**No. 23-**

IN THE

# Supreme Court of the United States

IRVIN HARRIS JOHNSON,
*Petitioner,*

v.

UNITED STATES,
*Respondent.*

**On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

While Petitioner Irvin Johnson was in jail awaiting trial for murder, he reviewed the police affidavit from his arrest, taking notes on questions and evidentiary topics that he planned to discuss with his trial counsel. Before he could do so, guards seized his legal note and turned it over to the prosecutors—who used it at trial, framing it as a confession. Aside from this "confession," the trial evidence was largely circumstantial. After asking to see the note during its deliberations, the jury entered a guilty verdict. The Court of Appeals affirmed, holding that the government's use of Mr. Johnson's legal note at trial did not violate his Sixth Amendment right to counsel because the note was not "on its face" an attorney-client communication, and no prejudice resulted from any work-product violation. The questions presented are:

1. If a pretrial detainee drafts notes reflecting his defense strategy for discussion with counsel, may the government seize those notes and use them at trial so long as they do not indicate on their face that they are privileged and the client does not currently have a specific meeting with counsel scheduled?

2. Is the government's use of such protected materials at trial always or presumptively prejudicial?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, the defendant-appellant below, is Irvin Johnson.

Respondent, the appellee below, is the United States.

No corporate parties are involved in this case.

## RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the Superior Court of the District of Columbia, Criminal Division, and the District of Columbia Court of Appeals: *United States* v. *Johnson*, Case No. 2011-CF1-017540 (D.C. Super.); and *Johnson* v. *United States*, Nos. 13-CF-0493, l 7-CO-0422 & 20-CO-0609 (D.C.).

No other proceedings are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Irvin Johnson respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

## OPINIONS AND ORDERS BELOW

The Court of Appeals' unreported opinion, *Johnson* v. *United States*, Nos. 13-CF-0493, 17-CO-0422 & 20-CO-0609 (D.C. Apr. 7, 2023), is reproduced at Pet. App. 1a–16a.

## STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on April 7, 2023, and denied rehearing on August 17, 2023. Pet. App. 94a. On December 5, 2023, the Chief Justice extended the time to file this petition to January 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a)–(b).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, as relevant: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

## INTRODUCTION

This case presents two important Sixth Amendment questions on which the lower courts are split: When does the Sixth Amendment right to counsel protect a pretrial detainee's notes about his case, prepared for later discussion with counsel, from government intrusion? And if the government seizes such legal notes and uses them at trial, how should courts analyze whether prejudice resulted? The answers to these

questions affect the ability of countless criminal defendants to participate in their defenses and thus to secure the effective assistance of counsel.

After he was arrested, Mr. Johnson wrote notes about his defense and reactions to the charges against him to discuss with counsel. This is common: Many jailed people do not know when they will next see their counsel, so they jot down ideas and questions as they arise. Mr. Johnson did not mark his note as "privileged and confidential," but he did later discuss its substance with his counsel. This, too, is common; layperson defendants cannot be expected to observe the same formalities as corporate lawyers.

Yet the D.C. Court of Appeals allowed the government to seize the note from Mr. Johnson's cell and use it at trial—portraying it as a "confession" to murder. According to the decision below, the Sixth Amendment did not protect the note because Mr. Johnson did not expressly mark it as privileged or have an upcoming meeting set with counsel. And while the court said the note "might" be protected under the work-product doctrine, it put the burden on Mr. Johnson to prove that the prosecution's use of this "confession" was prejudicial under the Sixth Amendment, concluding that he failed to do so.

Both holdings are wrong, and both implicate splits among the lower courts. Other courts rightly hold that such notes are protected by privilege and the Sixth Amendment so long as they are prepared for discussions with counsel and kept private. Other courts also correctly hold that, when the prosecution uses such protected information at trial, prejudice must be presumed, either rebuttably or conclusively. But different courts agree with the decision below or take yet another approach. Indeed, "many federal and state courts have struggled" with these issues. See *Kaur* v.

*Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., concurring in denial of certiorari). This case provides an ideal vehicle to resolve these conflicts, to provide much-needed guidance to courts and attorneys, and to ensure that the Sixth Amendment effectively safeguards the right of accused people to defend against criminal charges.

## STATEMENT OF THE CASE

Mr. Johnson was convicted in connection with two shootings that occurred on June 21 and July 9, 2011. At the first shooting, two individuals exchanged fire with another group. No one was injured. At the second, two people were killed and a third was injured. No eyewitnesses saw the fatal shooting, and no physical evidence linked either shooting to Mr. Johnson.

1. After his arrest, Mr. Johnson began preparing his defense with his trial counsel, Liyah Brown. After meeting with Ms. Brown, he reviewed the arrest warrant affidavit and prepared notes that he intended to discuss with her. Pet. App. 129a. The notes included questions about the evidence in the affidavit and defense strategy ideas for challenging that evidence. Intending to discuss his notes with Ms. Brown, but not knowing when he would have his next meeting with her, Mr. Johnson had no choice but to keep his notes in his cell. But before Mr. Johnson had the chance to meet with Ms. Brown, the government seized everything in his cell and then turned over the legal notes to the prosecution in Mr. Johnson's case. *Id.* at 10a–11a.

Mr. Johnson repeatedly tried to regain his protected legal notes, informing his trial counsel of the notes' seizure on multiple occasions. At the next legal visit after the notes were seized, for example, trial counsel recorded in the Public Defender Service case log that Mr.

Johnson's "phone lists and written questions he had" for Ms. Brown were seized. Pet. App. 11a. Likewise, Ms. Brown's handwritten notes from the same meeting confirmed that she and Mr. Johnson discussed the seized materials and the information contained in the notes. *Id.* at 131a. When Mr. Johnson later met with Ms. Brown to go through the prosecution's discovery file, he again pointed out the seized note to Ms. Brown and reminded her, "this is what I was telling you about." *Id.* at 109a.

2. At trial, the prosecution's case was largely circumstantial. With no physical evidence or eyewitnesses linking Mr. Johnson to the shootings, the prosecution relied heavily on the testimony of Richard Shores, who admittedly did not see the shooting but was at the scene; an expert on cell tower location data; Kurtis Faison, a serial jailhouse snitch, with a record of serious mental health problems, who testified that Mr. Johnson had "confessed" to the shootings—and Mr. Johnson's legal note.

After signaling that it planned to introduce "a note" seized from Mr. Johnson's jail cell, the prosecution used Mr. Johnson's legal note as a blown-up demonstrative. Pet. App. 111a. Mr. Johnson's counsel "objected to [the note] on hearsay grounds and, the next day, on privilege grounds," but the trial court overruled the objections. *Id.* at 11a.

The prosecution emphasized the note in its closing argument, focusing on this line: "If I [was] suppose[d] to have on a hat and glasses, [h]ow can you recognize me"? Pet. App. 11a, 93a. The prosecution characterized this as a confession, stating, "what's interesting about this note is that the Defendant's writing about the shooter, and he's referring to that individual in the first person: I, I, me. And you have to ask yourselves, if you were innocent, you were not the shooter, would

you be referring to the shooter in the first person?" *Id.* at 98a. During its deliberations, the jury asked to see the legal note. The jury found Mr. Johnson guilty shortly thereafter. Ms. Brown later testified that the note was "damning." *Id.* at 54a.

3. Mr. Johnson moved for a new trial, arguing that the government's seizure and use at trial of his legal notes violated his Sixth Amendment right to the assistance of counsel. The trial court held an evidentiary hearing. Mr. Johnson testified that, after meeting with his lawyer and receiving the affidavit in support of his arrest warrant, he wrote a legal note listing people he wanted to investigate and comments he had for his attorney. He detailed how each of the points in the note related to his defense and would be used in a future meeting with his attorney. See Pet. App. 125a–126a.

Mr. Johnson's trial counsel also testified. Ms. Brown initially recalled little about her work on Mr. Johnson's case. She did testify, however, that while she did not recall being present on the day in which Mr. Johnson first reported the note being seized, she had been told about it. The trial court credited Ms. Brown's testimony and discredited some of Mr. Johnson's. Pet. App. 46a. It then held that the note introduced at trial was not protected by attorney-client privilege or work product and denied Mr. Johnson's motion for new trial.

4. On appeal, Mr. Johnson argued that the prosecution's seizure and use of his legal note violated his Sixth Amendment right to counsel. As relevant, he argued that the note introduced at trial was protected under both the attorney-client-privilege and work-product doctrines. He contended that the government's seizure and use of the note violated the Sixth Amendment on each of these grounds by impermissibly interfering with Mr. Johnson's attorney-client relationship. Pet. App. 10a.

The D.C. Court of Appeals rejected Mr. Johnson's Sixth Amendment claims. The court held that he had not shown the note was a privileged attorney-client communication because he "had no meetings scheduled with counsel when [the note] was written" and because the note did not "on its face, mention counsel or otherwise indicate that it was intended for their eyes." Pet. App. 12a–13a. In turn, the court concluded that no privilege violation occurred that could have violated the Sixth Amendment. See *id.*

The court also rejected Mr. Johnson's work-product-based Sixth Amendment claim. It concluded that the note fell outside the doctrine's "core" protection because defense counsel did not explicitly instruct Mr. Johnson to write the note. Pet. App. 14a. But, acknowledging authority from other jurisdictions supporting the argument that "work product doctrine might cover documents created by a defendant on his own initiative to suggest defense strategy," the court ultimately did not decide whether the note was protected on this ground. *Id.* Instead, it held that "admitting the note at trial did not prejudice" Mr. Johnson's Sixth Amendment rights—despite the prosecution trumpeting it as a confession—because the note "merely indicate[d] that appellant wanted to challenge witness two's identification of him" and was otherwise "cryptic." *Id.*

The court denied Mr. Johnson's rehearing petition.

## REASONS FOR GRANTING THE PETITION

### I. Courts are split on the questions presented.

#### A. Courts are split on when the Sixth Amendment protects a defendant's legal notes from government intrusion.

The government violates the Sixth Amendment right to counsel when prosecutors gain and use confidential defense information. See *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977). This kind of intrusion interferes with a defendant's opportunity to confront the prosecution's case with counsel's expert help. "[T]he essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel." *In re Search Warrant*, 942 F.3d 159, 174 (4th Cir. 2019) (cleaned up); see *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984).

In applying these principles, the lower courts have split over when the government's seizure of a defendant's legal notes, and the subsequent use of those notes against the defendant at trial, violates the Sixth Amendment. On one side, four courts hold that such legal notes are protected against government intrusion so long as they are prepared for discussions with counsel. On the other side, two courts—including the court below—hold that there is no Sixth Amendment violation unless the government ignores explicit privilege markings on the face of the document.

1. The first side of the split includes at least the Sixth and Second Circuits and the Delaware, Connecticut, and Washington appellate courts.

In the Sixth Circuit, a defendant's notes prepared for his legal defense are protected by the Sixth Amendment, however labeled. See *Bishop* v. *Rose*, 701 F.2d

1150, 1151, 1155–57 (6th Cir. 1983). The *Bishop* defendant's draft note detailing his activities on the days surrounding the alleged crime was seized and given to the prosecutor, who used it at trial. *Id.* at 1151, 1154. The court held that the Sixth Amendment protected the note because it "was intended to help in preparation of his defense," and was thus a "confidential communication[] between attorney and client." *Id.* at 1154, 1157. It did not matter that "[t]here was no indication in the paper writing that it was a confidential instrument of any nature." *Id.* at 1153. And because the confidential note "was used … for the benefit of the prosecution and to the detriment of the defendant" in his cross-examination, the Sixth Amendment required a new trial. *Id.* at 1157–58.

The Second Circuit has likewise recognized that an inmate's legal notes are protected when they "outline … what a client wishes to discuss with counsel" and are "subsequently discussed with … counsel." *United States* v. *DeFonte*, 441 F.3d 92, 96 (2d Cir. 2006) (per curiam). In *DeFonte*, an inmate's journal containing notes intended for later discussion with her attorney was taken from her cell and delivered to prosecutors. *Id.* at 94–95. Relying on this Court's established precedent, the Second Circuit held that, "[c]ertainly, an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege." *Id.* at 96. While *DeFonte* did not apply that reasoning under the Sixth Amendment specifically, this precedent would require a Second Circuit panel to reach a result different from the one below. See *infra* § II.A (explaining that the Sixth Amendment protects materials covered by the common-law attorney-client privilege).

State supreme courts have followed the same principles. In Delaware, for example, the government cannot unilaterally seize an inmate's handwritten notes memorializing communications with counsel and legal research. *State* v. *Robinson*, 209 A.3d 25, 32–34 (Del. 2019). As in *Bishop*, it was irrelevant in *Robinson* that the notes did "not involve" or expressly "mention" counsel. *Id.* at 34 n.40. The state high court emphasized the "centrality of the attorney-client privilege" to "a defendant's Sixth Amendment right to counsel": "The privilege was designed to encourage full disclosure by a client to his or her attorney in order to facilitate the rendering of legal advice. For the adversary system to function properly, any such advice must be shielded from exposure to the government." *Id.* at 46–47. Applying those principles, the court found a Sixth Amendment violation from the notes' seizure and ordered a new trial with a new prosecutorial team. See *id.* at 60.

Likewise, the Connecticut Supreme Court found a Sixth Amendment violation—and ordered the dismissal of the indictment—where the prosecution seized and read strategy notes and outlines from the defendant's computer. *State* v. *Lenarz*, 22 A.3d 536, 553–54 (Conn. 2011). Again, it was not relevant to the analysis that the documents were "the narrative thoughts, musings and opinions of a layman" rather than "letters or e-mails between the defendant and his attorney." *Id.* at 540–41.

And the Washington Court of Appeals similarly found a Sixth Amendment violation and ordered dismissal where "a detective had wrongfully seized attorney-client writings while executing a search warrant, examined and copied the writings, and delivered the writings to the State's prosecution team." *State* v. *Per-*

*row*, 231 P.3d 853, 854 (Wash. Ct. App. 2010). Although the documents themselves were never communicated to counsel, they were "intended" for that purpose. *Id.* at 856. Once more, it did not matter that "[n]othing on the face of the writings indicated that they were made for an attorney or had been communicated to one." *Id.* at 859–60 (2010) (Korsmo, J., dissenting).

2. Courts on the other side of the split hold that there is no Sixth Amendment problem unless the government *knows* it is intruding on the defendant's privilege based on the face of the document.

In the Eighth Circuit, a Sixth Amendment violation requires a defendant to show, as a threshold matter, "that the government knowingly intruded into the attorney-client relationship." *United States* v. *Hari*, 67 F.4th 903, 912–13 (8th Cir. 2023), *cert. denied*, No. 23-5815, 2023 WL 8007570 (U.S. Nov. 20, 2023). In *Hari*, jail staff seized notes from an inmate that were made while she reviewed discovery materials after a meeting with counsel, reflecting trial strategy. According to the Eighth Circuit, there had been no "knowing intrusion" because "nothing on the face of the notes … indicated potential privilege." *Id.* at 913.

The decision below took that rule even further. In *Hari*, the Eighth Circuit also reasoned that the materials were not referred to or used at trial. *Id.* In Mr. Johnson's case, however, the legal note *was* used at trial—introduced in the prosecution's case-in-chief, blown up, and then featured prominently in the prosecution's closing argument. Like the Eighth Circuit, however, the court below held that the government had not violated the Sixth Amendment's protections because the note is supposedly "cryptic" and "does not, on its face, mention counsel or otherwise indicate that it was intended for their eyes." Pet. App. 13–15a & n.6.

### B. There is an open and entrenched split over the applicable prejudice analysis.

There is also an entrenched and acknowledged split over whether (or how) a presumption of prejudice applies in a case like this. "Since *Weatherford*, many federal and state courts have struggled to define what burden, if any, a defendant must meet to demonstrate prejudice from a prosecutor's wrongful or negligent acquisition of privileged information." *Kaur* v. *Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., concurring in denial of certiorari). Just a decade after *Weatherford*, three Justices observed that there were already three "conflicting approaches among the Circuits." *Cutillo* v. *Cinelli*, 485 U.S. 1037, 1038 (1988) (White, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting in the denial of certiorari). And that split has only deepened and solidified in the intervening years. See, *e.g.*, *Robinson*, 209 A.3d at 47–50 & nn.136–141 ("federal courts are divided on important aspects of the analysis, including whether a showing of prejudice to the defendant is required"); *Murphy* v. *State*, 112 S.W.3d 592, 602 (Tex. Crim. App. 2003) ("The federal circuit courts of appeals are split on the issue of whether prejudice is presumed or must be proven."); *Shillinger* v. *Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (acknowledging "split of authority"); *State* v. *Bain*, 872 N.W.2d 777, 790 (Neb. 2016) (same).

In this case, the three-way split deepened yet again. Some courts apply an irrebuttable presumption of prejudice; some apply a rebuttable presumption; and still others—now including the court below—apply no presumption, requiring the defendant to affirmatively show prejudice, regardless of the facts.

1. At least the Tenth and Third Circuits and two states apply an irrebuttable presumption of prejudice

when the government intentionally intrudes on confidential attorney-client communications.

The Tenth Circuit holds that, absent a legitimate law enforcement justification, an intentional intrusion by the prosecution into the attorney-client relationship constitutes a *per se* violation of the Sixth Amendment—that is, prejudice is conclusively presumed. *Shillinger*, 70 F.3d at 1142. When "the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so," "such an intrusion must constitute a *per se* violation of the Sixth Amendment," as "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Id.* (citation omitted).

The Third Circuit has similarly applied an irrebuttable presumption of prejudice when there is a "knowing invasion of the attorney-client relationship" and privileged information is disclosed to the prosecution. *United States* v. *Levy*, 577 F.2d 200, 208 (3d Cir. 1978). The "inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society." *Id.* at 209.

Some state supreme courts have followed suit. In South Carolina, "a defendant must show either deliberate prosecutorial misconduct *or* prejudice to make out a violation of the Sixth Amendment, but not both." *State* v. *Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000). North Dakota has adopted the same standard. *Ellis* v. *State*, 660 N.W.2d 603, 608 (N.D. 2003).

2. Other courts—including the First and Ninth Circuits and at least two more states—apply a rebuttable presumption of prejudice.

Acknowledging that it would be virtually impossible for a defendant to know how the prosecution used privileged information, yet believing that in some circumstances the revelation of confidential communications would be harmless, the First Circuit strikes a middle approach. A defendant must make a prima facie showing of prejudice by proving that confidential communications were conveyed to the prosecution due to a government intrusion into the attorney-client relationship. See *United States* v. *Mastroianni*, 749 F.2d 900, 907–08 (1st Cir. 1984). Then, the burden shifts to the government to show that the defense has not been and will not be prejudiced as a result of the intrusion. *Id.* at 908; see also *United States* v. *DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008).

The Ninth Circuit also uses a burden-shifting standard. If the "government deliberately … acted to elicit privileged trial strategy" and shared the privileged information with the prosecution team, the burden shifts "to the government to show that it did not use th[e] information"—*i.e.*, "that all of the evidence it introduced at trial was derived from independent sources, and that all of its pre-trial and trial strategy was based on independent sources." *United States* v. *Danielson*, 325 F.3d 1054, 1074 (9th Cir. 2003).

Nebraska and Connecticut use a comparable framework. In Nebraska, "when the State becomes privy to a defendant's confidential trial strategy," a presumption of prejudice can be rebutted only by clear and convincing evidence. *Bain*, 872 N.W.2d at 790–91. In Connecticut, even for unintentional intrusions, prejudice is presumed but can be rebutted by clear and convincing evidence. *Lenarz*, 22 A.3d at 542.

3. A third category of lower courts—including the Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, the Texas appellate courts, and the court below—presumes nothing, requiring some showing of prejudice to find a Sixth Amendment violation.

In conducting this analysis, the Fourth and Seventh Circuits apply no presumption, instead looking to factors drawn from *Weatherford* to determine whether prejudice exists. The Fourth Circuit has explained that at least "four factors must be considered" when "determining whether there has been an invasion such as to be violative of the Sixth Amendment": "(1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was a result of other inadvertent occurrences; (2) whether the government obtained, directly or indirectly, any evidence which was used at trial as a result of the informant's intrusion; (3) whether any other information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and finally, (4) whether the details about trial preparation were learned by the government." *United States* v. *Brugman*, 655 F.2d 540, 546 (4th Cir. 1981). The Seventh Circuit approach is similar. *United States* v. *Snyder*, 71 F.4th 555, 569 (7th Cir. 2023), *cert. granted*, 23-108, 2023 WL 8605740 (Dec. 13, 2023); see also *United States* v. *Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986) (noting this four-factor test but declining to adopt or reject it).

More severely, in the Sixth and Eighth Circuits, "[e]ven where there is an intentional intrusion by the government into the attorney-client relationship, prejudice to the defendant must be shown before any remedy is granted." *United States* v. *Steele*, 727 F.2d 580, 586 (6th Cir. 1984); see also *United States* v. *Sawatzky*,

994 F.3d 919, 923 (8th Cir. 2021) (the defendant must show that "the intrusion demonstrably prejudiced the defendant, or created a substantial threat of prejudice" (citation omitted)). Some state courts agree. *E.g.*, *Murphy*, 112 S.W.3d at 603 (Texas, requires "a showing of prejudice").

The decision below falls into this camp. The D.C. Court of Appeals held that "prejudice must be shown as an element of a [S]ixth [A]mendment violation." Pet. App. 14a (citation omitted). The court refused to apply any presumption, despite Mr. Johnson's arguments that one was particularly appropriate here. *E.g.*, Brief of Appellant 43, *Johnson* v. *United States*, Nos. 13-CF-493, 17-CO-422 & 20-CO-609 (D.C. Ct. App. June 15, 2021). And the court required no showing from the government to conclude that admitting the Note and showing it to the jury "did not prejudice" Mr. Johnson. Pet. App. 14a.

This Court's intervention is badly needed to bring uniformity to the lower courts' conflicting approaches.

## II. The decision below is wrong.

Both aspects of the Sixth Amendment holding below—that Mr. Johnson's legal note was not protected against government intrusion, and that he was required to affirmatively show prejudice from the government's use of the note at trial—are wrong. A pretrial detainee need not write "attorney-client privileged" on his strategy notes, or wait until a specific meeting with counsel is scheduled, to trigger the Sixth Amendment's protections. And when the government actually uses seized legal materials at trial, prejudice should be presumed, either conclusively or at least rebuttably. The contrary rules adopted below threaten pretrial detainees' right to counsel.

### A. A client's notes about defense strategy, drafted for discussions with counsel, are protected from government intrusion.

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. And counsel cannot play that role unless attorney-client communications are protected from disclosure. As this Court and the government have long recognized, "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding." *Weatherford*, 429 U.S. at 554 n.4 (quoting the United States's brief in a prior case). Thus, "a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the [S]ixth [A]mendment." *United States* v. *Noriega*, 917 F.2d 1543, 1551 n.9 (11th Cir. 1990) (per curiam) (citation omitted); accord *United States* v. *Melvin*, 650 F.2d 641, 645 (5th Cir. 1981); see *Weatherford*, 429 U.S. at 554 n.4.

The decision below violates these protections. In rejecting Mr. Johnson's privilege-based Sixth Amendment claim, the Court of Appeals emphasized two facts: That he "had no meetings scheduled with counsel" when he wrote the note, and that the note "does not, on its face, mention counsel or otherwise indicate that it was intended for their eyes." Pet. App. 12a–13a. The court thus appeared to adopt a rule that requires non-lawyer pretrial detainees to use the sort of privi-

lege headers that attorneys are trained to use, to refrain from writing notes to themselves until a specific meeting with counsel is imminent, or to do both. That rule departs from the common-law privilege doctrine the Sixth Amendment protects and conflicts with the basic purpose of the right to counsel.

To start with the obvious, while "privileged and confidential" headers are good practice in the legal industry, they are not required for the Sixth Amendment's protections to attach. "A communication is protected by the attorney-client privilege and … is protected from government intrusion under the Sixth Amendment if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential." *Melvin*, 650 F.2d at 645. That is, a privileged communication can be in any form as long as it is conveyed "by a means which, so far as the client is aware, discloses that information to no third persons." Restatement (Third) of the Law Governing Lawyers § 71 cmt. b (2000) (updated Oct. 2023); see also 1 Paul R. Rice et al., *Attorney-Client Privilege in the United States* § 5:17 (updated Dec. 2023) ("The form of the client's communication to the attorney should be, and generally is, irrelevant to the application of the attorney-client privilege."). There is no suggestion that Mr. Johnson disclosed the contents of his note to anyone or otherwise made it available to third parties. Rather, jail guards seized it from his cell, along with all his other personal possessions.[1]

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[1] That Mr. Johnson kept the note in his cell—as he had no choice but to do—does not mean he failed to keep the contents confidential for these purposes. *See DeFonte*, 441 F.3d at 94 ("An inmate does not … knowingly waive an attorney-client privilege with respect to documents retained in her cell….").

Nor is it reasonable to expect non-lawyers—let alone pretrial detainees—to observe the kind of formality the decision below demanded. Indeed, the court below previously recognized this precise point before backtracking: "[T]he sort of words or syntax that might alert a court to legal versus nonlegal purposes in many communications simply has no application in the typical court-appointed criminal case." *Moore* v. *United States*, 285 A.3d 228, 247 (D.C. 2022), *reh'g en banc granted, opinion vacated*, No. 19-CF-0687, 2023 WL 3674377 (D.C. May 25, 2023) (per curiam). "In the corporate setting, there is an entire cottage industry that offers advice to paying clients and their attorneys on how to properly invoke and maintain attorney-client privilege. But it is unrealistic to expect a person with court-appointed counsel to follow such formalistic rules in order to benefit from the privilege." *Id.* (footnote omitted). That analysis was correct, and the court should not have abandoned it.

The court's other key reason for its holding—that Mr. Johnson "had no meetings scheduled with counsel" when he wrote the note, Pet. App. 12a–13a—is even less defensible. Again, this requirement bears no relation whatsoever to the common-law test of privilege. As long as a client writes a confidential document for purposes of seeking legal advice, it is irrelevant *when* he will discuss its contents with his lawyer. "The protection of the privilege will extend to these sorts of preparatory communications"—that is, to "an individual's personal notes of matters that he intends to discuss with an attorney"—"provided the other elements of the privilege have been satisfied." 1 Rice, *supra* § 5:15. "The client should not be penalized because he or she finds it necessary or desirable to make notes of information to be communicated to the attorney." *Id.* (citation omitted).

Protecting such preparatory communications is especially important in this context. Pretrial detainees often cannot know when they will be able to meet with their counsel, and meetings are frequently rescheduled or canceled. See, *e.g.*, Pet. App. 126a (Mr. Johnson "never knew" when he would meet with his counsel). To adequately prepare for their defense, they must (like any other clients) be able to write down questions and ideas as they arise, "to ensure that the attorney's advice is based on full knowledge of all relevant facts." 1 Rice, *supra* § 5:15. And Mr. Johnson did in fact discuss the note's substantive contents with his counsel later, Pet. App. 126a—making this an "obvious" case for protecting his notes drafted in anticipation of that conversation. See *State* v. *Kosuda-Bigazzi*, 250 A.3d 617, 630 (Conn. 2020) (an "obvious example" of privileged material "is a client's outline or notes made in preparation for a meeting with an attorney … and then the client and the attorney actually communicate about the contents of the notes"); *DeFonte*, 441 F.3d at 96 (same). Whether Mr. Johnson knew exactly when that conversation would occur when he wrote the note is irrelevant.

In combination, these points create a trap for the unwary. Precisely because a pretrial detainee cannot be expected to follow the same formalities as a corporate lawyer, and cannot know when he may next get to meet with his lawyer, the decision below threatens to expose communications at the heart of the attorney-client relationship to government intrusion. In turn, it threatens to penalize or deter candid attorney-client communications, and thus to impede lawyers' ability to help their clients prepare for trial.

The Court of Appeals' other observations in rejecting the Sixth Amendment argument are irrelevant. The court agreed with the trial court that the note was "a

recitation of defendant's impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant," not "a list of questions" for counsel. Pet. App. 12a. But the Sixth Amendment protects not only questions, but *communications*. Indeed, a criminal defendant's thoughts about the facts of the case and the evidence against him are vital to counsel's ability to prepare a defense, and they are equally protected from government intrusion. See *Weatherford*, 429 U.S. at 554 n.4. The court also adopted the trial court's factual finding that, "before trial, [Mr. Johnson] did not tell [his counsel] that he wrote [the note] for her or otherwise single out [the note] for her attention." Pet. App. 12a. But "the test of confidentiality is an objective one, and if a document is in fact privileged or confidential, it is not divested of that quality merely because that status has not been expressly made known to the recipient." *Murphy* v. *Dep't of Army*, 613 F.2d 1151, 1159 (D.C. Cir. 1979).

In short, the court below erred by imposing restrictions with no basis in the common-law attorney-client privilege, and thus denying Sixth Amendment protections to confidential material that Mr. Johnson created for use in his own defense.

### B. It is presumptively prejudicial for the government to use confidential defense information at trial.

The court below also erred by requiring Mr. Johnson to affirmatively show prejudice from the government's use of his note. As explained above, while the court rejected Mr. Johnson's privilege-based Sixth Amendment claim on the merits, it resolved his work-product-based Sixth Amendment claim on prejudice grounds alone. Acknowledging the argument that (as other courts have held) "the work product doctrine ...

cover[s] documents created by a defendant on his own initiative to suggest defense strategy," the court held that "[s]ome prejudice must be shown as an element of a [S]ixth [A]mendment violation" and Mr. Johnson failed to do so. Pet. App. 14a. Because this holding was the court's sole basis for rejecting Mr. Johnson's alternative Sixth Amendment theory, *id.*, this error is independently dispositive.

At least when the government actually seizes confidential defense materials protected by the Sixth Amendment and *uses it at trial*, prejudice must be presumed—at least rebuttably, if not conclusively. *Weatherford* explains why. There, the Court found no "realistic possibility of injury to [the defendant] or benefit to the State," and thus "no Sixth Amendment violation," because—while a confidential informant sat in on meetings between the defendant and his lawyer—there was "no tainted evidence" and "no communication of defense strategy to the prosecution." 429 U.S. at 558. The informant did not "discuss with or pass on to his superiors or to the prosecuting attorney … 'any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff.'" *Id.* at 548. But the Court emphasized that the result would be different "had any of the State's evidence originated in these conversations … or even had the prosecution learned … the details of the [attorney-client] conversations about trial preparations." *Id.* at 554. The bottom line is that, in such cases, "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 522 (emphasis added).

As noted above, other courts have properly understood *Weatherford* to mean that, where privileged in-

formation "was actually disclosed" to the prosecution—let alone used at trial—"the inquiry into prejudice must stop." *Levy*, 577 F.2d at 209–10. After all, the "prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions." *Lenarz*, 22 A.3d at 544 (citation omitted). "Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant." *Id.*

In holding otherwise, the court below simply misread the D.C. Circuit's decision in *Kelly*, which discussed the multi-factor test that some lower courts apply. See 790 F.2d at 137; *supra* § I.B. While *Kelly* did say that "some prejudice must be shown," it rejected the government's argument that the defendant must show an outcome-determinative difference, instead emphasizing (as did *Weatherford* itself) the importance of whether "evidence used at trial [was] produced directly or indirectly by the intrusion" on confidentiality. 790 F.2d at 137. *Kelly* does not support the decision below, and even if it did, *Weatherford* does not.

Because Mr. Johnson's legal note, which the court assumed was protected work product, was seized by the government and used at trial *as a purported confession*, the court should have presumed prejudice—at least rebuttably, if not conclusively. Instead, the court put the burden on Mr. Johnson to show prejudice, which he should never have had to do. And even if the proper presumption were rebuttable, the government would not have been able to carry that burden: Again,

most of the evidence against Mr. Johnson was thin and circumstantial, and the purported "confession" was dramatic enough that the jury asked to see it. On these facts, his conviction could not stand.

## III. The questions presented are important and recurring.

The questions presented here unsurprisingly arise often. Every person who is detained pending trial, appeal, or post-conviction proceedings needs to communicate with counsel to prepare his defense. Every such person, like Mr. Johnson, may think of ideas, questions, or proposals to discuss with counsel at the next opportunity. And every such person may jot down those points, lest they forget before they see their lawyer. Again, many pretrial detainees do not know when they will next be able to meet with counsel. And as the sheer number of cases discussed above reflects, it is unfortunately not uncommon for the government to try to take advantage of such materials or communications when it can. These issues thus recur frequently, and as the ever-growing split reflects, courts and attorneys need clear guidance on these issues.

These questions are also undeniably important. The effective assistance of counsel, of which confidential communication is part and parcel, "is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. The system cannot function properly if clients cannot collaborate with their counsel to prepare their defense, or even to discuss possible plea bargains, without risking exposure to the government. Indeed, "contact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts." See *Bach* v. *Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) (per curiam).

## IV. This is a good vehicle.

This case presents an ideal vehicle to resolve the lingering splits on the questions presented. These legal arguments were pressed and passed upon below, and had the court decided these issues differently, Mr. Johnson would be entitled to a new trial. Indeed, as explained above, the prejudice holding is independently dispositive—it was the court's only basis for rejecting Mr. Johnson's second Sixth Amendment theory, so if the court erred by requiring him to show prejudice, the decision cannot stand.

It does not matter that the court resolved these issues in part by looking to local District of Columbia privilege law. Pet. App. 10a–14a. As the court acknowledged, Mr. Johnson squarely raised "Sixth Amendment claims," which the court resolved by applying federal precedent, including *Weatherford* and *Strickland*. See *id.* at 14a. In any event, the court did not suggest that local privilege law materially differs from the common law of privilege. And even if it differed, "a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the [S]ixth [A]mendment," *Noriega*, 917 F.2d at 1551 n.9 (citation omitted), so any difference in local law would not avoid the constitutional problem. See *supra* § II.A.

## CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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