No.

IN THE
SUPREME COURT OF THE UNITED STATES

ANDRE CHANDLER,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Did the government violate Petitioner's Sixth Amendment rights when it debriefed a witness who, by the time of trial was clearly cooperating with the government, about Petitioner's previously disclosed trial strategy for defending his case, in order to suggest that Petitioner's defense strategy was not grounded in science or fact, but rather was wholly fabricated?

List of Parties

All parties appear in the caption of the case on the cover page.

Petition for a Writ of Certiorari

Andre Chandler respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Opinion Below

The decision of the Second Circuit under review is reported at *United States v. Chandler*, 56 F.4th 27 (2d Cir. 2022).

Statement of Jurisdiction

The Second Circuit issued its opinion on December 27, 2022. The time within which to file the petition for certiorari extends to March 27, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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Statement of the Case

In October 2016, following an eight-day trial, a jury found Petitioner Andre Chandler guilty of seven counts of criminal activity related to cocaine and heroin dealing, and related firearm usage in 2014 and 2015. Petitioner was found to have committed these crimes while on a three-year period of supervised release begun in 2014. This period of supervised release was imposed as part of the sentence Petitioner received in 2012 for violating the terms of a previous period of supervision. He is currently serving a 354-month term of imprisonment imposed in 2018 by the United States District Court for the Eastern District of New York (Azrack, J.).

On appeal to the Second Circuit, relying principally on *Weatherford v. Bursey*, 429 U.S. 545 (1977), Petitioner argued that the government plainly erred when it elicited testimony about his trial strategy from his temporary cellmate, Shedret Whithead, who became a cooperating witness after their period of cell-sharing ended. The Second Circuit concluded that the district court did not err, "never mind plainly err," by admitting the cellmate's testimony. *Chandler*, 56 F.4th at 30. The court reasoned:

> Nothing in the record suggests that, through Whithead, the government intentionally invaded [Petitioner's] relationship with his attorney or learned privileged information; Whithead was not a government agent when [Petitioner] disclosed his thoughts about a defense to Whithead; and [Petitioner] has not shown that the plans revealed by [Petitioner] to Whithead were privileged or, to the extent that any privilege did apply, that it was not waived.

Id.

I. Historical facts relating to the question presented.

Petitioner was incarcerated at the Metropolitan Detention Center ("MDC"), while awaiting trial. Among other things, the government accused Petitioner of shooting Hashim Handfield to protect his drug-dealing territory, which included South Franklin and Linden streets in Hempstead, New York. Law enforcement officers searched Petitioner's home and seized drugs and firearms. Testing suggested that Petitioner's DNA was found on some of the firearms. (*See e.g.* Tr. 463-64). Cell tower data also indicated that a cell phone attributable to Petitioner was "in the vicinity" of where Handfield was shot. (Tr. 879).

Whithead is a convicted murderer, who was sentenced to 35 years in prison. (Tr. 1025-26).[1] He was lodged at MDC because he was

[1] Petitioner adopts the spelling of Mr. Whithead's name as it appears in the trial transcript.

planning to "provide information about someone not related to this case." (Tr. 1028). For reasons that are unimportant here, Whithead was never given that opportunity. (Tr. 1028). Whithead shared a cell with Petitioner while he was awaiting trial in this case. (Tr. 1033-34).

Whithead testified that, although the last time he saw Petitioner was in 2002, Petitioner told him about a shootout that he had on Linden and South Franklin. (Tr. 1033-25). According to Whithead, Petitioner said that "one of his crack head runners" said that someone was selling crack and heroin in "his territory." (Tr. 1025, 1036). Petitioner supposedly told Whithead that he shot the person because he wasn't supposed to be selling drugs in his (Petitioner's) territory. (Tr. 1036).

Whithead said that Petitioner arrived on the scene, "the kid" went up to the window to sell drugs, Petitioner's girlfriend passed him the gun, and Petitioner shot twice. (Tr. 1037-39). Whithead testified that Petitioner used a .9 millimeter Smith & Wesson for the shooting, and that he knew that the gun had his DNA on it. (Tr. 1043). According to Whithead, Petitioner drove a rented Mustang, and that "besides the kid that was shot, Debo and a white dope fiend female were on the street." (Tr. 1037).

According to Whithead – who, before his incarceration at MDC had last seen Petitioner fourteen years before the trial in this case, in 2002 – Petitioner was forthcoming with all of this incriminating information because they were members of the same gang and, as such, they trusted one another. (Tr. 1050, 1084). For Whithead, "[i]t would be my gang member before my family." (Tr. 1084).

Except that, evidently, that was not true, because Whithead was willing to cooperate with the government at Petitioner's expense in the hope of being resentenced. (Tr. 1047). Whithead had been incarcerated "almost continuously" since 2000, and he wanted his 35-year sentence to be reduced; he wants "freedom." (Tr. 1048, 1060).

II. District Court proceedings

Whithead had at least four conversations with Petitioner about Petitioner's case. According to Whithead, Petitioner told him all about his drug-dealing activities and the "shootout that he had on Linden and South Franklin." (*See* Tr. 1033-1038). Petitioner refers to these as offense-specific facts. To be clear, Petitioner does not object to Whithead's trial testimony about what Petitioner supposedly told him about offense-specific facts.

However – and this is the part that Petitioner does take issue with – in addition to offense-specific facts, the government elicited all sorts of information from Whithead at trial about Petitioner's trial strategy. To understand how that came about, we must return to our discussion about the offense-specific facts.

In early February 2016 – after Whithead had moved out of Petitioner's cell – Whithead's attorney contacted the government to say that his client "possessed information regarding the Petitioner." (Dkt. 69, p. 2). In April 2016, members of the prosecution team met with Whithead, and during that meeting, Whithead "provided information to the Government regarding Petitioner and his current charges." (A-366).

Before the trial began, the government moved *in limine* for the admission of evidence "regarding Petitioner's gang affiliation." (A-366). In that motion, the government outlined the anticipated testimony in question, including Whithead's offense-specific information. The government's motion provided, in pertinent part, that it intended to introduce evidence that:

> The CW [confidential witness] and [the Petitioner] were recently housed together in a cell in the Metropolitan Detention Center ("MDC"). During the time they were housed together, [the Petitioner] (a) made admission to the CW about

> narcotics trafficking during the relevant period; (b) admitted that he shot a rival narcotics trafficker for selling on Bloods turf, describing the incident in great detail; (c) admitted that the narcotics and firearms seized from his house and car were his….

(A-315). The government made no mention of its intent to offer trial strategy evidence.

Regarding the admissibility of offense-specific information (again, to Petitioner's knowledge at the time, the only sort of evidence the government intended to introduce), Petitioner responded by requesting "a fact finding hearing pursuant to *United States v. Massiah*…to determine whether the cooperator was acting as an agent of the Government at the time [Petitioner] made incriminating statements, while represented by counsel." (A-324; *Massiah v. United States*, 377 U.S. 201 (1964)). The government agreed to a *Massiah* hearing, and the district convened such a hearing on September 15, 2016. (A-325-A-364).

Following the hearing, the district court issued a Decision & Order in which it found that Whithead "was not acting as a government agent when he partook in conversations, and therefore his testimony will not be precluded by the Sixth Amendment." (A-365). Central to that determination was the district court's observation that: "There is no

evidence that any member of the prosecution team had heard of, met with, or spoken to [Whithead] prior to February 2016." (A-368). The district court made no ruling about the admissibility of trial strategy evidence because that evidence was never mentioned by the government pre-trial.

At yet at trial, in addition to his testimony about offense-specific facts, the government purposefully elicited this testimony about Petitioner's intended trial strategy during its direct examination of Whithead. For example:

> Q: Now, did you have any other discussions about the gun or guns, and [Petitioner's] concern about the gun or guns recovered?
>
> [Defense counsel]: Objection.
>
> THE COURT: Overruled.
>
> A: Yes, I did, ma'am.
>
> Q: Could you tell the jury and the Judge what those discussions were?
>
> A: He was scared that he knew that the gun that he had used for the shooting had his DNA on it.
>
> Q: **And what did he tell you he was going to do about that?**
>
> A: He said he was going to argue the fact that the search was botched, and that the guns where they was found

and the photographs were taken in a place where they were found that they shouldn't be in there.

Q: **So, [Petitioner] told you he was going to argue the search was botched; is that right?**

A: Correct, ma'am.

Q: **And how did that – how did he tell you that he was going to explain his DNA on this gun?**

A: From moving it from place to place, DNA transfer.

Q: Did he tell you the gun actually got a DNA [sic] because it was transferred or because he touched those guns?

A: Because he used the gun during the shooting.

Q: Besides having concerns about having his DNA on the gun, did [Petitioner] express to you any other concern about the .9 mm Smith and Wesson?

A: The fact that it was found in the house, and that he said he was going to use an alibi of where he was on the night of the shooting.

* * * * *

Q: And did he express any concerns to you during that conversation about certain evidence?

A: Yes, he did, ma'am, about a cell phone.

Q: What did he tell you?

A: He told me that the government had information, evidence, to put him at the scene of the shooting, because the cell phone itself came to a cell tower before the shooting.

Q: **And did he tell you that he was going to fight that evidence?**

A: He was going to have an alibi that he was at a party with his girlfriend where she's with him.

* * * * *

Q: Did he tell you he didn't sleep [in the room where the guns were recovered], or **that's what he was going to say** to the force or the police?

A: That's what he was going to tell people that he didn't sleep in that room.

Q: Who did he tell you he was going to say the guns were owned by?

A: Ms. Clarke.

Q: **So, he told you he was going to say he really didn't sleep in that room, and that the guns found in that room were Ms. Clarke's**?

A: That's correct, ma'am.

(Tr. 1039-1040, 1043-44, 1046; emphasis added).

Petitioner never objected pre-trial to the admission of Whithead's trial-strategy testimony, but in fairness, the government never hinted that it might seek to admit such evidence. When Whithead's testimony began to transition from offense-specific evidence to trial-strategy evidence, defense counsel objected (as the above-quoted passage

demonstrates). However, it isn't entirely clear what the basis of Petitioner's objection was, and in context, it seems that Petitioner's chief complaint was that the prosecution was leading the witness. (*See e.g.* Tr. 10410, 1042). Petitioner presumes, therefore, that the issue is unpreserved.

III. The Second Circuit's decision

The court began its analysis by noting: "[Petitioner] derives his Sixth Amendment claim from the Supreme Court's 1977 decision in *Weatherford*." *Chandler*, 56 F.4th at 36. After discussing the facts of that case, the Second Circuit observed: "In the 45 years since *Weatherford* was decided, this Circuit has never found a *Weatherford* violation." *Id.* at 37. It then concluded that Petitioner, likewise, had fallen "short of establishing a Sixth Amendment violation on this record" and that the "district court did not err by allowing Whithead's testimony." *Id.* at 38. The court reasoned:

> Since Whithead was not a government informant when [Petitioner] spoke to him about [Petitioner's] expected trial strategy, the government did not intrude on the attorney-client relationship. That is fatal to his Sixth Amendment claim.

Id. at 38.

Petitioner agreed, the Second Circuit observed, that he "shared his defense plan with Whithead of his own volition, and demonstrably before Whithead became a cooperator," *id.*, and moreover, the Second Circuit explained, "[t]he record does not reflect that [the conversation between the two men about trial] strategies came from consultation with counsel; we are asked to infer that they may have come from counsel, but any advice to develop a false alibi would likely have been unethical in any event," *id.* at 40. The court posited: "Indeed, as far as the record reveals, what [Petitioner] told Whithead about his defense was far more likely to be [Petitioner's] own thoughts than advice received from counsel, because it would have been unethical for an attorney to advise at least some of the trial strategy disclosed by [Petitioner]." *Id.* at 38.

The court concluded by promulgating a bright-line rule:

> [S]tatements such as these – voluntarily made by defendants to third parties *who are not agents of the government at the time of their utterance* – are by definition not privileged and cannot be used to establish an 'invasion' of the attorney-client relationship *attributable to the government*.

Id. at 40 (emphasis in *Chandler*).

In a footnote, the court discussed the Third Circuit's view of *Weatherford*. *Id.* at 40 n. 8 (citing *United States v. Costanzo*, 740 F.2d

251 (3d Cir. 1984). In *Costanzo*, the Third Circuit explained that a Sixth Amendment violation may occur even "when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant." *Costano*, 740 F.2d at 254. This rule, which Petitioner urged the Second Circuit to adopt, was, the court concluded, "inconsistent with our precedents interpreting *Weatherford*," which hold that "a Sixth Amendment violation can occur only if privileged information is given to the government or the government intentionally invades the attorney-client relationship," something the court reasoned did not happen to Petitioner. *Chandler*, 56 F.4th at 40 n. 8. The Second Circuit added:

> In any event, application of the *Costanzo* formulation would not change the result here because [Petitioner] – like the defendant in *Costanzo* – was not unfairly prejudiced as a result of his disclosure of his likely trial strategy. …. The primary value of Whithead's testimony lay in [Petitioner's] admission of guilt, his evident awareness of the strength of the prosecution's evidence, and his intention to concoct theories to obscure the truth about his actions. And while these portions of Whithead's testimony were certainly damaging to [Petitioner], it is indisputable that they were properly admitted.

Id.

Reasons for Granting the Writ

I. The Second Circuit's decision cannot be reconciled with this Court's case-law and it is at odds with decisions from other federal appellate courts.

Respectfully, the Second Circuit's exclusive focus on the government's *pre-trial* relationship with Whithead ignores the real Sixth Amendment problem. The prosecutor purposefully asked Whithead, its informant by the time of trial – in front of the jurors – how defendant planned to defend against evidence that he possessed guns; evidence that his DNA was found on guns; and GPS location evidence. And this testimony about defendant's trial strategy greatly prejudiced Petitioner. Because of it, the jurors were primed to believe that the defense Petitioner actually asserted was entirely fabricated and had no basis either in science or in the truth.

A. This Court's case-law

Regardless of how the government came to know from Whithead about Petitioner's trial strategy, this evidence was inadmissible at trial. Scores of evidence lawfully within the government's possession may – for one reason or another – not be appropriate for admission at trial. Whithead's trial strategy testimony is one such example.

We begin with *Weatherford v. Bursey*, 429 U.S. 545 (1977). In that case, an undercover agent responsible for the arrest of Bursey was also arrested and charged as a co-defendant in order to preserve his undercover status. *Id.* at 547. The agent, to continue to maintain his "cover," hired his own attorney. *Id.* at 547. On two occasions prior to trial, the agent met with his co-defendant (Bursey) and Bursey's counsel, at their request, to discuss the approaching trial. *Id.* at 547-48. The agent did not discuss with, or pass on to, his supervisors or to the prosecution team any information whatsoever concerning Bursey's "trial plans, strategy, or anything having to do with the criminal action pending against [Bursey]." *Id.* at 548. Although the agent later testified against Bursey at Bursey's trial about the facts constituting the alleged offense, the Court held that Bursey's Sixth Amendment right to effective assistance of counsel had not been violated by any of the agent's actions. *Id.* at 549, 555. The Court reasoned that no Sixth Amendment violation occurred because the agent never communicated any information he learned about Bursey's trial strategy to the prosecution. *Id.* at 554. The Court cautioned:

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and [his attorney]; had any of

> the State's evidence originated in these conversations; had those overheard conversations been used in any way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of Bursey-[Attorney] conversations about trial preparations, Bursey would have a much stronger case.

Id. at 554; *see United States v. Levy*, 577 F.2d 200 (3d Cir. 1978) (reflecting on this passage, and instructing: "We think the Court was suggesting by negative inference that a sixth amendment violation would be found where…defense strategy was actually disclosed or where…the government officials sought such confidential information.").

The *Weatherford* Court reiterated: "As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights." *Id.* at 556. The Court admonished:

> Moreover, this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly.

Id. at 557. In the end: "There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth

Amendment…." *Id.* at 558. Plus, Weatherford's trial testimony was devoid of any information about defendant's trial strategy:

> [N]either Weatherford's trial testimony nor the fact of his testifying added anything to the Sixth Amendment claim. Weatherford's testimony for the prosecution related only to events prior to the meetings with [Bursey's attorney] and Bursey and referred to nothing that was said in any of those meetings. There is no indication that any of this testimony was prompted by or was the product of those meetings.

Id. at 558; *see also Klein v. Smith* 559 F.2d 189 (2d Cir. 1977), *cert. denied,* 434 U.S. 984 (1977) ("The essence of the Court's holding appears to be that, at least where the intrusion by an 'agent' of the prosecution is unintentional or justifiable, there must be some communication of valuable information derived from the intrusion to the prosecutor or his staff in order that there can appear some realistic possibility of prejudice to the defendant.").

B. The Second Circuit's bright-line rule is at odds with *Weatherford.*

Weatherford itself makes the point that a Sixth Amendment violation may occur without a concomitant violation of attorney-client privilege.[2] The *Weatherford* Court admonished:

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[2] Petitioner acknowledges that much of the post-*Weatherford* case-law, including that from this Court, involves an antecedent violation by a government actor of the attorney-client relationship. *See e.g. United States v. Sanin*, 113 F.3d 1230 (2d Cir. 1997) (unpublished); *United*

> **[W]e need not agree** with petitioners that whenever a defendant converses with his counsel in the presence of a third party thought to be a confederate and allay, the defendant assumes the risk and cannot complain if the third party turns out to be an informer for the government who has reported on the conversations to the prosecution and who testifies about them at the defendant's trial.

Weatherford, 429 U.S. at 54. Why not? Because:

> Had [the informant] testified at [the defendant's] trial as to the conversation between [the informant] and [defendant's counsel]; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of [the defendant]; or even had the prosecution learned from [the informant], an undercover agent, the details of the [attorney-client] conversations about trial preparations, [the defendant] would have a much stronger case.

Id.

The *Weatherford* Court found no reversible error, however, because the prosecution took pains not to comingle the information it learned from the informant with the presentation of its case. The informant's "testimony for the prosecution" about the events in question "revealed nothing" about defense trial strategy. *Id.* at 555. And, none of the prosecution's proof was obtained as a result of the informant's knowledge

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States v. Schwimmer, 924 F.2d 443, 446-47 (2d Cir. 1991); *United States v. Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985); *United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979). However, as explained *infra*, Petitioner posits that *Weatherford*'s reach is broader, and that a violation may occur even without the government's violation of the attorney-client privilege.

of trial strategy. *Id.* This Court specifically noted that it would not disturb the district court's "express finding that [the informant] communicated nothing at all to his superiors or to the prosecution about [the defendant's] trial plans or the upcoming trial. *Id.* at 556. This Court instructed that "this is not a situation where [the prosecution's] purpose was to learn what it could about the defendant's defense plans…." *Id.* at 557.

Moreover, this Court noted, "it is also apparent that neither [the informant's] trial testimony nor the fact of his testifying added anything to the Sixth Amendment claim." *Id.* at 558. This is so because "[t]he [informant's] testimony for the prosecution related only to events prior to the meetings with [counsel] and [defendant] and referred to nothing said in those meetings." *Id.* Also: "**There is no indication that any of his testimony was prompted by or was the product of those meetings**." *Id.* (emphasis added).

Summarizing its reasoning, this Court emphasized – again – that there would be no **constitutional** error if the informant listened-in to a conversation between the defendant and his lawyer discussing "defense

plans." *Id.* at 558. Rather, the Sixth Amendment error occurs **when the informant communicates defense strategy to the prosecution**. *Id.* at 558.

Obviously, here, the informant communicated to the prosecution about Petitioner's trial plans. That happened from the witness stand, for all the jurors to hear. And this disclosure happened purposefully. The prosecutor elicited this testimony during his direct examination of the informant. The Second Circuit's implicit blame-shifting to Petitioner for assuming the risk that the informant would keep his secrets is not only unavailing – it is the very premise that the *Weatherford* Court rejected. *See Weatherford*, 429 U.S. at 554 ("[W]e need not agree…that whenever a defendant converses with his counsel in the presence of a third party thought to be a confederate and ally, the defendant assumes the risk and cannot complain if the third party turns out to be an informer for the government who has reported on the conversations to the prosecution and who testifies about them at the defendant's trial.")).

Weatherford and its progeny aren't concerned with a violation of the attorney-client privilege as such. That problem is covered by the Rules of Evidence. Rather, *Weatherford et al.* discuss the Sixth Amendment violation results from improper prosecutorial **use** of defense

strategy information. And it is this latter error to which defendant's argument on appeal is addressed.

C. Division among the lower courts over whether a violation of the attorney-client privilege is an essential antecedent to a Sixth Amendment violation

In *Costanzo*, the Third Circuit correctly observed that a Sixth Amendment violation may result even if the attorney-client relationship was not violated. In that case, a government informant previously acted as counsel for defendant, although the district court supportably found that the informant and the defendant did not have an attorney-client relationship at the time in question. *Id.* at 254. Thus, the attorney's informant status did not violate the attorney-client privilege. *Id.* This, however, was not determinative of the defendant's claimed *Weatherford* violation. As the court explained:

> **Upholding the district court's conclusion that no attorney-client relationship existed does not end our inquiry.** The sixth amendment is also violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; **or** (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1977).

Id. (emphasis added; full citation to *Weatherford* omitted).

The Third Circuit concluded that the first type of *Weatherford* error did not occur because the prosecutors made efforts never to learn about defense strategy information. The court explained: "FBI agents instructed [the lawyer] not to disclose any defense strategy information and…they periodically consulted with their supervisors to make certain that their use of [the lawyer] remained within legal limits." *Id.* at 255. Neither the second or third type of *Weatherford* error occurred, either, because none of the disclosures made by the lawyer to the prosecution "were the product of intentional intrusion into the defense camp, involved confidential defense strategy information, or were accompanied by a showing a prejudice." *Id.* at 257.

The First Circuit has similarly acknowledged the distinction between a violation of the attorney-client privilege and a Sixth Amendment violation. In *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984), the Court found that the informant's awareness of defense strategy "did not in itself violate the Sixth Amendment." However, the informant's disclosure of defense strategy to the prosecution might be constitutionally problematic; the First Circuit instructed that since the prosecution "debriefed" the informant after he

learned about defense strategy, "we must consider the propriety of the debriefing as well." *Id.* at 906. The court concluded that the government "failed adequately to justify" debriefing the informant, but that no *Weatherford* violation occurred because the informant never revealed the defendant's trial strategy to the government. *Id.* at 908.

In *Shillinger v. Haworth*, 70 F.3d 1132, 1134 (10th Cir. 1996), the Tenth Circuit underscored the way in which prosecutorial debriefing violates the Sixth Amendment, as well. In that case, the defendant (who was unable to make bail) and his attorney were permitted to hold several preparatory sessions at the courthouse on the condition that a deputy sheriff would be present at all time. Eventually, the prosecutor admitted that he debriefed the deputy sheriff about what was said during those preparatory sessions. *Id.* at 1135. The prosecutor argued, however, that "the attorney-client privilege had been waived by the deputy's presence." *Id.*

The Tenth Circuit admonished:

> [T]his is a case in which the prosecutor, by his own admission, proceeded for the purpose of determining the substance of [the defendant's] conversations with his attorney, and his attorney-client communications were actually disclosed. This sort of purposeful intrusion on the attorney-client

> relationship strikes at the center of the protections afforded by the Sixth Amendment….

Id. at 1141. The court remanded the case to the district court to investigate the "extent of the intrusion" and announce "the proper remedy." *Id.* at 1143.

Petitioner pauses here to make an additional observation. Whithead's official status – government agent, or not – is of no consequence. The deputy sheriff in *Shillinger* was never labeled an "informant" or an "agent" of the prosecution, either. The point is, the man was working in service of the prosecution, just as Whithead's testimony served the prosecution's case, here.

The Fourth and Fifth Amendment exclusionary rules may depend on whether a violator was a government actor. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment, so stating); *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (Fifth Amendment, so stating). But, the Sixth Amendment doesn't work that way. The Sixth Amendment is focused on a defendant's right to the effective assistance of counsel, and violations of that right most commonly occur from non-governmental actors. *See United States v. Morrison*, 449 U.S. 361, 667-69 (1981) (discussing the remedy for Sixth Amendment violations);

Strickland v. Washington, 466 U.S. 668 (1984) (discussing the Sixth Amendment's guarantee of effective assistance of counsel); *Georgia v. McCollum*, 505 U.S. 42, 53 (1992) (even court-appointed counsel does not qualify as a state actor when engaged in his general representation of a client).

Plus, arguably, Whitford became an "agent" of the prosecution when he agreed to testify against defendant at trial. *See Klein v. Smith*, 559 F.2d 189 (2d Cir. 1977) (so stating). Regardless, the gravamen of Petitioner's complaint is that the prosecuting Assistant United States Attorney – who was unambiguously a governmental actor – violated his Sixth Amendment rights by eliciting information about defense strategy. This Court may comfortably reject the state-actor distinction the Second Circuit has drawn. It may likewise reject the Second Circuit's bright-line rule regarding the Sixth Amendment, which is at odds with the aforementioned cases, namely:

> [S]tatements…voluntarily made by defendants to third parties *who are not agents of the government at the time of their utterance* – are by definition not privileged and cannot be used to establish an 'invasion' of the attorney-client relationship *attributable to the government*.

Chandler, 56 F.4th at 40 (emphasis in *Chandler*).

D. Division among the lower courts on the issue of prejudice

The issue of prejudice has divided the Courts of Appeal, as well. *See Mastroianni*, 749 F.2d at 907 (identifying the split). The Third Circuit and the District of Columbia "have held that disclosure of defense information by itself creates a showing of prejudice." *Id.* at 907 (citing *Briggs v. Goodwin,* 698 F.2d 486, 494-95 (D.C. Cir. 1983); and *Levy*). The Ninth Circuit "has found that prejudice exists only when information obtained through interference with the attorney-client relationship is used against the defendant." *Id.* at 907. The First Circuit has taken a "middle position." *Id.* at 907. In order "to make a prima facia showing of prejudice" in the First Circuit, "the defendant must prove that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting. Upon such proof, the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications." *Id.* at 908. The First Circuit has explained that the "burden on the government is high because to require anything less would be to condone intrusions into a defendant's protected attorney-client communications." *Id.* at 908.

II. This case is an excellent vehicle for clarifying *Weatherford*'s reach.

A. The *Weatherford* violation in Petitioner's case was plain.

There is no doubt that in our case, the government purposefully elicited from its own informant defense trial strategy information: the prosecutor did it in plain sight, during the trial. Our case is thus factually distinct – and much worse – from the cases cited *supra* where the prosecutor surreptitiously debriefed the informant pretrial about defense strategy. In our case, the prosecutor debriefed the informant – it consciously elicited Sixth Amendment information – about trial strategy **in front of the jury**. This was a textbook *Weatherford* violation. *See e.g. Weatherford*, 429 U.S. at 554 (suggesting by negative inference that a Sixth Amendment violation would have occurred if Weatherford testified at Bursey's trial about trial strategy); *Klein*, 559 F.2d at 197 (the essence of *Weatherford*'s holding is communication of valuable Sixth Amendment information derived from the intrusion of the prosecutor); *Ginsberg*, 758 F.2d at 833 (testimony from a prosecution witness about attorney-client communications would constitute a Sixth Amendment violation); *Levy*, 577 F.2d at 210 (a Sixth Amendment violation occurs where "defense strategy was actually disclosed").

It does not matter that Whithead did not communicate with Petitioner's trial attorney directly, or that Petitioner did not specifically indicate that his trial strategy was concocted by his attorney, or that Petitioner himself may have divulged strategy without prompting from Whithead (if Whithead's version of events is to be believed).[3] The salient point is that the information in question related to Petitioner's anticipated defense – a defense that the law presumes had its genesis in counseled communications. *See McCoy v. Louisiana*, 138 S.Ct. 1500, 1508 (2018) ("Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue….'") (quoting *Gonzalez v. United States*, 553 U.S. 242, 248 (2008)). And this defense-strategy information is something that the government had no business pursuing, much less presenting to the jury.

The only remaining question is whether Petitioner was prejudiced by the government's elucidation of trial-strategy evidence, and he

[3] As *Costanzo*, *supra*, makes clear, a breach of the evidentiary attorney-client privilege (which may or may not have happened in our case) is a separate inquiry from whether a Sixth Amendment violation has occurred. The constitutional violation may exist regardless of any underlying sub-constitutional or evidentiary problem.

obviously was. Respectfully, the Second Circuit's discussion about a putative unethical alibi defense is a red herring. As the cited transcript passages make clear, Whithead portrayed the defense that Petitioner actually mounted (obviously with his attorney's assistance) as a complete fabrication. Whithead's testimony about DNA transfer is illustrative. According to Whithead, Petitioner actually touched the guns in question, but Petitioner was going to claim that his DNA was found there for other exculpatory reasons. Petitioner's DNA transfer evidence might actually have had merit, but thanks to the prosecutor's exchange with Whithead, the jurors were primed to believe that the DNA transfer theory was just a lie. Likewise, the government obviously knew in advance of trial that DNA transfer would be Petitioner's theory. The prosecutor's questions reveal as much; she wasn't shooting blindly in the dark for answers: she knew exactly what she was fishing for. This enabled the government to take into consideration the need for the type of juror who could carefully evaluate DNA transfer evidence.

The government easily could have confined Whithead's testimony to offense-specific facts, only. Its purposeful choice to veer into testimony about defense trial strategy violated defendant's Sixth Amendment

rights and prejudiced him greatly. Respectfully, the failure to curtail this testimony constitutes obvious error.

The government debriefed Whithead about defense strategy on the witness stand. It did this in order to paint Petitioner's entire case as a complete fabrication. (Blue Br. 15-17, 30-31). The prosecutor asked these questions of Whithead:

- "And what did he tell you he was going to do about that [referring to his DNA on the gun?]?
- "So, [defendant] told you he was going to argue the searched was botched; is that right?"
- "And how did that – how did he tell you that he was going to explain his DNA on the gun?"
- "And did he tell you that he was going to fight that evidence?"
- "…[T]hat's what he was going to say [referring to the location of the gun]…?"
- "So, he told you he was going to say he really didn't sleep in that room, and that the guns were found in that room were Ms. Clarke's?"

(*See* Blue Br. 16-17). Such questions have no place in a criminal trial. There is a reason – *Weatherford* – why these questions are not asked in other cases. Respectfully, the government should have confined itself to

attacking the merits of the defense case, rather than eliciting defense strategy information in order to paint Petitioner as a calculating liar.

The reason such testimony offends the Sixth Amendment is because it suggests that any defendant who has the audacity to develop a response to the government's evidence must, necessarily, be a calculating fraudster. It is impossible to simultaneously respect the notion that a criminal defendant has a constitutional right to present a defense, and then to use evidence of his plans to assert that defense as a sword against him, which is precisely what the government did here. Petitioner urges this Court to say so.

B. The issue is one of importance with far-ranging implications.

The Bureau of Prisons ("BOP") monitors communications between inmates and lawyers. *See* Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. at 55,066 (October 31, 2001), codified at 28 C.F.R. pts. 500, 501 (authorizing such monitoring). The BOP provides notice to both the inmate and the lawyer before any monitoring occurs. *Id.* Naturally, defendants and their lawyers communicate about defense strategy anyway – knowing that their conversations are monitored – principally because they have no other option but to communicate under those

circumstances. Arguably, in doing so, either the government intrudes on the attorney-client privilege or defendants waive that privilege. The legal distinction is unimportant.

The point is, the same rule that allows this monitoring to occur also contemplates a "privilege team," separate and apart from the prosecution and investigation, and this privilege team many not disclose any intercepted information without court approval, except where the material the team obtains indicates that violent acts are imminent. *Id.* In fact, as the Rule makes clear, these procedures are essential in order to satisfy *Weatherford.* Pertinent portions of the Rule summary cite to *Weatherford* and provide:

> The procedures established in this new rule are designed to ensure that defendant's Sixth Amendment rights are scrupulously protected. … In following these procedures, it is intended that the use of a taint team and the building of a firewall will ensure that the communications which fit under the protection of the attorney-client privilege will never be revealed to prosecutors or investigators.

28 C.F.R. pts. 500, 501 (Rule summary). These procedures exist regardless of whether monitoring constitutes the violation of the attorney-client privilege. They exist to satisfy the Sixth Amendment, which is broader.

In other words, in this, albeit different, context, the Department of Justice recognizes what the Second Circuit doesn't, in this case: when the government acquires information about defense trial strategy, it may not use that information to the defendant's detriment. Doing so results in a Sixth Amendment violation. All of the cases cited *infra* and the Appellant's Brief, demonstrate this principle.

Here, the government understood that Whithead had information about defendant's trial strategy. On direct examination, the government debriefed Whithead about what that information was. Rather than try to build "a firewall" or work to ensure that the information Whithead had about trial strategy would "never be revealed," the prosecutor did the opposite: the prosecutor shared that information **with the jury**. Doing so prejudiced defendant.

Conclusion

This Court should grant the writ of certiorari.

Respectfully submitted,

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