No. 21-8174

In the Supreme Court of the United States

SCOTT SVOBODA,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether dismissal of the indictment is the proper remedy for an assistant prosecutor's cursory examination of a criminal defendant's legal paperwork, when the trial court eliminates any risk of possible prejudice to the defendant by removing the assistant prosecutor and the entire prosecutor's office from the case and appointing a special prosecutor to handle the prosecution.

LIST OF PARTIES

The Petitioner is Scott Svoboda, an inmate at the Warren Correctional Institution in Lebanon, Ohio.

The Respondent is the State of Ohio.

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STATEMENT OF JURISDICTION

28 U.S.C. § 1257 sets forth this Court's jurisdiction to review final judgments or decrees rendered by the highest court of a State. Section (a) of that provision states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction. It is Respondent's position, however, that this case is inappropriate for the exercise of this Court's discretionary jurisdiction. The decision from the highest court of the State denied Petitioner's request to consider his discretionary appeal. The state intermediate court's opinion is based on the unique facts of this case, it is not repugnant to a provision of the United States Constitution, and it is not inconsistent with a decision of this Court.

STATEMENT OF STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

STATUTES

28 U.S.C. § 1257 State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 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 accusation; 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.

STATEMENT OF THE CASE

In January 2018, Petitioner Scott Svoboda was charged in the Hamilton County, Ohio Court of Common Pleas in Case No. B-1800423 with: rape of a child under ten years of age; rape of a child under thirteen years of age; rape by force or threat of force; two counts of sexual battery; gross sexual imposition by force or threat of force; and gross sexual imposition of a child under thirteen years of age. *State v. Svoboda*, 2021-Ohio-4197, ¶ 1, 180 N.E.3d 1277, 1284 (Ohio Ct. App. Dec. 1, 2021) In August 2018, he was charged in Case No. B-1804429 with an additional two counts of rape of a child under ten years of age by force or threat of force and an additional two counts of gross sexual imposition of a child under thirteen years of age. *Id.* The charges were based on Svoboda's repeated sexual abuse of his step-daughter, A.S., from the time A.S. was six years old until she was sixteen years old, which her younger half-brother observed on one occasion. *Id.* at ¶¶ 1, 3, 15, 180 N.E.3d at 1284, 1287. A.S. reported the abuse to her supervisor at work and law enforcement on January 14, 2018. *Id.* at ¶¶ 12, 180 N.E.3d at 1286. Svoboda made incriminating statements in text messages that he exchanged with A.S. on the same day. *Id.* at ¶¶ 10-14, 180 N.E.3d at 1285-87.

The case ultimately proceeded to a jury trial on both indictments. *Id.* at ¶ 1, 180 N.E.3d at 1284. However, prior to trial, the assistant prosecutor originally assigned to the case in the Hamilton County Prosecutor's Office was monitoring a jail phone call between Svoboda and his sister when she learned that Svoboda and his sister were in possession of a transcript of the forensic interview of A.S. at the Mayerson Center for Safe and Healthy Children at Cincinnati Children's Hospital. (Transcript of Proceedings, pp. 36-40; 5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶ 17) The forensic interview was designated as "For Counsel Only" and was not to be disseminated to Svoboda and/or his family members.

(Transcript of Proceedings, pp. 37-39; 5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶¶ 4-5, 17) Based on the jail phone call and other information, the assistant prosecutor determined that defense counsel had distributed the interview to Svoboda and was thus in violation of Ohio R. Crim. P. 16(C) and the ethical rules governing attorney conduct. (Transcript of Proceedings, pp. 39-40) The assistant prosecutor immediately notified her supervisor. (5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶ 17) The assistant prosecutor also spoke with General Counsel at the Cincinnati Bar Association, who provided her legal authority analogous to defense counsel's ethical violation and advised her that it would be appropriate and ethically responsible to disclose defense counsel's behavior to the trial judge. (Transcript of Proceedings, p. 40; 5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶¶ 23-25) That afternoon, the assistant prosecutor received authority from her superior to request a search of Svoboda's jail cell for the transcript of the Mayerson interview believed to be in Svoboda's possession. (5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶ 20) Hamilton County Sheriff's deputies entered Svoboda's jail cell and removed his paperwork, and the assistant prosecutor thereafter examined the paperwork in the presence of a deputy simply to see if Svoboda possessed the transcript of the Mayerson interview. (Transcript of Proceedings, pp. 73-74) When she determined that the transcript was not there, she left, and the paperwork was returned to Svoboda's cell. (*Id.* at p. 74)

Svoboda filed a motion to disqualify the assistant prosecutor, as well as "every prosecutor and investigator involved in the search" of the jail cell, and asked for an evidentiary hearing. (4/23/19 Motion to Disqualify Prosecutor) He alleged with no supporting evidence that his paperwork contained notes from meetings with his counsel about trial strategy, cross-

examination of witnesses, and trial preparation, and that the search and seizure of his paperwork violated his right to counsel under the Sixth Amendment. (*Id.*)

On June 7, 2019, when the trial court and the parties convened for a hearing on the matter, the prosecution agreed to the removal of the assistant prosecutor and the Hamilton County Prosecutor's Office as a whole from the case and the appointment of a special prosecutor. (Transcript of Proceedings, pp. 74-75) Svoboda's counsel agreed to withdraw his motion to disqualify because "he's getting what he asked for" and further agreed not to litigate the issue with the special prosecutor, stating "[t]here would be no point." (*Id.* at pp. 75, 78-79) He expressed to the court, "[W]e have asked for the removal of [the assistant prosecutor] and others, and that appears to be what's happening, so I'm not trying to relitigate that at all." (*Id.* at p. 78) However, on September 11, 2019, after getting the remedy that he specifically asked for, Svoboda filed a motion to dismiss the indictments on the basis of the search of his jail cell, again arguing a violation of the Sixth Amendment. (9/11/19 Motion to Dismiss Indictments) The trial court denied the motion. (9/19/19 Entry Denying Motion to Dismiss Indictments)

The case proceeded to trial with a special prosecutor from the Warren County Prosecutor's Office representing the State of Ohio. *Svoboda*, 2021-Ohio-4197 at ¶ 55, 180 N.E.3d at 1293. The special prosecutor represented to the trial court, as an officer of the court, that "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 [ ]. In fact, everything that I have is stuff that pertains prior to that." (Transcript of Proceedings, p. 88)

The jury found Svoboda guilty as charged, and the trial court imposed sentence. *Svoboda*, 2021-Ohio-4197 at ¶ 1, 180 N.E.3d at 1284. Svoboda filed a direct appeal in the First District Court of Appeals of Ohio. *Id.* The court of appeals affirmed his convictions. *Id.*

Svoboda filed a discretionary appeal in the Supreme Court of Ohio. *State v. Svoboda*, 166 Ohio St.3d 1449, 2022-Ohio-994, 184 N.E.3d 150 (2022). On March 29, 2022, the Supreme Court of Ohio declined to accept Svoboda's appeal for review. *Id.*

From the Supreme Court of Ohio's decision, Svoboda filed a petition for a writ of certiorari and a motion for leave to proceed *in forma pauperis* in this Court, which was filed on June 14, 2022. The State of Ohio hereby responds.

ARGUMENT

Reasons for Denying the Writ

I. A writ of certiorari to review the Question Presented should be denied because the state intermediate court's decision does not conflict with a decision from this Court. The court of appeals' decision resolved a purely factual issue in a way that is consistent with this Court's Sixth Amendment jurisprudence.

Svoboda's Question Presented challenges the state intermediate court's resolution of his claim of government intrusion into attorney-client communications, which the state supreme court declined to accept for discretionary review. He asserts that dismissal of the indictments is the only remedy that will "send an unwavering message that the boundaries of the attorney-client relationship will be respected." (Petition for a Writ of Certiorari, p. 32) However, dismissal is contrary to the remedy Svoboda asked for and agreed to in the trial court; it is inconsistent with case law from this Court; and it is not appropriate under the facts of this case.

Introduction

This Court has held that "[c]ases 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," e.g., a defendant's right to counsel and a fair trial versus society's interest in the administration of justice. *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). In light of this Court's cases of *Morrison* and *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), the First District Court of Appeals of Ohio correctly recognized that "[t]he proper approach is to 'identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.'" *State v. Svoboda*, 2021-Ohio-4197, ¶ 67, 180 N.E.3d 1277, 1295 (Ohio Ct. App. Dec. 1, 2021), quoting *Morrison*, 449 U.S. at 365.

After the assistant prosecutor who was originally assigned to the case looked through the paperwork in Svoboda's jail cell for a transcript that Svoboda was not permitted to have, Svoboda specifically requested and agreed to the removal of the assistant prosecutor and the Hamilton County Prosecutor's Office as a whole from the case and the appointment of a special prosecutor as a complete remedy to the assistant prosecutor's conduct. (Transcript of Proceedings, pp. 49-52, 75, 78-79) When the trial court appointed a special prosecutor, Svoboda withdrew his motion to disqualify the assistant prosecutor because he was "getting what he asked for." (*Id.* at pp. 75, 79) He further agreed not to litigate the issue further with the special prosecutor, stating, "There would be no point." (*Id.* at p. 75) He further expressed to the trial court, "[W]e have asked for the removal of [the assistant prosecutor] and others, and that appears to be what's happening, so I'm not trying to relitigate that at all." (*Id.* at p. 78)

The special prosecutor assured the trial judge as an officer of the court, "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 [ ]. In fact, everything that I have is stuff that pertains prior to that." (*Id.* at p. 88)

The appointment of a special prosecutor ensured that Svoboda would receive a fair trial and that nothing arising out of the search of his cell would enter into the prosecution of the case. Svoboda was not prejudiced, and the extreme remedy of dismissal of the indictments is not appropriate.

Law and Analysis

The standard governing an allegation that the government intruded upon privileged attorney-client communications was set forth by this Court in *Weatherford.* The test is case-specific and analyzes the following four factors: (1) whether the government purposely caused the intrusion in order to garner confidential, privileged information, or whether the intrusion was the result of other inadvertent occurrence; (2) whether the government obtained, directly or indirectly, any evidence that was used at trial as the result of the intrusion; (3) whether any information gained by the intrusion was used in any other manner to the substantial detriment of the defendant; and (4) whether details about trial preparation were learned by the government. *United States v. Steele*, 727 F.2d 580, 585 (6th Cir. 1984), cert denied sub nom. *Scarborough v. United States*, 467 U.S. 1209, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984), citing *Weatherford*, 429 U.S. at 554.

In *United States v. Robinson*, Nos. 94-1538, 94-1727, 1996 WL 506498 (6th Cir. Sept. 5, 1996), cert denied sub nom. *West v. United States*, 520 U.S. 1181, 117 S.Ct. 1459, 137 L.Ed.2d 563 (1997), the United States Court of Appeals, Sixth Circuit, applied the *Weatherford* test to find no prejudice and thus no Sixth Amendment violation in a case very similar to this one. *Id.*

at *11. In response to defendant West's report of receiving threatening letters and phone calls from her co-defendant Robinson, the FBI obtained a search warrant and went through papers in West's jail cell. *Id.* at *2. West claimed in a subsequent evidentiary hearing that the FBI had violated her Sixth Amendment right to counsel by viewing confidential, attorney-client communications. *Id.* The FBI official in charge responded that the agents had "studiously avoided all privileged documents – including all papers with her attorney's letterhead – and had looked only for evidence of Robinson's threats." *Id.* at *2, *11. The court of appeals affirmed the district court's denial of West's claim. *Id.* The court of appeals noted that West did not present anything to contradict the government's evidence that all attorney-client documents were avoided, and her arguments were based upon "mere supposition as to the types of documents the FBI agents might have seen." *Id.* at *11. The court of appeals found that, "[i]n the absence of any evidence to the contrary, the district court was certainly entitled to credit the government's assertion that it did not view any privileged materials during the search." *Id.* Furthermore, the court concluded that there was no reversible error even if the searching officers did view confidential information, as alleged by West. *Id.* Consideration of the *Weatherford* factors revealed no prejudice to West. *Id.* The purpose of the government's search was not to obtain confidential information but, rather, to investigate alleged threats by Robinson. *Id.* No privileged information derived from the search was used at trial, with the exception of information about West's down payment on a Honda Civic, which was discovered through independent means. *Id.* No privileged information was used in any other manner that was detrimental to West. *Id.* And, finally, no details of confidential trial preparations were learned (aside from the down payment on the Honda). *Id.* Consequently, there was no Sixth Amendment violation. *Id. See, also, Brown v. Kentucky*, 416 S.W.3d 302, 307 (Ky. 2013), cert

denied, *Brown v. Kentucky*, 573 U.S. 909, 134 S.Ct. 2733, 189 L.Ed.2d 771 (2014) (distinguished on other grounds) (affirming denial of motion to dismiss when the detective had a proper motive to search the defendant's jail cell, the detective was looking for a letter that the defendant had sent to media outlets, it was not the detective's intention to search for privileged documents, the prosecutor unequivocally informed the court that she had no knowledge of the contents of the privileged documents, and the defendant failed to point to any privileged information that the government either gained or used to his detriment). *Accord Chittick v. Lafler*, 514 Fed.Appx. 614, 617 (6th Cir. 2013) (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); *United States v. Collins*, Nos. 87-1283 to 87-1286, 87-2038, 87-2072, 1991 WL 23558 (6th Cir. Feb. 26, 1991), at *13, cert denied sub nom. *Fitzsimmons v. United States*, 502 U.S. 858, 112 S.Ct. 174, 116 L.Ed.2d 137 (1991) (no prejudice where no attorney-client communications, information or defense strategies were revealed); *Steele*, at 586 (government's evidence did not consist of any conversation undercover agent may have overheard while in custody with the other co-defendants, nor was there any evidence derived from any such conversations, and the government had no knowledge of any discussion of trial tactics, discussion of investigations, statements of defendants to counsel, or statements of legal advice to defendants).

Applying the *Weatherford* test to this case, it is readily apparent that there was no constitutional violation. Just as in *Weatherford*, at 557 and *Robinson*, at *11, this case does not present a situation where the prosecution's purpose was to learn what it could about Svoboda's defense plans, or in which the prosecution seized Svoboda's paperwork for the purpose of obtaining confidential and privileged information. When the assistant prosecutor leafed through

the paperwork from Svoboda's jail cell, she was looking for the transcript of the forensic interview of A.S. at the Mayerson Center for Safe and Healthy Children at Cincinnati Children's Hospital. (Transcript of Proceedings, pp. 73-74) Prior to trial, the assistant prosecutor was monitoring a jail phone call between Svoboda and his sister and learned that Svoboda and his sister were in possession of the transcript of the Mayerson interview. (*Id.* at pp. 36-40; 5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶ 17) The forensic interview was designated as "For Counsel Only" and was not to be disseminated to Svoboda and/or his family members under Ohio R. Crim. P. 16(C). (Transcript of Proceedings, pp. 37-39; 5/15/19 State's Response to Motion to Disqualify Prosecutor, Affidavit at ¶ 4-5, 17) Based on the jail phone call and other information, the assistant prosecutor determined that defense counsel had distributed the interview to Svoboda and was thus in violation of Ohio R. Crim. P. 16(C) and the ethical rules governing attorney conduct. (Transcript of Proceedings, pp. 39-40) While Svoboda questions the assistant prosecutor's belief that the criminal discovery rule had been violated, stating that defense counsel is permitted to orally communicate the content of "For Counsel Only" materials to a defendant, the assistant prosecutor described very clearly to the court that it was the way in which Svoboda and his sister were talking about the interview and what A.S. said during the interview, and Svoboda's question to his sister "did you finish reading it," that made the assistant prosecutor believe that Svoboda and his sister had viewed the transcript themselves, and not just received information about the interview from counsel. (*Id.* at pp. 38-39) The transcript that the assistant prosecutor was looking for would have been readily apparent from its outward appearance and did not disclose communications between Svoboda and his attorney or trial strategy. When the assistant prosecutor looked through the paperwork for the sole purpose of finding the transcript, she was not interested in what was contained *within the contents of* the

transcript or in the other paperwork in Svoboda's cell. She merely wanted to ascertain whether the transcript was there, to confirm her belief that it was in Svoboda's possession in violation of Ohio R. Crim. P. 16(C) and the ethical rules governing attorney conduct. (Transcript of Proceedings, pp. 73-74)

This is also not a case in which the assistant prosecutor learned of confidential communications between Svoboda and his counsel or trial strategy. Although Svoboda makes the assertion that the assistant prosecutor gained access to confidential communications and trial strategy, that assertion is conclusory, it is based on nothing more than speculation, and it was refuted by the prosecution's representations to the trial court. Specifically, at a pretrial hearing on June 7, 2019, the assistant prosecutor's supervisor represented to the court, as an officer of the court, that the assistant prosecutor leafed through the paperwork in a very cursory manner, examining nothing for content, for the sole purpose of seeing if Svoboda possessed the easily-distinguishable and easily-identifiable, lengthy typewritten transcript. (*Id.* at pp. 73-74) She did not find the transcript, so not even the outer pages of the transcript were viewed. (*Id.* at p. 74) She did not copy anything. (*Id.*) She did not take notes. (*Id.*) She learned nothing about Svoboda's privileged communications. (*Id.*)

Furthermore, since the assistant prosecutor did not learn anything from her cursory examination of the materials, the prosecution did not use at trial anything derived directly or indirectly from the search. Since no information was obtained, it did not provide the prosecution with any "leads" or assist the prosecution in any way in preparing for trial. Consequently, Svoboda does not establish any of the *Weatherford* factors.

When the government intrusion has no adverse effect upon the effectiveness of counsel's representation and has not produced some other prejudice to the defense, there is no basis for

imposing a remedy in the proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial. *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). However, upon Svoboda's request and in an effort to protect Svoboda's rights and remove any risk of prejudice to him, the trial court appointed the Warren County Prosecutor, or one of his assistants, as special prosecutor, who was to handle the case from that point forward. (6/17/19 Entry Appointing Special Prosecuting Attorney) The appointment of a special prosecutor ensured that Svoboda would receive a fair trial and that nothing arising out of the search of Svoboda's jail cell would enter into the prosecution of the case.

Nevertheless, because Svoboda surmises that his *trial strategy* was intercepted by the prosecution, he asks this Court to apply a per se rule. This Court has rejected a rule that presumes prejudice. *Morrison*, 449 U.S. at 364-66. Even where a violation has occurred, the remedy must be tailored to the injury suffered. *Id.* at 364. In *Morrison*, this Court reversed the court of appeals' dismissal of the indictment as a remedy for the government's interference with the defendant's right to counsel. *Id.* at 364. This Court explained, "The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial. More particularly, *absent demonstrable prejudice*, or substantial threat thereof, *dismissal of the indictment is plainly inappropriate*, even though the violation may have been deliberate." (Emphasis added.) *Id.* at 365. The First District Court of Appeals of Ohio reasonably rejected application of a per se rule in light of this Court's precedent.

In the alternative of a per se test, Svoboda urges application of a burden-shifting test. Under that test, once the defendant makes a prima facie showing that the government has interfered with the attorney-client relationship and thereby obtained privileged trial strategy information, the burden shifts to the prosecutor to show non-use of that trial strategy information.

As an initial matter, the case Svoboda cites for a burden-shifting test – *United States v. Danielson*, 325 F.3d 1054 (9th Cir. 2003) – is materially different from the case at bar. In *Danielson*, the government learned of the defendant's intended trial strategy through the defendant's conversations with an informant. *Id.* at 1060-62. The informant had, at the direction of the government, actively gathered and reported a great deal of information about the defendant's trial strategy, which was shared with the prosecuting attorney. *Id.* at 1062-63, 1068. That information included the defendant's plan to testify in his own defense and the trial strategy he was planning to employ in his upcoming trial. *Id.* at 1067. The government made specific use of what it had learned about the defendant's trial strategy. *Id.* at 1064-65. At trial, the prosecuting attorney specifically questioned the defendant about statements he had made to the informant related to his trial strategy. *Id.* In determining the remedy for the intrusion, the United States Court of Appeals, Ninth Circuit, construed *Weatherford* to mean that there is no Sixth Amendment violation unless there is prejudice. *Id.* at 1069. The court of appeals, however, distinguished *Weatherford* on its facts, stating, "the problem in this case is that [the informant] obtained, and communicated to the prosecution team, privileged trial strategy information." *Id.* at 1069. The court of appeals also distinguished other cases it had decided in which trial strategy information had been improperly obtained, stating that "the issue of whether prejudice was suffered in those cases was never a close question." *Id.* at 1070. Thus, it was the particular facts of the case that caused the court of appeals to apply a burden-shifting test.

This case is not remotely similar to *Danielson*. As set forth above, the assistant prosecutor's supervisor represented to the court, as an officer of the court, the nature and scope of the assistant prosecutor's search, which did not include an observation of any privileged communications or trial strategy. (Transcript of Proceedings, pp. 73-74) Since the assistant prosecutor did not learn anything from her cursory examination of the materials, the prosecution did not use at trial anything derived directly or indirectly from the search. Since no information was obtained, it did not provide the prosecution with any "leads" or assist the prosecution in any way in preparing for trial. Moreover, the trial court appointed a special prosecutor to handle the prosecution of the case from that point forward. (6/17/19 Entry Appointing Special Prosecuting Attorney) The special prosecutor assured the trial judge as an officer of the court, "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 [ ]. In fact, everything that I have is stuff that pertains prior to that." (Transcript of Proceedings, at p. 88) This case is unlike *Danielson*.

Nevertheless, even if this Court were to apply a burden-shifting case to the unique facts of this case, it would not change the result. The First District Court of Appeals of Ohio took a very cautious approach to this case, the court applied a burden-shifting test, and it was not outcome-determinative. *State v. Svoboda*, 2021-Ohio-4197, ¶ 65, 180 N.E.3d 1277, 1295 (Ohio Ct. App. Dec. 1, 2021), citing *State v. Milligan*, 40 Ohio St.3d 341, 345, 533 N.E.2d 724 (1988). In fact, the First District Court of Appeals of Ohio engaged in an analysis that was very favorable to and benefitted Svoboda by assuming, without Svoboda establishing, that the assistant

prosecutor learned of confidential information in her cursory inspection of Svoboda's paperwork. *Svoboda,* at ¶ 65, 180 N.E.3d at 1295. The court of appeals considered Svoboda's unproven allegations in his affidavit to his motion to disqualify as satisfying the first step of the burden-shifting test. *Id.* However, the court of appeals went on to find that "the appointment of the special prosecutor neutralized any possible prejudice." *Id.* at ¶66, 180 N.E.3d at 1295. Svoboda challenges that particular finding on the issue of prejudice. Thus, Svoboda's challenge does not take issue with the test applied by the court of appeals. He merely disagrees with the result, which was factually-based.

Despite the court of appeals' favorable analysis of his claim, Svoboda criticizes the court for reaching the conclusion that "the appointment of the special prosecutor neutralized any possible prejudice" and for not remanding the case for an evidentiary hearing. A remand for a hearing was unnecessary where there was a record sufficient for appellate review.

On the day that an evidentiary hearing was scheduled and before deciding the remedy that would apply, the trial court considered the statements of defense counsel and the assistant prosecutor's supervisor. (Transcript of Proceedings, pp. 72-80) Svoboda claims that the prosecutor's statements were not sworn and not subject to cross-examination. They were, however, representations made to the court by an officer of the court. Svoboda criticizes that certain individuals were not questioned at a hearing about what information they obtained and passed on to the assistant prosecutor. It bears noting that Deputy Jones, the officer who removed Svoboda's legal paperwork from his cell and who was present with the assistant prosecutor when she looked through the paperwork for the transcript, was present in court on the day that the evidentiary hearing was scheduled to occur and likely would have testified and been cross-examined if the hearing had gone forward. (Transcript of Proceedings, p. 73) The reason why

no formal evidentiary hearing went forward – with witnesses being sworn under oath and cross-examined – was because, prior to the hearing, Svoboda's counsel withdrew his motion to disqualify when the prosecution agreed to the appointment of a special prosecutor. (*Id.* at pp. 75, 78-79) Svoboda withdrew his motion to disqualify the assistant prosecutor for the express reason that he was "getting what he asked for." (*Id.* at pp. 75, 79) Because the decision not to have a formal evidentiary hearing was Svoboda's, after he obtained the specific result that he wanted, Svoboda cannot now complain that the State did not present sufficient evidence at a hearing or that statements made to the court were not under oath and subject to cross-examination.

The record on appeal also contained the special prosecutor's representations in which he told the trial court, "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 [ ]. In fact, everything that I have is stuff that pertains prior to that." (*Id.* at p. 88) The special prosecutor's representations were made to the court as an officer of the court. Svoboda has not presented any evidence to show that the special prosecutor was anything other than entirely unbiased and independent in his prosecution of this case.

Svoboda complains that Mr. Hardman, the special prosecutor who handled prosecution of the case, was somehow incapable of being unbiased and independent because he worked in the Hamilton County Prosecutor's Office at some point in time prior to being employed with the Warren County Prosecutor's Office and lived in Hamilton County, Ohio. He further asserts that Mr. Hardman was "handpicked for the job by the Hamilton County Prosecutor itself." (Petition

for a Writ of Certiorari, p. 21) His assertions are nothing more than unsubstantiated speculation. After being appointed special prosecutor, the Warren County Prosecutor selected which of his assistant prosecutors from his office would handle the case, not the Hamilton County Prosecutor.

Svoboda argues that he "was never satisfied with simply replacing the offending prosecuting attorney * * * 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." (Petition for a Writ of Certiorari, p. 29) Svoboda's argument is flatly contradicted by defense counsel's statements on the record to the trial court. Svoboda requested the removal of the assistant prosecutor and the Hamilton County Prosecutor's Office, and he agreed to the court's removal of her and the office and the appointment of a special prosecutor as a complete remedy for the assistant prosecutor's search of his paperwork for the transcript of the Mayerson interview. In particular, Svoboda withdrew his motion to disqualify the assistant prosecutor for the express reason that he was "getting what he asked for." (Transcript of Proceedings, at pp. 75, 79) He further agreed not to litigate the issue further with the special prosecutor, stating, "There would be no point." (*Id.* at p. 75) He further expressed to the trial court, "[W]e have asked for the removal of [the assistant prosecutor] and others, and that appears to be what's happening, so I'm not trying to relitigate that at all." (*Id.* at p. 78) Svoboda's subsequent motion to dismiss the indictment on the basis of the search of his jail cell was directly contrary to the remedy that he specifically requested and received on an issue that he agreed not to litigate further.

Finally, Svoboda suggests that he was not satisfied with the appointment of Mr. Hardman as special prosecutor. Significantly, Svoboda never objected to Mr. Hardman's appointment at

any point, even after Mr. Hardman appeared in court on behalf of the State of Ohio. Consequently, he waived his challenge to Mr. Hardman's appointment for all but plain error. "Notice of plain error under [Ohio R. Crim. P.] 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), at paragraph three of the syllabus. Plain error does not exist unless it is demonstrated that, but for the error, the outcome of trial clearly would have been different. *Id.*, at paragraph two of the syllabus. Svoboda does not establish that, but for the appointment of Mr. Hardman, the outcome of his trial clearly would have been otherwise. Another special prosecutor would have presented the same evidence, which was overwhelming, with the same result. Svoboda has not demonstrated plain error.

Summary

This Court has held that "[c]ases 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," e.g., a defendant's right to counsel and a fair trial versus society's interest in the administration of justice. *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). The First District Court of Appeals of Ohio correctly recognized that "[t]he proper approach is to 'identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial.'" *State v. Svoboda*, 2021-Ohio-4197, ¶ 67, 180 N.E.3d 1277, 1295 (Ohio Ct. App. Dec. 1, 2021), quoting *Morrison*, at 365.

The First District Court of Appeals of Ohio expressed its disapproval of the assistant prosecutor's actions. *Svoboda*, at ¶ 69, 180 N.E.3d at 1296. However, under the circumstances of this case, dismissal of the indictments is not tailored to fit the injury. The trial court remedied

the assistant prosecutor's actions by removing the assistant prosecutor and the Hamilton County Prosecutor's Office as a whole and appointing a special prosecutor to handle the case. Svoboda specifically asked for that remedy, he was satisfied with that remedy, and he agreed not to relitigate the issue of the search of his jail cell and observation of his paperwork. The appointment of a special prosecutor ensured that Svoboda would receive a fair trial and that nothing arising out of the search would enter into the prosecution of the case. The First District Court of Appeals of Ohio found that "on this record, the appointment of the special prosecutor purged any taint[.]" *Svoboda*, at ¶ 69, 180 N.E.3d at 1296. The court of appeals' resolution of this purely factual issue does not conflict with a decision of this Court.

There is no basis for certiorari review of the court of appeals' resolution of the Sixth Amendment issue, which the state supreme court declined to accept for review. The State of Ohio, Respondent herein, asks this Court to deny Svoboda's petition for a writ of certiorari on the Question Presented.

CONCLUSION

For the reasons set forth in the above argument, Respondent asks this Court to deny Svoboda's petition for a writ of certiorari.

Respectfully Submitted,

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