the fruit-of-the-poisonous-tree evidentiary test in the Fourth Amendment area, could accommodate the broader Sixth Amendment policies. We think the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government agencies responsible for investigating and prosecuting the case. Any other rule

> would disturb the balance implicit in the adversary system and would jeopardize the very process by which guilt and innocence are determined in our society.

Id., at 209.

In *Commonwealth v. Manning*, 373 Mass. 438, 367 N.E.2d 635 (1977), the Supreme Court of Massachusetts was left to remedy a Sixth Amendment violation after federal agents contacted Manning without his counsel's consent, made disparaging comments about his attorney, and tried to convince him to cooperate with federal agents. *Manning,* 373 Mass. at 440.

While admitting to a Sixth Amendment violation, the Commonwealth argued Manning had showed no prejudice, and any error was therefore harmless. The *Manning* Court rejected the harmless error standard and decided that dismissal of the indictment with prejudice was the only just resolution. The *Manning* Court concluded that the "misconduct was so pervasive as to preclude any confident assumptions that proceedings at a new trial would be free of the taint." * * * "We also think that a stronger deterrent against the type of conduct demonstrated here is necessary." *Id.* at 444.

> Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. * * * "[W]e wish to leave no doubt that such conduct will not be tolerated in our criminal justice system.

Id. at 445-445.

In *Shillinger v. Haworth*, 70 F.3d 1132, 1134 (10th Cir. 1995), the prosecutor improperly intruded into the attorney-client relationship by eliciting information

from a deputy sheriff who was present in the courtroom when defense counsel was preparing the defendant for trial. The Tenth Circuit concluded that: "when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." *Id.* at 1142.

> Because we believe that the prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such a intrusion must constitute a *per se* violation of the Sixth Amendment.

Id.

In *United States v. Orman*, 417 F. Supp. 1126, 1133 (D.C. Colo. 1976), the district court concluded that: "[W]here there is surveillance of attorney-client conferences, prejudice must be presumed." Similarly, in *State v. Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011), the Connecticut Supreme Court was faced with a case where the police searched a computer that contained certain material that was subject to the attorney-client privilege. The trial court ordered that any communications between defense counsel and the defendant were to remain unread. However, the state laboratory read and copied much of this material and forwarded it the police department, who forwarded it to the prosecutor. The Connecticut Supreme Court concluded that "prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy,

regardless of whether the invasion of the attorney-client privilege was intentional." *Id.* at 425.

Additionally, this Court's decision in *Weatherford* has been misinterpreted to stand for the proposition that this Court has rejected the prejudice per se rule in cases of prosecutorial interference with counsel claims. In Svoboda's appeal, the prosecution argued such to the Ohio court of appeals. The State of Ohio argued in its Brief: "Significantly, the Court explicitly rejected a per se rule that presumes prejudice. *Weatherford,* at 551-552, 557."

While *Weatherford* may be interpreted as a rejection of a prejudice per se rule in cases where the violation was not purposeful and confidential information was not passed to the prosecutor, this Court did not address the issue of what would happen if the violation was purposeful and defense trial strategy was accessed by the prosecution. This Court must clarify that a rejection of the prejudice per se rule does not apply in cases where these critical factors are present. This Court should accept this case to address this critical distinction and prevent further misapplication of *Weatherford.*

3. A Burden-Shifting Analysis

Some courts have applied neither a harmless analysis standard, nor a prejudice per se standard, but have adopted a burden-shifting analysis. In *United States v. Danielson*, 325 F.3d 1054 (9th Cir. 2003), the Ninth Circuit wrestled with the heightened problem of trial strategy that is wrongfully exposed to the prosecution.

> Most Sixth Amendment interference-with-counsel cases involve particular pieces of evidence obtained by the prosecution as a result of

> the unconstitutional interference. The evidence is often an incriminating statement made to a government informant. [citations omitted] In other cases, the evidence is physical. * * * In cases where the prosecution obtained a particular piece of evidence, such as an inculpatory statement or a dead body, we have put the burden on the defendant to show prejudice. In *Bagley*, for example, we wrote that "to establish a violation of *Massiah* defendant must show that he suffered prejudice at trial as a result of the evidence obtained from interrogation outside the presence of counsel." 641 F.2d at 1238. Placing the burden on the defendant in such cases makes good sense, for the defendant is in at least as good a position as the government to show why, and to what degree, a particular piece of evidence was damaging.
>
> In cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle. In such cases, it will often be unclear whether, and how, the prosecutor's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice. More important, in such cases the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did. The defendant can only guess.

Id., 325 F.3d at 1070.

In *Danielson,* while the Ninth Circuit did not apply a prejudice per se analysis, it solved its quandary by looking to this Court's reasoning in *Kastigar v. United* States, 406 U.S. 441, 92 S.Ct. 1653 (1972). *Kastigar* was a Fifth Amendment case in which this Court held that a potential criminal defendant could be compelled to testify under a grant of use immunity. The petitioners argued against this and pointed out that it would be difficult for defendants to demonstrate impermissible use of the information obtained by the government. In *Kastigar,* this Court resolved this dilemma by shifting the burden of non-use to the government.

> A person accorded [use] immunity. . . and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> The burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

Id., 406 U.S. at 460.

Applying this same rationale, the *Danielson* Court set forth a similar burden-shifting analysis for Sixth Amendment interference claims. The Ninth Circuit concluded that once the defendant makes a prima facie case of interference by showing that "the government has improperly interfered with the attorney-client relationship and thereby obtained privileged trial strategy information," the burden shifts to the prosecutor to satisfy the 'heavy burden' of showing non-use."

> The particular proof that will satisfy the government's "heavy burden" * * * will vary from case to case, and we therefore cannot be specific as to precisely what evidence the government must bring forward. The general nature of the government's burden, however, is clear. As the Court stated in *Kastigar*, the mere assertion by the government of "the integrity and good faith of the prosecuting authorities is not enough." *Id.* at 460. Rather, the government must present evidence, and must show by a preponderance of evidence, that "all of the evidence it proposes to use," and all of its trial strategy, were "derived from legitimate independent sources." *Id.* In the absence of such an evidentiary showing by the government, the defendant has suffered prejudice.

Danielson, 325 F.3d at 1072.

The *Danielson* Court concluded:

> Under the second step of this burden analysis, the government must introduce evidence and show by a preponderance of that evidence that it did not use this privileged information. Specifically, it must show that

> all of the evidence it introduced at trial came from independent sources, and that all of its pre-trial and trial strategy was based on independent sources. Strategy in this context is a broad term that includes, but is not limited to, such things as decisions about the scope and nature of the investigation, about what witnesses to call (and in what order), and what lines of defense to anticipate in presenting the case in chief, and about what to save for possible rebuttal. The district court did not apply this standard in its post-trial hearing in this case. We remand to permit it to hold an evidentiary hearing at which this standard can be applied.

Id., at 1074.

The First Circuit adopted this same burden shifting analysis in *United States v. Mastroianni*, 749 F.2d 900, 907-908 (1st Cir. 1984), and stressed that "[t]he burden on the government is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications."

Whether this Court adopted the prejudice per se or burden-shifting analysis, Svoboda is entitled to reversal of his convictions. While the prosecution claimed through an unsworn statement that it did not learn anything about Svoboda's trial strategy, such a self-serving claim certainly does not meet its "heavy burden" of presenting evidence that all its trial strategy and evidence originated from an independent source. In fact, it presented no real evidence on this issue at all. The affidavit of the assistant prosecuting attorney that reviewed Svoboda's legal paperwork goes into great detail about *why* the legal paperwork was seized, but says nothing at all about what was reviewed, what was seen, etc. While a supervisor made a self-serving claim that nothing prejudicial was seen, that supervisor was not even present during the review of Svoboda's paperwork and had no firsthand knowledge of the matter. Further, that statement was unsworn and not subjected to cross-

examination. The special prosecutor also made an unsworn statement that he knows nothing about what was recovered from Svoboda's cell. However, this unsworn self-serving claim is also a far cry from satisfying the "heavy burden" of proving non-use. Svoboda's sacred constitutional rights cannot rest upon "the integrity and good faith" representations of the prosecuting authorities. *See, Kastigar,* 406 U.S. at 460; *Danielson,* 325 F.3d at 1072. Since the prosecution failed to present any meaningful evidence to rebut Svoboda's prima facie showing of a Sixth Amendment violation, his conviction must be reversed.

It is critical that this Court accept this case and create a uniform framework for lower courts to address interference with counsel claims when the interference is purposeful and when trial strategy and confidential communications are compromised.

C. Appointment of Special Prosecutor Did Not Purge the Taint

In *State v. Milligan,* 40 Ohio St.3d 341, 342-343, 533 N.E.2d 724 (1988), an Ohio Sheriff interfered in an attorney-client relationship by having the jail director record a telephone conversation between Milligan and his attorney. In *Milligan,* the Ohio Supreme Court reversed and adopted a burden-shifting standard. It then remanded the case for further development of the record. The Ohio Supreme Court concluded that:

> Given that such knowledge is within the exclusive control of the government, the burden is upon the state, after a prima facie showing of prejudice by the defendant to demonstrate that the information gained was not prejudicial to defendant.

Id., 40 Ohio St.3d at 345.

In Svoboda's case, the state court of appeals seems to have started applying the burden-shifting analysis. The state court of appeals stated: "Because there is no recording that could tell us what the assistant prosecuting attorney learned during her search, this case falls under the type described in *Milligan* where burden shifting is appropriate once Svoboda has made a prima facie showing of prejudice." The state court of appeals then acknowledged that "Svoboda has made such a showing by submitting an affidavit in which he stated that the documents taken from his jail cell contained notes relating to cross-examination of witnesses, trial preparation, and strategy and his own preparation to testify." *Svoboda* at ¶ 65.

Then inexplicably, the state court of appeals takes a giant leap, ends its analysis, and concludes that "the appointment of the special prosecutor neutralized any possible prejudice." *Id.* at ¶ 66.

The Ohio court of appeals was dangerously wrong in its belief that the appointment of the special prosecutor was sufficient to cure this error of a constitutional magnitude. Such conclusion is the epitome of naivete and quite frankly borders on the disingenuous.

This so called "special prosecutor" was anything but independent of the Hamilton County Prosecutor's Office. To the contrary, the special prosecutor was handpicked for the job by the Hamilton County Prosecutor itself. The "special prosecutor" was a 20-year veteran as an assistant prosecuting attorney for the Hamilton County Prosecutor, now employed only one county away. Also, this "special prosecutor" remained a resident of Hamilton County as well as a mayor for a city in

Hamilton County. To believe that this "special prosecutor" was independent of the Hamilton County Prosecutor's Office is absurd.

The special prosecutor, in an unsworn statement to the trial court, claimed he knew nothing about what was reviewed by the prior prosecutor when reviewing Svoboda's legal paperwork. In a self-serving unsworn statement, the special prosecutor stated:

> I know nothing about anything that was recovered from the Defendant's jail cell. Nothing has been provided to me, from any of the information and the stuff that I had received in this case, that came from the Defendant's jail cell. To me, it was as if the Defendant's jail cell was never searched because there is nothing in our file that would indicate [sic]. In fact, everything I have is stuff that pertains prior to that.

This unsworn statement cannot be permitted to end this issue. First, if a constitutional violation could be cured by a simple self-serving unsworn representation of a state agent, then our constitution would be rendered meaningless. This Court has recognized, our sacred constitutional rights cannot rest upon "the integrity and good faith" representation of the prosecuting authorities. *See Kastigar v. United States*, 406 U.S. 441, 460, 92 S.Ct. 1653 (1972).

Second, the Ohio court of appeals' conclusion makes light of the harm that is caused by the prosecution improperly gaining access to confidential communications and legal strategy. In *Briggs v. Goodwin*, 698 F.2d 486 (D.C. Cir. 1983), the circuit court logically reasoned:

> Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental, . . . unfairly advantages the prosecution and threatens to subvert the adversary system of justice."

Finally, the special prosecutor never even claimed that he did not consult with the offending prosecuting attorney when preparing his case for trial—of course he would have done that. What potential strategies were discussed, what tips or pointers may be given, knowingly or unknowingly, are unknown? That information is known only to the prosecution. Simply accepting an unsworn "I know nothing" to give a pass to the prosecution's egregious constitutional infraction in inexcusable.

As the Tenth Circuit reasoned in *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995):

> What do we know? The deputy prosecutor did not testify under the punitive constraints of disbarment or felony perjury . . . The deputy sheriff was not brought before the trial court, put under oath, or otherwise examined to obtain a factual recitation of his involvement.

Id. at fn. 2.

The Tenth Circuit's question is left unanswered in this case. There was no evidentiary hearing, no evidence was taken, no sworn testimony was given by the offending parties in order to determine what was known, what was learned, what may have been known, and what may have been passed between the offending prosecutor and the special prosecutor, whether consciously or unconsciously. The sworn affidavit submitted by the offending prosecutor detailed *why* she took and reviewed Svoboda's legal paperwork, but never details *what* may have been learned or gleaned from her review of the confidential paperwork.

The offending prosecutor's supervisor, in an unsworn statement to the court, claimed no content of the paperwork was reviewed. However, the supervisor was not

even present during the taking and review of the confidential paperwork and had no direct knowledge of what was learned or reviewed by the offending prosecutor. This unsworn self-serving claim of innocence by a supervisor who had no direct knowledge of the offense was a meaningless as the claim of the special prosecutor.

Further, the state court of appeals completely ignores the problem of Detective Stoll. Detective Stoll was the primary investigator and employee of the Hamilton County Sheriff's Office. Detective Stoll was also the designated case agent that sat with, assisted, and consulted with both the offending prosecutor during pretrial proceedings, and then later with the special prosecutor during trial.

Deputy Jones, the officer who removed Svoboda's legal paperwork from his cell and was present with the offending prosecutor during review of Svoboda's legal paperwork, was also an employee of the Hamilton County Sheriff's Office. Detective Stoll was well aware that his fellow deputy was involved in the confiscation and review of Svoboda's legal paperwork. What information may have been passed between the fellow deputies and onto the special prosecutor—known or unknown—consciously or unconsciously—is unknown and was never even questioned at an evidentiary hearing in the trial court. The taint of this constitutional violation is much more pervasive than the state court of appeals was willing to acknowledge. Its conclusion that the error was resolved by the special prosecutor's claim to "know nothing" makes a complete mockery of our constitution and the sanctity of the attorney-client relationship.

The decision that appointment of this special prosecutor purged the taint ignores the reality that "once the investigatory arm of the government has obtained information, that information may reasonably be assumed to have been passed on to other governmental organs responsible for prosecution." *Briggs v. Goodwin*, 698 F.2d 486, 495 (D.C. Cir. 1983).

In *United States v. Levy,* 577 F.2d 200, 211 (3rd Cir. 1978), an interference with counsel claims was sustained after a DEA informant sat in on meetings between the defendant and his counsel. In reversing the conviction, the Third Circuit recognized the futility of bringing in a special prosecutor in the hopes of curing the error. The *Levy* Court reasoned: "Any effort to cure the violation by some elaborate scheme, such as bringing in new case agents and attorneys from distant places, would involve the court in the same sort of speculative enterprise which we have already rejected." *Id.* at 210.

In Svoboda's case, the State did not even try to appear that it was serious about curing its constitutional transgression by bringing in a prosecutor from "distant places" as was mentioned, but quickly rejected, in *Levy*. Instead, the prosecutor in this case chose an assistant prosecuting attorney with whom it had an established two-decade employee-employer relationship, now just working one county over, and still living in and actively involved in Hamilton County politics.

The Ohio court of appeals' conclusion that the appointment of this so called "special prosecutor" somehow cured this serious constitutional violation is incredulous and demeans the importance of the Sixth Amendment right to counsel.

If this decision is permitted to stand it will undermine the long-established sanctity of the attorney-client relationship. Prosecutors will be free intrude into sanctity of the attorney-client relationship and steal defense strategy and as long as they swap out the offending prosecutor with an old friend who is working in another county—all is forgiven. Such a ridiculous standard cannot be allowed in our system of justice.

D. No Legitimate Reason to Confiscate Confidential Legal Paperwork

In *Schillinger, supra.,* the Tenth Circuit concluded that if the state lacks a legitimate justification for intruding upon the attorney-client relationship, prejudice must be presumed. *Schillinger,* 70 F.3d at 1142.

In this case, the prosecutor claimed that it allegedly overheard Svoboda talking over the jail phone about the contents of a "for counsel only" report, which supposedly led the prosecutor to believe Svoboda had the actual report in his jail cell. This belief led the prosecutor to raid Svoboda's jail cell and then confiscate and review his confidential legal paperwork. This falls well short of a legitimate justification to justify the prosecutor's intrusion into Svoboda's attorney-client relationship.

While Ohio Crim. R. 16(G) prohibits defense counsel from copying "counsel only" material and giving it to their client, the very same rule permits defense counsel to "orally communicate the content of 'counsel only' material to the defendant." Ohio Crim. R. 16(G). Therefore, just because Svoboda had knowledge of the contents of the report, it does not mean that he had possession of the actual report—which he undoubtedly did not have. There was no legitimate justification for the prosecution's confiscation and review of Svoboda's legal paperwork.

The case of *Howard v. State,* 279 Ga. 166, 611 S.E.2d 3 (2005), from the Georgia Supreme Court illustrates a sufficiently compelling reason that would justify confiscation of an inmate's legal paperwork. It further demonstrates how this could be accomplished in a manner that does not run afoul of the constitution.

In *Howard*, the defendant was suspected of threatening and coercing other inmates into signing false affidavits in an effort to fraudulently exonerate himself of certain crimes. To ensure the safety of the jail, Detective Wynn confiscated documents from the defendant's cell that matched the described affidavits. *Id.,* 279 Ga. at 168-69.

At an evidentiary hearing on this issue, Detective Wynn testified that he deliberately avoided taking any documents relating to attorney-client communications; he was interested only in "coercion and threats that may be going on between [the defendants] and Clifton." "The next morning Detective Wynn took the documents to the prosecuting attorney, who did not review them, but advised Wynn to deliver them to the trial court for review." *Id.*, 279 Ga. at 169. Finding that the state had a legitimate justification and that there was no interference with the attorney-client relationship, the *Howard* Court found no Sixth Amendment violation. The *Howard* Court also acknowledged the Tenth Circuit's decision in *Shillinger* and agreed with its holding. However, it distinguished the results as follows:

> In the present case, the State established a legitimate purpose for conducting a search for the affidavits, and after an in-camera inspection, the trial court determined that no confidential communication was implicated. It was also shown that the prosecutor was shielded from any access to any information obtained by the search, and there is no allegation that the documents were used to the detriment of the

> defendants at trial. Under the circumstances, we hold the State had a legitimate justification for searching defendants' cell and that no interference with the Sixth Amendment right to counsel occurred.

Howard, 279 Ga. at 170.

Svoboda's case is clearly distinguishable from *Howard*. In this case there was no legitimate law enforcement purpose. Also, in Svoboda's case, the prosecutor seized all of his legal paperwork, and in fact specifically targeted his legal paperwork for review. Further, in Svoboda's case there was no *in camera* inspection or judicial oversight as in *Howard*. Most importantly, in Svoboda's case, the prosecutor was not shielded from the documents as in *Howard*—but in fact it was the prosecutor that personally reviewed Svoboda's legal documents.

E. The Importance of Deterrence and Chilling Effect

It is important that this Court accept this case to establish a deterrence to such egregious conduct in order to protect the sanctity of the attorney-client relationship. In *Milligan, supra.,*the Ohio Supreme Court rejected a simple exclusionary remedy because of its lack of deterrence. As this Court has noted: "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393, 101 S.Ct. 677 (1981). If this case stands, defendants will have no confidence that their privileged communications and written defense strategy will have any meaningful protection from the prying eyes of the prosecution.

The decision of the state courts of appeals in this case fails to establish any deterrence against such misconduct in the future—in fact it encourages such misbehavior by allowing the prosecution to obtain a tremendous advantage by stealing a defendant's trial strategy knowing that even if discovered, the defendant will face the hopeless burden of proving prejudice. Further, to allow this decision to stand will serve to discourage the open and free communications between clients and their attorneys—thus chilling the sanctity of the attorney-client relationship.

F. No Defense Waiver

While not explicitly stating so, the court of appeals seems to infer that Svoboda may have waived this error. The state court of appeals points to an entry from July 19, 2019, which states that "the Sixth Amendment claims and discovery issues which underlied the above motions will not be relitigated." However, there is no record of this entry being discussed or mentioned in open court. The entry was never signed or agreed to by Svoboda or his counsel. But more telling, the record reveals that Svoboda waived nothing as it related to this egregious constitutional violation. Svoboda's counsel stated: "I want to be clear about something else. It was not my client's intention, nor mine, to waive his rights to claim that this was improper." Svoboda was never satisfied with simply replacing the offending prosecuting attorney and replacing her with a veteran prosecuting attorney with a long-established relationship with the same office. While removal of the offending prosecuting attorney was one of the remedies sought, it was not the exclusive remedy sought. Svoboda's counsel also pursued dismissal of the indictment as a remedy as well.

Further, Svoboda attempted to obtain the jail surveillance video showing the confiscation of his legal paperwork and access by the prosecuting attorney but was denied by the trial court. In a case where such highly inappropriate behavior took place on the part of the prosecution, the court of appeals' attempt to infer waiver on Svoboda's part through this questionable entry is troubling.

G. Dismissal of the Indictment: Too Extreme?

In affirming Svoboda's convictions, the state court of appeals concluded that dismissal of the indictment was "too extreme." While the state court of appeals ineffectively claims that it does not condone this misconduct, the outcome of its decision speaks otherwise.

> As Judge Jerome Frank stated in his often-cited dissent in *United States v. Antonelli Fireworks, Inc.* (C.A. 2, 1946), 155 F.2d at 661, the repeated use of vigorous language denouncing prosecutors for improper conduct, without more, constitutes an "attitude of helpless piety * * *. It means actual condonation of counsel's alleged offense, coupled with disapprobation. If we continue to do nothing practical to—prevent such conduct, we should cease to disapprove it. For otherwise * * * the deprecatory words we use in our opinions on such occasions are purely ceremonial. * * * The practice * * * breeds a deplorably cynical attitude towards the judiciary."

State v. Fears, 86 Ohio St.3d 329, 353, 715 N.E.2d 136 (1999) (Moyer, C.J. dissenting).

"The judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process, and basic fairness." *Morrow v. Superior Court,* 30 Cal. App.4th 1252, 1262, 1994 Cal. App. LEXIS 1253. In *State v. Cory*, 62 Wash.2d 371, 377-378, 382 P.2d 1019 (1963), the Supreme Court of Washington held that

eavesdropping upon private consultation between the defendant and his attorney vitiates the whole proceeding, requiring dismissal of the charges.

In *State v. Holland,* 147 Ariz. 453, 456, 711 P.2d 592, 595 (1985), the Supreme Court of Arizona held that where the right to counsel was violated, the suppression of the breath test alone is an inadequate remedy and dismissal of charges is required.

In *Fusco v. Moses,* 304 N.Y. 424, 433, 107 N.E.2d 581 (1952), the New York court held that any deprivation of the right to counsel and to a fair trial is, in itself, a basis for annulment of a determination resulting therefrom. *See also, People v. Mason*, 97 Misc.2d 706, 711, 1978 N.Y. Misc. LEXIS 2853 ("Resort to rule of evidence cannot reasonably remedy [the defendant's] right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is [defendant's] right to due process"); *Morrow v. Superior Court,* 30 Cal. App.4th, 1994 Cal. App. LEXIS 1253 (Dismissal warranted when prosecutor eavesdropped on attorney-client communications in courtroom).

In *Graddick v. State*, 408 So.2d 533, 547, 1981 Ala. Crim. App. LEXIS 2431, the Alabama court found that impermissible invasion of the attorney-client relationship occurred by intercepting and monitoring attorney-client communications, and dismissal of the indictment was the only viable remedy.

In *United States v. Peters*, 468 F. Supp. 364 (S.D. Fla. 1979), the district court found dismissal of the case was appropriate after a conversation between attorney and client was recorded in which possible defenses to the charges as well as possible methods to discredit a government informant were discussed with counsel.

If dismissal of an indictment is ever an appropriate remedy, this is the case. The prosecution purposely inserted itself into the sacred attorney-client relationship and committed a violation of a constitutional magnitude. How blatant, purposeful, and egregious must a constitutional violation be before a court refuses to condone prosecutorial wrongdoing? How sacred of a right must be sacrificed upon the alter of judicial efficiency before a court decides to condemn such misconduct by reversing the conviction? Dismissal of the indictment in this case was not "too extreme"—it was the appropriate remedy to deter this egregious unconstitutional conduct which subverted the long-established sanctity of the attorney-client relationship.

In summary, the sanctity of the privileged relationship between and attorney and client, a bedrock of our system of justice, has been desecrated by a needless and unwarranted intrusion by the prosecuting attorney. This Court should accept jurisdiction of this important case to restore the protection that the constitution demands of the sacred boundaries protecting the accused and his or her legal counsel. Additionally, to curtail such egregious conduct in the future, this Court needs to send an unwavering message that the boundaries of the attorney-client relationship will be respected and an unwarranted intrusion into this relationship by the prosecution will not be tolerated.

CONCLUSION

For the foregoing reasons, Scott Svoboda respectfully requests that this Court grant his petition for a writ of certiorari.

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Respectfully Submitted,

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