No. _____

In The
Supreme Court of the United States

ROBERT S. SCHWARTZBERG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The
Fourth District Court of Appeal Of Florida

PETITION FOR WRIT OF CERTIORARI

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December 29, 2022

QUESTIONS PRESENTED

This case arises from a domestic dispute involving Petitioner, Robert S. Schwartzberg. The alleged victim claimed that he attacked and sexually assaulted her. Mr. Schwartzberg claimed that she was the aggressor and that he acted in self-defense. Following his conviction, Mr. Schwartzberg sought post-conviction relief based on ineffective assistance of counsel.

The questions presented are:

1. Should a post-conviction court presume prejudice where the prosecutor obtains a defendant's attorney-client and work-product privileged notes prior to trial and introduces those notes as evidence of his guilt?

2. Does the standard under *Strickland v. Washington*, 466 U.S. 668 (1984) require courts to consider the cumulative effect of all errors of counsel in determining whether a defendant satisfied the prejudice prong, or does a defendant need to raise an independent "claim" of cumulative error in his post-conviction pleadings before a court can consider the cumulative effect of those errors?

3. Does a defendant carry his burden under *Strickland* where his counsel failed to (a) move to suppress attorney-client and work-

product privileged notes or object to their introduction at trial as evidence that the defendant committed the charged offenses as well as two other uncharged crimes; (b) object to a flawed self-defense jury instruction that, at the time of trial, Florida courts had condemned as erroneous; (c) present the testimony of an available first responder who would have testified that the defendant's wounds were "defensive" in nature, that the victim had no observable injuries and a calm demeanor, and that the defendant's heart was racing?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Robert S. Schwartzberg was the Defendant-Appellant in the court below.

Respondent, the State of Florida, was the Plaintiff-Appellee in the court below.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

- *State of Florida v. Robert S. Schwartzberg*, Case No. 50-2011-CF-011814-AXXX-MB (Fla. 15th Jud. Cir. 2015), Criminal Judgment entered on March 5, 2015.

- *Robert S. Schwartzberg v. State of Florida*, Case No. 4D15-2304 (Fla. 4th DCA 2017); Mandate issued April 21, 2017.

- *Robert S. Schwartzberg v. State of Florida*, Case No. 50-2011-CF-011814-AXXX-MB (Fla. 15th Jud. Cir. 2015), Final Order Denying Amended Motion for Postconviction Relief issued on September 15, 2021.

- *Robert S. Schwartzberg v. State of Florida*, Case No. 4D21-2860 (Fla. 4th DCA 2022), Mandate issued October 21, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert S. Schwartzberg, respectfully petitions the Court for a writ of certiorari to review the decision of Florida's Fourth District Court of Appeal denying his ineffective assistance of counsel claims.

DECISIONS BELOW

The Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, entered an order granting Mr. Schwartzberg an evidentiary hearing on two claims in his Amended Motion for Post-Conviction Relief. App. 12. That court thereafter entered a Final Order Denying Defendant's Amended Motion for Post-Conviction Relief. App. 3.

Florida's Fourth District Court of Appeal issued an order per curiam affirming the denial of post-conviction relief without a written opinion. That order is published at 346 So. 3d 1190 (Fla. 4th DCA 2022) and reproduced in the appendix. App. 1. Mr. Schwartzberg filed a timely Motion for Rehearing en banc, which the Fourth District Court of Appeal denied on October 3, 2022. App. 29.

STATEMENT OF JURISDICTION

The Fourth District Court of Appeal issued its opinion per curiam affirming the denial of Mr. Schwartzberg's Amended Motion for Post-Conviction Relief. App. 1. Mr. Schwartzberg filed a timely

motion for rehearing en banc in the Fourth District Court of Appeal. That court denied en banc review on October 3, 2022. App. 29.

This Court has jurisdiction to review this timely petition under 28 U.S.C. § 1257(a), because the appellate court, the "highest court of a State in which a decision could be had,"[1] ruled on Mr. Schwartzberg's claim that his conviction violated his right to effective assistance of counsel under the Sixth Amendment. *See Florida v. Rodriguez*, 469 U.S. 1, 2 (1984) (granting petition for writ of certiorari to the Third District Court of Appeal of Florida to review per curiam affirmance on issue of federal constitutional law); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (jurisdiction lies where the decision in question "appears to rest primarily on federal law, or to be interwoven with the federal law," or where the "adequacy and independence of

[1] The Florida Supreme Court lacks jurisdiction under article V, section 3(b)(3), of the Florida Constitution, to review any "unelaborated per curiam decision" from Florida's district courts of appeal. *Wells v. State*, 132 So. 3d 1110, 1111 (Fla. 2014). Mr. Schwartzberg could not avail himself of federal habeas relief under 28 U.S.C. § 2254, because his sentence had completely expired, and he no longer remained "in custody" when the state appellate court rendered its ruling denying his post-conviction Sixth Amendment claims. 28 U.S.C. § 2254(a) (a writ may issue "only on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States"); *see also Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). Thus, Petitioner has exhausted all other possible avenues to challenging the constitutionality of the decision rendered below.

any possible state law ground is not clear from the face of the opinion").

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution states that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Facing criminal charges stemming from a domestic dispute, Robert S. Schwartzberg consulted with three criminal defense attorneys—John Cleary, Marc Shiner, and Jan Peter Weiss—at their respective law offices. App. 6, 32; R. at 1695-96;[2] R. at 2961. He took detailed notes of his conversations with those attorneys, whose names appear prominently on the pages of a notebook he kept. App. 32.

The notes revealed the attorneys' ideas, potential strategies, and mental impressions regarding Mr. Schwartzberg's defense. App. 32. Specifically, the notes included an evaluation of the case that identified potential holes in the theory of prosecution, such as the "lack of evidence," "no

[2] The supplemental citations in the following sections refer to the record on appeal and other filings made in the Fourth District Court of Appeal in *Robert S. Schwartzberg v. State of Florida*, Case No. 4D21-2860 (Fla. 4th DCA 2022).

witnesses," and the "lack of injuries" sustained by the alleged victim, the absence of which would undermine her version of the events. App. 32.

The notes also described specific strategies that the defense could employ at trial, such as cross-examining the victim with evidence that the State offers "cash incentives" to victims to secure their cooperation with the prosecution. App. 32. It revealed potential witnesses, including the names of former boyfriends of the alleged victim. App. 32. Another strategy delineated in the notebook, presenting witnesses who could give Mr. Schwartzberg a "character reference," was employed during his trial. App. 32; R. at 1696, 2563-68. So, too, was his ultimate theory of the defense, "self-defense," which was also reflected in contents of the notebook. App 32.

Law enforcement seized that notebook during a warrantless post-arrest search of Mr. Schwartzberg's house pursuant to an alleged violation of a no-contact order. R. at 2172. Instead of promptly notifying the defense that it had received privileged communications, the prosecution photocopied the notebook pages and produced them as discovery under cover of a notice of "Supplemental Discovery Pursuant to Rule 3.220(j)," a document that referred to the pages as "evidence." R. at 1439.

The photocopied front cover of the notebook bore a large stamp labelling it "CONFIDENTIAL," which suggested that the State was aware of the sensitive nature of its contents. App. 32; R. at 1439. That classification should also have put defense counsel on notice that it contained privileged communications. Though they received the notice, Mr. Schwartzberg's retained counsel, Douglas Liefert and Robert Gershman, never moved to suppress the notebook, or disqualify the opposing attorneys who reviewed its contents, or take any other measure to remedy the breach of attorney-client and work-product privileges in the three years between their receipt of the discovery and the trial.

Prior to trial, defense counsel took the deposition of a first responder, Captain Anthony Faso, a firefighter and certified paramedic, who had advanced training in multiple areas of emergency medicine. R. at 333. On the night in question, Captain Faso was the supervisor, and he had the opportunity to view the comportment of both Mr. Schwartzberg and the victim in the aftermath of their dispute. R. at 338. Mr. Schwartzberg had an abnormally fast heart rate – over two-hundred beats per minute – a notable fact that made Captain Faso remember the call. R. at 341.

Captain Faso testified that Mr. Schwartzberg did not exhibit any visible signs of impairment, but instead appeared to be "fully alert and oriented." R.

at 343. Mr. Schwartzberg answered "question[s] appropriately and interacted well with fire rescue." R. at 343. Captain Faso recalled Mr. Schwartzberg "complaining of pain from multiple superficial trauma that he had received from the domestic dispute." R. at 343. The complaints included "pain to the face, the arms and the genital injury." R. at 344. Mr. Schwartzberg told the first responders that the latter injury was caused by the victim twisting and punching his genitals. R. at 344-45.

Captain Faso described superficial abrasions to Mr. Schwartzberg's face and arms and opined that those appeared to be "defensive wounds," as opposed to self-inflicted injuries or "offensive wounds" that might be sustained while attacking another individual. R. at 349. Captain Faso believed that the injury to Mr. Schwartzberg's genitals was exculpatory and corroborated the statement Mr. Schwartzberg had given to the first responders. R. at 352-53.

According to Captain Faso, none of the first responders treated the victim for any injuries. R. at 354. Based on his recollection of his interaction with her, Faso did not initially believe that she was deemed a "patient," though she was listed as one in his incident report. She was described as not being in "acute distress," which meant she was "calm and collected and not emotionally upset." R. at 356. In addition, he made no mention in his report of her

crying, a detail he would have included if observed. R. at 356.

The report noted no bruising, no bleeding, and no abrasion to her eye. R. at 360. According to the report, "she was only complaining of irritation and pain to the right eye and scratches to her middle back." R. at 362. She made no statements about sexual assault or an injury to her vagina. R. at 362-63, 366-67.

His report did not refer to any examination of her genitals, and it noted that the victim admitted to drinking a few beers and refused both medical treatment and transport to the hospital. R. at 367-70. It was only after Captain Faso examined the victim that she proceeded to a law enforcement officer to give a statement. R. at 371.

At trial, the State claimed in opening statements that Mr. Schwartzberg was intoxicated that night: "She has two beers, he has more than two beers, to the point where he does become intoxicated by alcohol." R. at 2125. The State also asserted that the victim was "going to come [into court] and tell you that she [was] hysterical," and that a police officer would "confirm that." R. at 2127. According to the prosecutor, the victim was "so upset that it took a while to kind of get the statement out." R. at 2127. The prosecutor then told the jury that it would see her eye "almost welded shut." R. at 2128.

Instead of calling Captain Faso, the defense called a different first responder, Bradley Kanter, who provided none of the same favorable testimony that Faso had given during his deposition. Captain Faso, had he been called as a witness, would have refuted key aspects of the State's version of the events, including: (1) the purportedly "hysterical" behavior of the victim; (2) the alleged intoxication of Mr. Schwartzberg; (3) the severity of the injuries that the victim sustained; and, crucially, (4) the State's contention that Mr. Schwartzberg was the aggressor on the night in question. However, Mr. Schwartzberg's attorneys never called Captain Faso, even though he was available to testify if he had been subpoenaed. R. at 2950.

During its case in chief, the State introduced the pages from the notebook containing Mr. Schwartzberg's notes of his communications with defense attorneys into evidence. App. 32. Though defense counsel objected, counsel did not raise the privileged nature of the communications as part of their objection. R. at 2178. The trial court overruled that objection finding defense counsel had "[p]rocedurally defaulted," because they failed to file a motion to suppress prior to trial. R. at 2178. The trial court also observed that the notebook contained the names of defense attorneys and offered defense counsel the opportunity to redact some of the contents. R. at 2277. Defense counsel inexplicably declined the offer. R. at 2277.

The notebook became a feature of the State's case. The State asked the victim about the names of her former acquaintances found in the notebook. R. at 2268-2280. She testified about each of the names and wondered how Mr. Schwartzberg would have possibly known about them. R. at 2268-2280. As the post-conviction court recognized, this suggested to the jury that Mr. Schwartzberg may have been "stalking" her by digging into her past associations. R. at 2908. In addition to the victim, the State asked a law enforcement officer about the contents of the notebook and the circumstances surrounding its seizure, which drew further attention to the exhibit. R. at 2180-81.

Finally, when Mr. Schwartzberg took the stand, the State cross-examined him extensively with his own attorney-client and work-product privileged notes. At one point, the State suggested that Mr. Schwartzberg had concocted his defense after-the-fact in consultation with a defense attorney: "Was this conversation before or after you wrote in your notebook self-defense, *that's what I can claim*?" R. at 2521 (emphasis added).

In addition, the State twisted the words in his notebook to suggest that he had plotted with an attorney to commit the uncharged crime of witness tampering, even though the State had previously "agreed not to bring in the fact that he may have allegedly violated a non-contact order or a

restraining order." R. at 2179-80. That colloquy proceeded as follows:

> Q: Mr. Schwartzberg, in your notebook you wrote something called cash incentives. What exactly does that mean?
>
> A: I met with a number of attorneys, and I did my due diligence immediately after being arrested, so I would be able to retain the best counsel
>
> * * *
>
> Q: On 5D, you wrote Marc Shiner and underneath that offer her cash incentives to prosecute the case.
>
> * * *
>
> Q: What does cash incentives mean?
>
> A: Mr. Shiner was the first person or second person I saw, and he told me that the state prosecutor will assist alleged domestic violence victim by offering them cash incentives, such as helping them with their bills, paying for shelter and a number of other things, in order for them to prosecute the cases and go along with it. He said a number

> of victims of domestic violence that are either like married or have kids don't move forward on these cases, so he said the way the State has it set up they give them incentives such as money to pay for some food and they can get in the shelter and things like that.
>
> Q: So, you wrote cash incentives in the notebook, right? You wrote down that phrase, cash incentives in the notebook?
>
> A: To prosecute.
>
> Q: And you offered to pay her medical bills, correct?

R. at 2522-24 (emphasis added).

Defense counsel never objected to the State's cross-examination of Mr. Schwartzberg with attorney-client and work-product privileged information. Nor did the defense object to the use of the privileged portion of the notebook to suggest Mr. Schwartzberg had committed the uncharged crimes of witness tampering and stalking.

The jury convicted Mr. Schwartzberg. After his conviction became final, Mr. Schwartzberg moved for post-conviction relief pursuant to Florida Rule of

Criminal Procedure 3.850. He argued that defense counsel provided ineffective assistance because they never moved to suppress the attorney-client and work-product privileged notebook and failed to object on those grounds to its use at trial. R. at 274. In addition, he claimed that he received ineffective assistance of counsel when his attorneys failed to call Captain Faso, whose exculpatory testimony was never presented to the jury.

In another ground for post-conviction relief, Mr. Schwartzberg argued that defense counsel failed to adequately cross-examine key witnesses and stipulated to a flawed self-defense jury instruction that negated his theory of defense. R. at 268, 277. He observed that, at the time of trial, the Second District Court of Appeal had already decided *Talley v. State*, 106 So. 3d 1015, 1017 (Fla. 2d DCA 2013), where it held that the standard jury instruction used at trial was erroneous because it suggested that the defendant had no right to defend himself with any force whatsoever unless the alleged victim threatened him with deadly force. In both his motion and his reply, Mr. Schwartzberg asked that the post-conviction court consider the cumulative effect of the errors of counsel in evaluating the prejudice prong of the *Strickland* test. R. at 288, 2899.

The post-conviction court issued two orders in connection with his Mr. Schwartzberg's motion. R. at 2914. In the first order, the post-conviction court

granted Mr. Schwartzberg an evidentiary hearing on his claims related to the failure to call Captain Faso as a witness at trial and the failure to suppress or object to the introduction of the privileged notebook. The post-conviction court expressly found that the notebook could have been suppressed because its contents were privileged work product. R. at 2906. It likewise found that the attorney-client privilege applied to the contents of the notebook because they memorialized and summarized "conversation that would undoubtedly have been protected by the attorney-client privilege." R. at 2907.

Having found that the contents of the notebook were privileged, the post-conviction court concluded that defense counsel performed deficiently at trial. R. at 2907-08. It also found that Mr. Schwartzberg "demonstrated potential prejudice that will require fact-finding in an evidentiary hearing." R. at 2907. Specifically, the court observed that the "State used content in the notebook on cross-examination that indicated Defendant may have been stalking or witness tampering with the victim." R. at 2908.

At the ensuing evidentiary hearing, the State called Mr. Schwartzberg's attorneys, Douglas Liefert and Robert Gershman. Attorney Liefert testified that they took no measures to protect the attorney-client or work-product privilege because they viewed the disclosure as "rather innocuous." R. at 2972, 2981. Regarding Captain Faso, Attorney Liefert

conceded that "there were some observations that [he] may have made that may have been inconsistent with what everyone else was saying," but Liefert attempted to explain that he declined to present Faso *because* his version of events conflicted "with what everyone else was saying." R. at 2983. Notwithstanding this admission, he characterized the testimony of Captain Faso as "cumulative" of the testimony of other witnesses. R. at 2984.

Attorney Gershman conceded in his testimony that the notebook provided a "road map" of what the defense would argue at trial. R. at 3047. He further conceded to the general proposition that the State prosecutor should not be privy to a criminal defendant's theory of defense prior to trial, and he and testified that he would never turn over his own notes to the State. R. at 3052-53. Yet he still defended his decision not to move for suppression of the notebook, claiming it was unnecessary from a "strategy self-defense factual run through the case." R. at 3052-54.

With regard to Captain Faso, Gershman explained that his testimony was "inconsistent with a few things." R. at 3034. Specifically, Mr. Gershman claimed that Captain Faso's testimony conflicted with the account of Mr. Schwartzberg's neighbor, who told an investigator that the victim was hysterical. R. at 3035-36. This neighbor did not testify at trial, though, and Captain Faso had no

motive to corroborate Mr. Schwartzberg's version of the events.

Mr. Gershman also claimed that Mr. Schwartzberg agreed with the decision not to call Captain Faso as a witness: "he and I had agreed that his witnesses were those, what I would call reputation slash character type witnesses and it did not include law enforcement, EMT or those quasi-cop type witnesses." R. at 3036-37 (emphasis added). However, the very first witness the defense called at trial was Bradley Kanter, an emergency medical technician. R. at 2437.

In the final order, the post-conviction court reiterated its prior ruling that the contents of the notebook were "prepared in anticipation of litigation" and "memorialized confidential conversations between Defendant and his prospective attorneys." R. at 2914. Thus, it found the notes were "protected by both work-product and attorney-client privilege." R. at 2914.

The court also found that trial counsel rendered deficient performance: "The Court wholeheartedly agrees with Defendant's postconviction counsel that trial counsel erred in failing to suppress Defendant's notebook—which was clearly protected by privilege." R. at 2915. Nevertheless, it ruled that Mr. Schwartzberg "did not

suffer the requisite prejudice to prevail on an ineffective assistance of counsel claim." R. at 2915.

Though it recognized that the prosecution used the notebook to suggest that Mr. Schwartzberg attempted to "bribe" the alleged victim, it ultimately concluded that the contents of the notebook were "cumulative." R. at 2915; R. at 2917. It also faulted Mr. Schwartzberg for his decision to "ignore trial counsel's advice and testify on his own behalf." R. at 2917. In the view of the court, "the State's use of the notebook on cross-examination is attributable to a decision that Defendant, not counsel, made." R. at 2917-18.

The court also observed that Mr. Schwartzberg maintained that "he was prejudiced because the notebook allowed the State to view his theory of defense prior to trial." R. at 2918 n.2. However, it concluded that "there is no evidence that the State received an unfair advantage from the notebook's contents," and so it declined to consider the prejudice associated with the pretrial disclosure of opinion work product. R. at 2918 n.2.

Though Mr. Schwartzberg asked the post-conviction court to consider the cumulative effect of the errors of counsel, in its two orders the court considered the prejudice associated with each claim independently, without ever considering the prejudicial effect of all the errors in the aggregate.

See App. 4-9 (evaluating prejudice from introduction of notebook separately); App. 15-18 (evaluating prejudice from use of flawed self-defense jury instruction separately); App. 22 (considering prejudice from failure to impeach witnesses separately).

On appeal, Mr. Schwartzberg argued that the post-conviction court erred when it failed to consider the cumulative effect of the errors of counsel, as required under the *Strickland* test. In response, the State claimed that Mr. Schwartzberg "failed to preserve a claim of cumulative error or obtain a ruling on such a claim." Answer Br. at 56. In the view of the State, a defendant must plead a stand-alone "claim" of cumulative error to obtain relief based on the prejudice stemming from the aggregate errors of counsel. *Id.* at 58-59.

Mr. Schwartzberg also argued that the post-conviction court erred when it ruled that he failed to establish prejudice stemming from the failure to suppress the attorney-client and work-product privileged notebook or object to the presentation of those privileged communications to the jury. In response, the State echoed the characterization of defense counsel, claiming that the revelation of privileged communication to the jury was "innocuous." Answer Br. at 50.

The Fourth District Court of Appeals per curiam affirmed the denial of post-conviction relief without any written elaboration. Mr. Schwartzberg filed a timely motion for rehearing en banc, arguing that his case presented issues of exceptional importance. Mot. for Reh'g at 9.

He observed that the State not only learned of the contents of his privileged communications with his counsel in advance of trial; the prosecutor also had the gall to present those privileged communication to the jury as evidence of his guilt. *Id.* at 11. He argued that the appellate court should reiterate the importance of protecting the attorney client privilege, particularly since his own defense attorneys, as well as the appellate counsel for the State, characterized the outrageous breach of his privilege as "innocuous." *Id.* at 15.

He also argued that the facts of the case called for a "presumption of prejudice" because the receipt of privileged communication represented a total breakdown in "meaningful adversarial testing" of the State's case. *Id.* at 14 (quoting *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019)). He stressed that defense counsel admitted during the evidentiary hearing that the notebook was a "road map" of the approach Mr. Schwartzberg would take at trial and argued that it was error for the post-conviction court to find this aspect of the prejudice to be too speculative to consider. *Id.* at 14.

Finally, Mr. Schwartzberg argued that the appellate court should review en banc whether, as the State maintained on appeal, that a post-conviction defendant must plead a stand-alone "claim" of "cumulative error" to raise that argument on appeal, or whether, as he maintained, consideration of the cumulative effect of all errors is inherent in the *Strickland* standard and is cognizable regardless of whether it was initially raised as a stand-alone "claim." *Id.* at 15.

The Fourth District Court of Appeal denied en banc review without a written opinion. Mr. Schwartzberg now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This petition raises three questions of paramount importance to the Sixth Amendment's guarantee of effective assistance of counsel. The first question—whether courts should presume prejudice where the prosecutor obtains attorney-client and work product privileged information and relies on it during trial—provides the Court with the opportunity to resolve a split in authority on the issue and clarify the classes of cases where prejudice can be presumed. It also gives the Court the chance to reiterate the importance of protecting attorney-client privilege and work-product privilege, which are central to ensuring the effectiveness of counsel and reliability in the criminal justice system.

The second question involves the proper approach to evaluating *Strickland* prejudice. The post-conviction court never considered the cumulative effect of the errors of counsel in making that determination and instead conducted a divide-and-conquer analysis of the prejudice Mr. Schwartzberg sustained. This Court should repudiate that approach and hold, as it suggested in *Strickland*, that consideration of the cumulative effect of counsel is inherent in the standard for evaluating ineffective assistance of counsel claims.

By resolving the third question presented, the Court can provide guidance to courts adjudicating ineffective assistance of counsel claims and hold that the facts of this case represent a clear example of both deficient performance and prejudice under the *Strickland* standard. The Court should grant the writ.

I. The Court should Clarify whether the Presumption of Prejudice Applies where the Prosecution Obtains a Defendant's Privileged Notes regarding Trial Strategy and Uses that Information as Evidence to Secure a Conviction.

Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) that any such

deficiency was "prejudicial to the defense." *Strickland*, 466 U.S. at 687-688, 692. Certain circumstances, however, call for a presumption of prejudice. *See generally Garza v. Idaho*, 139 S. Ct. 738, 744 (2019).

In *Garza*, this Court listed some of the instances that warrant a post-conviction court to presume that the defendant suffered prejudice. The presumption applies where a defendant is denied "counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659 (1984). It also applies where a defendant is left "entirely without the assistance of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Similarly, if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, or neglects to file a notice of appeal when instructed to do so by a defendant, *Garza*, 139 S. Ct. at 744, courts may presume prejudice. Though it listed these illustrative circumstances, nothing in *Garza* suggested that those circumstances are the only time when a post-conviction court ought to presume prejudice.

This case presents another scenario that calls for the presumption of prejudice. As the post-conviction court expressly found, the contents of the notebook were attorney-client privileged work product "prepared in anticipation of litigation." App. 4. The post-conviction court further found that Mr.

Schwartzberg's attorneys provided deficient performance in failing to secure the suppression of the notebook. App. 5.

Nevertheless, it concluded that Mr. Schwartzberg failed to establish any prejudice because "there [was] no evidence that the State received an unfair advantage from the notebook's contents." App. 6. This erroneous ruling demonstrates the why prejudice should be presumed under these circumstances.

As defense counsel conceded at the evidentiary hearing, the State obtained a "roadmap" of Mr. Schwartzberg's strategy three years before trial. The notebook contained defense counsel's mental impressions and legal opinions as to the strength of the evidence, a list of potential witnesses for the defense, strategies for cross-examination of certain witnesses, as well as the ultimate theory of defense Mr. Schwartzberg would employ—self-defense. In other words, the State received his attorneys' opinion work product, including the mental processes of defense counsel that have remained "heretofore inviolate." *Hickman v. Taylor*, 329 U.S. 495, 516 (1947).

In *United States v. Nobles*, 422 U.S. 225, 238 (1975), the Court cautioned that the work product privilege was "even more vital" in criminal cases than in civil ones. The *Nobles* Court observed that the

"interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Id.*

But what happens when those safeguards are stripped away, when the prosecution avails itself of attorney work product and obtains a conviction "on wits borrowed from the adversary"? *Hickman*, 329 U.S. at 516 (1947) (Jackson, J., concurring). The answer cannot be to excuse the invasion of privilege as "innocuous," even if the defendant could not point to a specific page in the transcript that showed he suffered prejudice. On the contrary, the "general policy against invading the privacy of an attorney's course of preparation is . . . so essential to an orderly working of our system of legal procedure," *Hickman*, 329 U.S. at 512, and so "vital" to the administration of the criminal justice system, *Nobles*, 422 U.S. at 238, that prejudice should be presumed under these circumstances.

Not only was there a breach of the work-product privilege, the State also knowingly violated Mr. Schwartzberg's attorney-client privilege, which is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Its primary concern is "to encourage full and frank communication between attorneys and their clients

and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

In criminal law, the existence of the privilege allows clients to feel free to "make full disclosure to their attorneys" of any past wrongdoings. *Fisher v. United States*, 425 U.S. 391, 403 (1976). Protection of the privilege is crucial to the Sixth Amendment's guarantee of effective assistance of counsel. *See Weatherford v Bursey*, 429 U.S. 545, 554 n.3 (1977) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard."). Moreover, courts have held that the "deliberate intrusion into the attorney-client relationship" amounts to "outrageous government conduct" that can violate a defendant's right to due process. *See United States v. Voigt*, 89 F.3d 1050, 1066-67 (3d Cir. 1996).

This case represents an outrageous invasion of the attorney-client privilege. Not only did the State learn of the contents of Mr. Schwartzberg's privileged communications regarding trial strategy with his counsel in advance of trial; the prosecutor saw fit to present those privileged communications to the jury as evidence of his guilt.

This included the following question posed to Mr. Schwartzberg: "Was this conversation before or after you wrote in your notebook self-defense, *that's what I can claim*?" R. at 2521 (emphasis added). This comment denigrated the defense by insinuating that he did not act in self-defense but was only "claiming" self-defense after discussing the matter with his attorney.

Since the words in the notebook were written by Mr. Schwartzberg, their exposure to the jury suggested he had confessed his guilt to his counsel. And the admission of the notes into evidence was particularly dangerous because the jury learned the communications took place in a private conversation with counsel, where jurors would expect an individual to speak the unvarnished truth.

The Court last dealt with this issue in *Weatherford v Bursey*, 429 U.S. 545 (1977), where a confidential informant attended an attorney-client meeting and learned of defense strategy. Although the confidential informant never related any information gleaned from the meeting to the prosecutor, the Fourth Circuit held that "whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Weatherford*, 429 U.S. at 549.

This Court rejected the per se rule adopted by the Fourth Circuit. *Id.* at 557-58. The Court stressed that the prosecution never learned of the substance of the privileged communications: "There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by [the informant], there was no violation of the Sixth Amendment." *Id.* at 558. The Court mentioned in dicta that it "could be inferred" from precedent that, "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Id.* at 552. But it had no occasion to affirmatively adopt that rule because that factual predicate was not present in *Weatherford*.

In the wake of *Weatherford*, the federal circuit courts of appeal have adopted differing approaches regarding the extent to which a defendant must show prejudice after government intrusion into attorney-client communications. The First, Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits require a showing of prejudice and place the burden on the defendant. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); *United States v. Melvin*, 650 F.2d 641, 644 (5th Cir. 1981); *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984); *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986); *United States v. Irwin*, 612 F.2d 1182, 1186–89 (9th Cir.

1980); *United States v. Ofshe*, 817 F.2d 1508, 1515 (11th Cir. 1987); *United States v. Kelly*, 790 F.2d 139, 137 (D.C. Cir. 1986).

In the Second Circuit, a defendant is not even entitled to an evidentiary hearing on a claim related to the intrusion into the attorney-client privilege absent a recitation of "specific facts" that would establish prejudice if proven. *United States v. Ginsberg*, 758 F.2d 823, 825 (2d Cir. 1984). Meanwhile, the Fourth Circuit has adopted a four-factor test to determine whether an invasion into the privilege has caused a Sixth Amendment violation. *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981). But that circuit still requires a showing of prejudice, even where the government obtains confidential attorney-client communications containing defense strategy. *United States v. Allen*, 491 F.3d 178 (4th Cir. 2007); *see also United States v. Chavez*, 902 F.2d 259, 266 (4th Cir. 1990) ("[I]t is well settled that some showing of prejudice is a necessary element of a Sixth Amendment claim based on an invasion of the attorney-client relationship.").

The Third Circuit, by contrast, has held that there is a per se violation of the Sixth Amendment where "there is a knowing violation of the attorney-client relationship and where confidential information is disclosed to the government." *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978). The Tenth Circuit likewise presumes a defendant has

been prejudiced when the defendant can establish that the government intentionally intruded on the attorney-client relationship without a "countervailing state interest," because such intentional conduct "must constitute a per se violation." *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *see also State v. Lenarz*, 301 Conn. 417, 22 A.3d 536, 542 (2011) (holding that there is a rebuttable presumption of prejudice when the prosecution reads "privileged materials containing trial strategy," even when the prosecutor's conduct is unintentional).

Scholars have lamented the lack of clarity in the state of the law after *Weatherford*. *See* Blake R. Hills, *Unsettled Weather: The Need for Clear Rules Governing Intrusion Into Attorney-Client Communications*, 50 N.M. L. Rev. 135 (2020) (describing split in circuits and concluding that the "current system is not only inconsistent, it is unfair"). This Court should grant this petition and hold, as it suggested in *Weatherford*, that a defendant need not show any further prejudice where the intrusion of his attorney-client communications led to admissible evidence.

Adopting the alternative rule, which the post-conviction court did below, makes little sense. To force a defendant to adduce additional "evidence" that the intrusion caused him prejudice is an unusually difficult, if not impossible, task. It is hard to imagine that a prosecutor would ever admit on the

record that her strategic or tactical decisions at trial were influenced by the receipt of privileged materials that were not supposed to be in her hands in the first place. Furthermore, the prejudice that flows from the prosecutor's knowledge in advance of the plans and strategies of the defense is not readily susceptible to "proof."

By way of analogy, a chess grandmaster whose opening preparation has been pilfered by his rival stands at a distinct disadvantage. His challenger would know all the lines of attack the grandmaster might employ out of the opening and, perhaps with computer assistance, all their refutations. The aggrieved grandmaster might not be able to identify a specific move that demonstrates he was prejudiced by the foul play on the part of his opponent, but that does not mean that the game was fair.

In the same way, a defendant can be severely disadvantaged if the prosecution knows of his strategic and tactical ideas in advance. The State might choose not to call a certain witness because it knows that the defendant has uncovered damaging impeachment evidence. Or, alternatively, if the State knows why a defendant intends to call a witness and how the witness benefits the defense, then it could prepare a strategy to undermine the effectiveness of that witness. Though the prosecutor's use of the privileged information would not be ascertainable

from the face of the record, that does not mean the defendant suffered no prejudice.

The better rule is to presume prejudice under these circumstances. Applying the presumption makes sense, because when one side gains an unfair informational advantage, it undermines confidence in the result and the proper functioning of the adversarial process, which is the animating principle underlying the *Strickland* test. *See Strickland,* 466 U.S. at 688 (reversal is warranted where a conviction "resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable"). This approach would also disincentivize the invasion of the work-product and attorney-client privilege, an outcome that appears warranted, given that Mr. Schwartzberg's defense counsel, as well as appellate counsel for the State, viewed the breach of privilege to be "innocuous."

It would also provide a measure of fairness to the criminal defendant, who, though a victim of an intrusion into his privileged communications, might not be able to pinpoint "evidence" that shows he was prejudiced by it. Finally, endorsing a permissive approach to the breach of attorney-client privilege could chill the communications between an attorney and a criminal defendant, who might fear that, as in this case, his privileged communications could be used against him at trial.

In sum, when the criminal justice "process loses its character as a confrontation between adversaries, the constitutional guarantee [of effective assistance of counsel] is violated." *Cronic*, 466 U.S. at 654. That is what transpired here, and so the Court should grant the writ on the first question presented.

II. The Court should Resolve the Question of Whether the *Strickland* Standard Requires Consideration of the Cumulative Effect of the Errors of Counsel in Evaluating the Prejudice Suffered by a Defendant.

In *Strickland*, this Court stated that a defendant seeking to establish prejudice "must show that there is a reasonable probability that, but for counsel's unprofessional **errors**, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The *Strickland* Court went on to say that this "legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's **errors**. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the **errors**, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695 (emphasis added).

The portions of *Strickland* quoted above are noteworthy because the Court repeatedly used the

plural form—"errors"—in describing how courts should assess the prejudice prong of the analysis. This, in turn, suggests that courts should look to the cumulative effect of *all* the errors of counsel in deciding whether the defendant established prejudice.

In this case, though, the post-conviction court failed to consider the cumulative effect the numerous errors of counsel had on the trial proceedings. Though Mr. Schwartzberg urged the court in both his motion for post-conviction relief and his reply memorandum to consider the errors in the aggregate, the lower court failed to do so. Instead, it considered each error in isolation, even though certain claims were intertwined.

For example, when it disposed of the claim related to the notebook, the lower court only considered the effect of that one error, the effect of which it characterized as "miniscule." App. 7. It also faulted Mr. Schwartzberg for taking the stand against the advice of counsel. App. 7-8. However, when he took the stand, the notebook was already introduced into evidence as an exhibit. Furthermore, as argued below, Mr. Schwartzberg felt he had to take the stand because his attorneys failed to secure the participation of Captain Faso, and up to that point there was scant evidence that could rebut the State's version of the events. Thus, the prejudice

arising from these two claims was interconnected, but the trial court viewed them in isolation.

Likewise, the post-conviction court concluded that stipulating to an erroneous jury instruction that deprived Mr. Schwartzberg of his only theory of defense did not give rise to *Strickland* prejudice because "giving the jury instruction was not fundamental error." App. 16. Even if that were the case, the prejudice from the jury instruction was exacerbated by the failure to properly impeach or cross-examine witnesses, which made his self-defense claim that much harder to prove. But on those claims, too, the post-conviction court viewed prejudice of each in isolation, instead of considering it alongside the detrimental effect of all the other errors identified in the motion for post-conviction relief. App. 22. Simply put, the lower court applied the wrong standard, engaging in a divide-and-conquer analysis, instead of considering the cumulative effect of all the errors of counsel.

When Mr. Schwartzberg raised that argument on appeal, though, the State argued that he had waived consideration of the cumulative effect of the errors of counsel because he failed to raise a stand-alone "claim" of cumulative error in his post-conviction pleadings. The appellate court appears to have adopted this rationale, as it affirmed his conviction without written opinion, despite the post-conviction court's use of an improper standard.

The Court should take this opportunity to clarify whether, as Mr. Schwartzberg argued below, consideration of the cumulative effect of the errors of counsel is inherent in the *Strickland* test, or whether, as the State argued on appeal, a post-conviction defendant must raise cumulative error as a separate "claim" in his post-conviction pleadings. As evidenced by the varying decisions cited in the parties' respective briefing below, this remains an unsettled question on an issue of utmost importance under federal constitutional law.

In resolving this question, the Court should confirm what it suggested in *Strickland*, that is, the operative test for prejudice demands consideration of the cumulative effect of *all* the errors of defense counsel. This makes sense because the ultimate inquiry turns on whether a defendant can demonstrate that he did not receive a fundamentally fair trial, an inquiry that necessarily entails consideration of the totality of the circumstances that transpired during all the critical phases of the proceedings. Accordingly, the Court should grant this petition on the second question below.

III. The Court should Reverse the Decision Below because Mr. Schwartzberg Clearly Received Ineffective Assistance of Counsel.

The Court should also issue a writ of certiorari and review the third question presented. As the post-conviction court found, Mr. Schwartzberg's attorneys performed in a deficient manner when they neglected to move to suppress the attorney-client and work-product privileged communications and failed to object to the use of that privileged information at trial.

As the post-conviction court recognized, the "State used content in the notebook on cross-examination that indicated Defendant may have been stalking or witness tampering with the victim." R. at 2908. Hence, through Mr. Schwartzberg's own privileged communications with counsel, the State introduced facts that suggested he committed not just one, but two uncharged collateral crimes. *See* Fla. Stat. § 784.048(4), (criminalizing stalking); Fla. Stat. § 914.22, (criminalizing witness tampering).

Though the post-conviction court found that Mr. Schwartzberg failed to establish *Strickland* prejudice, the jury's exposure to uncharged collateral crimes could easily have affected the outcome. In its appellate briefing, the State candidly admitted that the purpose of delving into the uncharged crime of

witness tampering was to show "consciousness of guilt." Answer Br. at 53. Using a client's privileged communication with his attorney to establish "consciousness of guilt" is not "innocuous." It is shocking.

In addition, the State used the notebook to suggest that Mr. Schwartzberg had concocted his self-defense claim after-the-fact during a consultation with defense counsel—"Was this conversation before or after you wrote in your notebook self-defense, *that's what I can claim*?" R. at 2521 (emphasis added).

Finally, the notebook allowed the State to gain an advantage prior to trial, and even if the Court declines to presume prejudice, Mr. Schwartzberg established prejudice from his attorneys' failure to suppress the notebook all the same because his attorney-client and work-product privileged notebook was used against him as evidence of his guilt at trial.

Mr. Schwartzberg also received ineffective assistance of counsel when his attorney failed to object to the use of an erroneous self-defense jury instruction that undermined his theory of defense. It is well-established that the jury instruction used in this case was erroneous under Florida law. *Talley v. State*, 106 So. 3d 1015, 1017 (Fla. 2d DCA 2013); *Jackson v. State*, 179 So. 3d 443 (Fla. 5th DCA 2015); *Sims v. State*, 140 So. 3d 1000, 1005 n.7 (Fla. 1st

DCA 2014) (finding instruction to be error but not reversible because Sims was not entitled to the self-defense theory provided by section 776.013(3) and prosecutor did not rely on the erroneous portion in closing); *Neal v. State*, 169 So. 3d 158, 162 (Fla. 4th DCA 2015) (similar).

The justifiable use of non-deadly force self-defense instruction employed in this case read, in pertinent part, as follows:

> If the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of Felony Battery.

R. at 1552; R. at 2642.

The flaw with the jury instruction, which has since been amended by the Florida Supreme Court, is the effect created by including a stray comma:

> This additional comma is erroneous because under the rules of grammatical

> construction it makes the phrase 'including deadly force' a nonessential part of the sentence and thus changes the meaning by indicating that a defendant has no duty to retreat and has the right to stand his ground and meet force with force only if he reasonably believed that it was necessary to do so to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

Talley, 106 So. 3d at 1017.

As First District opined in *Sims*, the "problem with the instruction is not as much with the extra comma as it is with the inclusion of the language after the first comma, which pertains only to the use of deadly force and has no place in the instruction on justifiable use of non-deadly force." *Sims*, 140 So. 3d at1005 n.7. Hence, as the instruction is framed, a juror might conclude that, where only non-deadly force is at issue, a defendant is justified in defending himself only if he believed that it was necessary to prevent death or great bodily harm to himself or to prevent the commission of a forcible felony.

As noted, every court to have considered the jury instruction used in this case has concluded that it is legal error to give this instruction. Moreover,

Talley was decided in 2013, well in advance of trial. Any reasonably prudent defense attorney would have conducted research on issues related to the jury instruction prior to the charge conference, particularly, where, as here, the Court gave the attorneys advance notice that the instruction would likely be used regardless of whether Mr. Schwartzberg would be testifying. Thus, the failure to correct the erroneous jury instruction constitutes deficient performance and therefore satisfies the first prong of the *Strickland* test.

Mr. Schwartzberg suffered prejudice as a result of this deficient performance. Self-defense was the only theory of innocence that Mr. Schwartzberg advanced. As in *Talley*, the claim of self-defense "came down to a credibility call" between Mr. Schwartzberg and the victim. The prosecutor argued at length in closing that Mr. Schwartzberg's theory of self-defense made no sense and conflicted with the evidence presented, which, according to the prosecutor, did not support Mr. Schwartzberg's claim that the victim injured his genitals.

In such a classic "he said/she said" case, the use of this confusing and flawed self-defense instruction clearly prejudiced the defense. That is because, even if the jury believed his claim that the victim was the aggressor, the jury could have still found Mr. Schwartzberg guilty because the instruction suggests his use of force would be

justified only if necessary to prevent death or great bodily harm, which was not at issue in this case. *Talley*, 106 So. 3d at 1017; *see also Martin v. State*, 154 So. 3d 1161, 1163 (Fla. 2d DCA 2015).

The post-conviction court rejected Mr. Schwartzberg's claim because (1) the State did not rely on the instruction during closing arguments; and (2) the defense agreed to the instruction. R. at 2905. This is error. Though the State might not have relied on the instruction (it is hard to imagine a prosecutor who would, given the state of the law at the time of trial), it did strenuously argue that Mr. Schwartzberg was not entitled to self-defense because he was the aggressor. The second point—that defense counsel agreed to the instruction—is an argument in favor of Mr. Schwartzberg, who claimed that his attorneys' stipulation to the instruction was the product of ineffective assistance of counsel.

Furthermore, in its discussion of prejudice, the post-conviction court reasoned that the error was not sufficiently grave to warrant relief because "part of his defense was to attack the credibility of the victim." R. at 2905. It is true that Mr. Schwartzberg sought to discredit the victim. But that is always going to be the case in a "he said/she said" case, which is a scenario where courts have found the instruction to be prejudicial. This error violated Mr. Schwartzberg's rights under the Sixth Amendment and vitiated the fairness of his trial.

The lower court also erred when it ruled against Mr. Schwartzberg's claim that his trial attorneys were ineffective for failing to call Captain Faso. Based on his deposition, trial counsel knew that Captain Faso's testimony was exculpatory; however, defense counsel failed to subpoena him prior to trial. As Captain Faso confirmed at the evidentiary hearing, he would have testified at trial had he been subpoenaed, and his trial testimony would have been consistent with his deposition testimony.

That testimony would have exposed numerous flaws in the State's theory of the case. For instance, the law enforcement agents both claimed that Mr. Schwartzberg was intoxicated that night, but Faso testified to the contrary during his deposition. Similarly, law enforcement claimed that the victim was "hysterical" and remained at all times in a highly emotional state. Faso, on the other hand, testified that she remained calm and had not been crying, a detail that he testified he would have included in his report.

Furthermore, law enforcement claimed that they could not recollect whether Mr. Schwartzberg ever complained about injuries to his genitals. Captain Faso, by contrast, testified during his deposition that Mr. Schwartzberg told the EMTs about all his injuries, including those to his genitals. According to Faso, those injuries were defensive,

which corroborated Mr. Schwartzberg's version of the events. In sum, Faso's testimony would have refuted many unrebutted threads in the State's narrative, including the claim that Mr. Schwartzberg was drunk, that the victim was hysterical, that Mr. Schwartzberg invented the injury to his genitals, and that Mr. Schwartzberg was the aggressor.

Any one of these three claims should have been sufficient to establish a violation of Mr. Schwartzberg's right to effective assistance of counsel. If considered in the aggregate, the pervasive effect of the ineffectiveness rendered the trial fundamentally unfair and deprived Mr. Schwartzberg of his rights under the Sixth Amendment. Accordingly, this Court should issue the writ and reverse the ruling below.

CONCLUSION

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 29th day of December, 2022.

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