No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

DANIEL LOREN JENKINS,

Petitioner,

v.

ERIN REYES,
Superintendent, Two Rivers Correctional Institution,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Oregon Court of Appeals reversed Mr. Jenkins's initial conviction because his defense attorney, without discussion with her client, told the judge and prosecutor about confidential statements disclosed to a defense psychologist that were within the attorney-client privilege. *State v. Jenkins*, 190 Or. App. 542, 79 P.3d 347 (2003). After the prosecutors secured a change in the scope of the attorney-client privilege from the legislature, the prosecutors used those same statements to convict Mr. Jenkins in a second trial over defense objections that the disclosure violated the Sixth Amendment's guarantee of effective assistance of counsel, relying on authority including *Nix v. Whiteside*, 475 U.S. 157 (1986). After Mr. Jenkins filed for federal habeas corpus relief under 28 U.S.C. § 2254, the Ninth Circuit approved the attorney's conduct of revealing privileged communications, stating "Jenkins does not point to any case that would have required [defense counsel] to consult with her client prior to disclosure." The question presented is:

> Does clearly established Supreme Court precedent establish that defense counsel renders ineffective assistance of counsel by disclosing information protected by the attorney-client privilege without first consulting with the client to determine whether an exception to confidentiality applied?

PARTIES TO THE PROCEEDINGS

The petitioner, Daniel Loren Jenkins, is an Oregon Department of Corrections prisoner housed at the Two Rivers Correctional Institution in Umatilla, Oregon. The respondent, Erin Reyes, is the Superintendent of Two Rivers Correctional Institution.

RELATED PROCEEDINGS

There are no related proceedings to this matter.

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The petitioner, Daniel Loren Jenkins, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 16, 2024, affirming the denial of habeas corpus relief.

Opinions Below

The district court denied federal habeas corpus relief on March 27, 2022 (Appendix B) and a motion for reconsideration on June 22, 2022 (Appendix E). After the petitioner filed a timely notice of appeal and motion for issuance of a certificate of appealability, the

Ninth Circuit granted the request for a certificate of appealability on October 27, 2022 (Appendix F). The Ninth Circuit affirmed the denial of habeas corpus relief in a memorandum opinion on April 16, 2024 (Appendix A). The Ninth Circuit denied panel and en banc rehearing on July 17, 2024 (Appendix D).

Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Relevant Statutory And Constitutional Provisions

The Sixth Amendment to the United States Constitution states:

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

The Oregon statute on the attorney-client privilege at the time of trial stated that there was no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]" Former Evidence Code § 503(4)(a) (2002) (repealed). After Mr. Jenkins's trial and appeal, the Oregon legislature amended the definition of the attorney-client privilege to add an exception when the following conditions are met:

> (a) In the professional judgment of the person receiving the communications, the communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse, or death;

(b) In the professional judgment of the person receiving the communications, the declarant poses a danger of committing the crime; and

(c) The person receiving the communications makes a report to another person based on the communications.

Oregon Evidence Code § 504-5(a)(2002).

The federal habeas corpus statute states in relevant part:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Statement Of The Case

This is an appeal from the denial of habeas relief under 28 U.S.C. § 2254. In the state courts, Mr. Jenkins exhausted his claim that his Sixth Amendment rights were violated in his retrial for solicitation of murder, then brought his claims to federal court.

In the first trial, Mr. Jenkins' attorney went to the judge, and then the prosecutor, disclosing that Mr. Jenkins made threatening statements to the defense psychologist about third parties. The defense attorney made the disclosures without first speaking with Mr. Jenkins about the purported threats. The attorney did not hear the statements herself nor did she speak with the client to determine their seriousness and the imminence of any

danger. As a consequence of the disclosures, the prosecutor increased the charges against Mr. Jenkins and used the statements to convict him at trial. The Oregon Court of Appeals reversed the conviction because the statements fell within the Oregon attorney-client privilege then in effect. *State v. Jenkins*, 190 Or. App. 542, 79 P.3d 347 (2003), *adhered to as modified on reconsideration*, 191 Or. App. 617, 83 P.3d 390, *review denied*, 337 Or. 160, 94 P.3d 876 (2004).

Before Mr. Jenkins' retrial, the prosecutors went to the Oregon legislature and obtained an amendment to the statutory attorney-client privilege. The new law purported to operate retroactively and to allow admission of the formerly privileged statements that had been unlawfully disclosed. In a second trial, the state court admitted the threatening statements over Mr. Jenkins' objections that the Sixth Amendment required exclusion of the statements. The trial court admitted the statements, applying the amended privilege rule retroactively. Appendix H. He was convicted and sentenced to prison for 30 years.

On direct appeal from the second conviction, Mr. Jenkins exhausted the Sixth Amendment claim to the highest Oregon court in both counseled and pro se filings to no avail, resulting in affirmances without opinions. *State v. Jenkins*, 227 Or. App. 506, 206 P.3d 286, *review denied*, 346 Or. 362, 211 P.3d 931 (2009). The last reasoned opinion on the Sixth Amendment issue was by the trial-level post-conviction state judge, who found the statements admissible based on the retroactive statute, without reaching the merits of the Sixth Amendment claim (Appendix H at 4). The trial court judge expressed misgivings over the decision: "The ruling would appear to say no privilege is truly protected in the law

– the legislature, especially following a notorious case, can make *any* supposedly privileged communication admissible by enacting a provision like this one." *Id.*

In the state post-conviction proceedings after the second trial, Mr. Jenkins again raised his Sixth Amendment rights by arguing that his first attorney's disclosure violated the attorney-client privilege. The State responded that the claim was not properly raised in post-conviction proceedings, also asserting that Mr. Jenkins' prior attorneys acted properly under Oregon ethical rules. The state court granted summary judgment, which was affirmed on appeal to Oregon's highest court. *Jenkins v. Franke*, 266 Or. App. 229, 337 P.3d 204 (2014), *review denied*, 358 Or. 70, 363 P.3d 501 (2015).

After filing a timely petition for habeas corpus relief under 28 U.S.C. § 2254, the federal district court denied relief. Appendix B. The court adopted a magistrate judge's findings and recommendation that defense counsel reasonably believed disclosure of the communications to the judge and prosecutor was necessary to prevent criminal acts. Appendix B at 19. On a motion for reconsideration, the court found that the original defense counsel's admission that, at the time of disclosure, Mr. Jenkins' release from custody was neither imminent nor contemplated, did not render the disclosure unreasonable. Appendix E at 10-12.

On appeal to the Ninth Circuit, Mr. Jenkins placed primary reliance on two cases—one from this Court and the other from the Ninth Circuit—that approved disclosures of attorney-client privileged information only after considering whether the defense attorney first discussed the information with the client:

- *Whiteside*, 475 U.S. at 169: "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."

- *McClure*, 323 F.3d at 1246: the majority and the dissent debated the reasonableness of disclosure regarding harm to others based on the adequacy of conversations between the attorney and client.

During oral argument, Mr. Jenkins continued to focus on the *Whiteside* requirement of an attorney's consultation with the client before revealing harmful information and the strong policy reasons in favor of such a requirement:

> Look what the Supreme Court said in *Whiteside*. They said, oh, the guy said he's going to perjure himself on the stand. Oh, let's run to the court . . . . The Supreme Court says no. *The first duty that everybody recognizes is for the lawyer to go and say don't do that, you can't do that, that's illegal*, ... Same thing here. Where was the conversation? *She never even heard him say a threatening thing*.

Oral Argument at 16:43, *Jenkins v. Reyes*, No. 22-35341, 2024 WL 1635550 (9th Cir. April 16, 2024); *see also id.* at 18:05 ("The way you determine imminence is you talk to the person and you find out what they were thinking, what they were doing, and you advise against it. There was no consultation and there was no imminence.").[1] The State, while arguing the disclosures were lawful, cited no authority allowing for disclosure without consultation between attorney and client.

Despite Mr. Jenkins's reliance on *Whiteside*, the Ninth Circuit issued an opinion declaring that the defense counsel's actions were reasonable, claiming that "Jenkins does not point to any case that would have required [defense counsel] to consult with her client

[1] Available at https://www.youtube.com/watch?v=FSWQ0bsqQzM.

prior to disclosure." Appendix A at 4.5. The court denied rehearing and rehearing en banc. Appendix D.

Reasons For Granting The Petition

The Court should grant the petition for a writ of certiorari. The Ninth Circuit's opinion contradicts this Court's precedential reasoning in *Whiteside* that, before disclosing harmful attorney-client privileged information, an attorney must first consult with the client to determine if disclosure is necessary. Further, the Ninth Circuit's unprecedented diminishment of defense counsel's ethical responsibilities to safeguard privileged communications raises an exceptionally important question that should be resolved in favor of non-disclosure.

A. The Ninth Circuit's Decision Directly Contradicts This Court's Requirement In *Whiteside* That, Before Violating Attorney-Client Confidentiality, Defense Counsel Must Consult With The Client.

The Sixth Amendment's protection of statements within the attorney-client privilege forecloses disclosure in the absence of consultation between lawyer and client. The reasoning of *Whiteside* recognizing the duty of consultation as "universally agreed" requires that the attorney at least hear the statements that supposedly fall within an exception to the privilege and consult regarding their validity and the imminence of any danger. The Ninth Circuit's unprecedented approval of disclosure without consultation undermines the purposes of the Sixth Amendment and the strong public policies favoring confidential communication between attorney and client.

1. *The Sixth Amendment Requires That Defense Counsel Maintain Confidentiality Within The Attorney-Client Privilege.*

As in *Whiteside*, the professional duties of confidentiality are measured by the applicable ethical standards of the relevant jurisdiction. 475 U.S. at 175 ("Since there has been no breach of any recognized professional duty, it follows that there can be no deprivation of the right to assistance of counsel under the *Strickland* standard."). Although professional standards can change, the measure of Sixth Amendment effectiveness are the provisions in effect at the time of the disclosure. *Michaels v. Davis*, 51 F.4th 904, 939 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 914 (2024). Therefore, the starting point for determining whether disclosure of confidential information violated Mr. Jenkins' Sixth Amendment right to the effective assistance of counsel is the Oregon statutory attorney-client privilege rule in effect at the time that the defense attorney told the judge and the prosecutor about Mr. Jenkins' confidential communications.

The Oregon Court of Appeals determined that the defense attorney violated the attorney-client privilege at the time of disclosure because Mr. Jenkins' statements did not fall within an exception to the requirement of confidentiality. The Oregon court held that, as conceded by the state, the statements were within the scope of the attorney-client privilege. *Jenkins*, 79 P.3d at 350 ("The communication was (1) made confidentially (2) for the purpose of facilitating the rendition of legal services to defendant and (3) between defendant and a representative of defendant's lawyer."). The Oregon court then held that

no exception to the attorney-client privilege applied: "We conclude that the future crimes exception is inapplicable here." *Id.* at 351.

Despite the fundamental importance of confidentiality, the Ninth Circuit in the present case approved defense counsel's disclosure to the judge and prosecutor of otherwise protected communications *without there ever being a conversation between the defense counsel and the client.* By doing so, the panel decision conflicts with the governing precedent requiring consultation with the client as well as the Oregon ruling that "the future crimes exception is inapplicable here."

In *Whiteside*, this Court determined that defense counsel did not provide ineffective assistance when he told his client that he would have to advise the trial court if the client intended to perjure himself. 475 U.S. at 171. The Court noted that defense counsel acted in accordance with the applicable rules of professional responsibility. 475 U.S. at 175. In reaching its holding, the Court stated that, before the confidential information about the intended crime of perjury could be revealed, defense counsel had a predicate responsibility to dissuade the client from the looming illegality that would trigger disclosure: "It is universally agreed that *at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.*" 475 U.S. at 169 (emphasis added).

Both the holding and reasoning of *Whiteside* should have been binding on the Ninth Circuit panel: "It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases." *Ramos v. Louisiana*, 590

U.S. 83, 104 (2020). For the same reasons consultation was "universally agreed" as necessary in *Whiteside* regarding the potential future crime of perjury, the concerns regarding threatened future harm to others require consultation and advice before defense counsel can disclose privileged information. The ethical duties of loyalty, zealous representation, and confidentiality required a first step of "attempt[ing] to dissuade the client from the unlawful course of conduct." *Whiteside*, 475 U.S. at 169.

If anything, the duty to determine imminence and to attempt to dissuade the client are more pressing in the context of threatening statements, because this Court has understood that not every threat demonstrates a serious intention to commit violence rather than constituting mere hyperbole. *See Elonis v. United States*, 575 U.S. 723, 727 (2015) (on-line posts that "frequently included crude, degrading, and violent material about his soon-to-be ex-wife" require proof of mens rea to be criminal); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928-29 (1982) (holding that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" "did not exceed the bounds of protected speech"). Direct interaction between attorney and client is necessary for defense counsel to determine whether the context of the statements and the client's frame of mind indicate an intent to follow through rather than mere venting or hyperbole. The attorney's counsel, by talking with the client, can also dissuade the client from any concerns regarding future bad conduct.

2. *The Ethical Rules Requiring Defense Counsel To Maintain Confidentiality Further Important Societal Goals.*

The norm of consultation with the client before determining whether disclosure of harmful information is necessary is consistent with ethical norms that this Court frequently cites in support of Sixth Amendment standards. *Strickland v. Washington*, 466 U.S. 668 (1984) (American Bar Association standards are "guides to determining what is reasonable"). The ABA standards for the defense function strongly disfavor the conduct in the present case in which the defense attorney, without speaking to the client, told the judge and the prosecutor devastating information that led directly to enhancement of his charges and his conviction of those charges. *See* American Bar Association Criminal Justice Standards, *Defense Function*, Standard 4-1.3(a)-(d), Continuing Duties of Defense Counsel (duties of confidentiality, loyalty, and communication with clients); Standard 4-1.4(a), Defense Counsel's Tempered Duty of Candor ("Defense counsel must act zealously within the bounds of the law and applicable rules to protect the client's confidences and unique liberty interests that are at stake in criminal prosecution.").

The ABA standards requiring confidentiality and consultation embody policies essential for the protections of both clients and the public. The norm of consultation before disclosing privileged statements allows lawyers to learn of and dissuade clients from illegal actions:

> A lawyer's advice is important when clients honestly seek guidance as to their duties under complicated regulatory regimes, *but it is even more vital when the client misguidedly contemplates or proposes actions that the client knows to be illegal*. The existence of the attorney-client privilege encourages

> clients to make such unguarded and ill-advised suggestions to their lawyers. *The lawyer is then obliged, in the interests of justice and the client's own long-term best interests, to urge the client, as forcefully and emphatically as necessary, to abandon illegal conduct or plans.* The sincere counsel of a trusted advisor will persuade many clients to comply with the law. Indeed, discouraging clients from illegal conduct is a regular occurrence in an attorney's practice.

In re Pub. Def. Serv., 831 A.2d 890, 901 (D.C. 2003) (emphases added; citations omitted); *see Purcell v. Dist. Attorney for the Suffolk Dist.*, 424 Mass. 109, 676 N.E.2d 436, 441 (1997) ("[A]n informed lawyer may be able to dissuade the client from improper future conduct . . . ."). Bluntly stated: "[A]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." *In re Pub. Def. Serv.*, 831 A.2d at 901 (quoting *McCandless v. Great Atlantic & Pacific Tea Co.*, 697 F.2d 198, 201-02 (7th Cir.1983)).

Not only is consultation required for the attorney to determine the objective facts, defense counsel must speak with the client to assess imminence, which is a necessary predicate to determine the seriousness of spoken words. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (protecting speech that constitutes "mere advocacy" as opposed to "incitement to imminent lawless action"). Without direct interaction between the attorney and the client, no such evaluation can reliably be made by an ethical attorney. In this case, the attorney received only a second-hand report regarding Mr. Jenkins' statements, but never took the time to determine for herself Mr. Jenkins' frame of mind. The attorney-client privilege is too important to be destroyed based on speculation and

second-hand information. Further, defense counsel never engaged in the basic function of attempting to dissuade Mr. Jenkins from any unlawful acts.

3. *This Case Presents An Exceptionally Important Question Because No Prior Authority Has Authorized Breach Of The Attorney-Client Privilege Without Direct Interaction Between Attorney And Client.*

This Court has identified the attorney-client privilege as an essential bulwark of the Sixth Amendment's right to effective assistance of counsel. The confidentiality that inheres in the privilege is foundational to the trust that must exist between the accused and defense counsel. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys"); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (The purpose of the attorney-client privilege "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"). Without the trust that confidentiality promotes, "the [accused] would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher*, 425 U.S. at 403; *see Mickens v. Taylor*, 535 U.S. 162, 180 (2002) ("Truthful disclosures of embarrassing or incriminating facts are contingent on the development of the client's confidence in the undivided loyalty of the lawyer.").

In the criminal context, this means that a failure to protect the duty of confidentiality can undermine the right of defendants to access the full scope of counsel's skill and knowledge to which they are entitled under the Sixth Amendment. *See Whiteside*, 475 U.S. at 165; *Strickland*, 466 U.S. at 685; *United States v. Henry*, 447 U.S. 264, 295 (1980)

("[T]he Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.") (Rehnquist, J., dissenting).

Up until the panel's opinion in this case, no precedent or ethical standard allowed an attorney to disclose otherwise-protected communications without first consulting the client. The opinion therefore represents an unwarranted erosion of the attorney-client privilege to the detriment of the greater societal interests the privilege protects. Even with an unpublished opinion, the case presents an important question for resolution. The sanctity of the attorney-client privilege should not be eroded by any precedent that tolerates disclosure without consultation, especially when this Court in *Whiteside* identified consultation and advice as universal principles to be implemented prior to disclosure.

Conclusion

For the foregoing reasons, the Court should either grant a writ of certiorari, vacate the decision below, and remand for reconsideration in light of *Whiteside*, or grant the writ and set for full briefing on the merits.

Dated this 10th day of October 2024.

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