

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL TAPPEN,
Petitioner,
v.
JULIE L. JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

**On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals**

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution’s interference with the Petitioner’s attorney-client relationship (by surreptitiously recording an attorney-client meeting being conducted “for purposes of trial preparation”) violated the Petitioner’s Sixth Amendment right to assistance of counsel.

2. Whether the Eleventh Circuit Court of Appeals applied the 28 U.S.C. § 2254(d) “unreasonable application of clearly established Federal law” standard too narrowly by requiring the Petitioner to establish that this Court has granted relief in a case involving *identical* facts (as opposed to requiring the Petitioner to establish that a “general standard” adopted by this Court has been applied by a state court in an unreasonable manner).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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The Petitioner, DANIEL TAPPEN, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on January 9, 2018 (A-3),¹ rehearing denied on March 13, 2018. (A-1-2).

D. CITATION TO ORDER BELOW

Tappen v. Sec’y, Fla. Dep’t of Corr., 708 Fed. Appx. 630 (11th Cir. 2018).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the opinion of the Eleventh Circuit Court of Appeals.

F. CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication between counsel and client. *See Glasser v. United States*, 315 U.S. 60 (1942); *cf. Massiah v. United States*, 377 U.S. 201 (1964).

¹ References to the appendix to this petition will be made by the designation “A” followed by the appropriate page number.

G. STATEMENT OF THE CASE

On the evening of September 28, 2008, the Petitioner called 911 to report that he found his wife (Kimberly Tappen) unconscious in the closet of their residence. The Petitioner found Mrs. Tappen with a belt around her neck. Although medical personnel attempted to resuscitate Mrs. Tappen, she died while being transported to the hospital. The Petitioner was subsequently charged in Florida state court (Florida Second Judicial Circuit/Leon County) with first-degree murder. At trial, the prosecution argued that the Petitioner killed his wife and the defense argued that Mrs. Tappen committed suicide.²

Prior to trial, the Petitioner was incarcerated in the jail with no bond pending resolution of his case. Defense counsel therefore filed a motion to allow the Petitioner to be transported from the jail to his residence in order to allow the Petitioner and defense counsel to walk through the residence and discuss the circumstances of the alleged crime “for purposes of trial preparation.” (A-44).³ The motion explained that the walk-through of the residence was “necessary” for the Petitioner to “adequately assist” defense counsel in the preparation of the Petitioner’s defense so that the Petitioner could “completely explain where all events took place on the night of his

² During the trial, the Petitioner presented evidence establishing that Mrs. Tappen had a history of depression, including previous suicide attempts. The defense argued that Mrs. Tappen committed suicide on September 28, 2008, by hanging herself from the closet shelf. At trial, both parties presented expert testimony in support of their theories of the case.

³ The motion explained that the residence would soon be foreclosed, thereby preventing the Petitioner and defense counsel from being able to access the residence.

wife's passing.” (A-44). The trial court granted the motion (which was not objected to by the State), but the trial court ordered that at all times during the walk-through, the Petitioner was to “remain in the custody of the Leon County Sheriff's Department” (A-47). The trial court further stated that “[a]ny costs affiliated with the transportation of the Defendant to his home for purposes of trial preparation shall be born [sic] by the Defendant.” (A-47).

The Petitioner was subsequently transported to his residence and he engaged in a walk-through of the scene of the alleged crime with his attorney (Paul Villeneuve). During the walk-through, defense counsel asked the Petitioner about what happened on the evening in question and the Petitioner answered defense counsel's questions. However, during the walk-through, the Petitioner was *handcuffed* to the arm of a deputy (apparently due to the trial court's order that the Petitioner remain in the custody of law enforcement officials during the walk-through). (A-55). Moreover, during the walk-through, law enforcement officials *surreptitiously videotaped (with audio)* the entire conversation between the Petitioner and defense counsel (i.e., the Petitioner and defense counsel were not told or informed that the walk-through would be videotaped). (A-56-57).⁴ Law enforcement officials subsequently provided the videotape to the prosecution team.

At trial, the prosecution announced its intention to play the videotape of the

⁴ Sergeant Paul Pruett admitted that the Petitioner did not know that the walk-through was being recorded. (A-61). Sergeant Pruett explained that he “had a camera placed on the front of [him] here near the button area” and he “had a recorder in [his] pocket of [his] coat, and [he] had another one hooked on [his] belt.” (A-61).

walk-through for the jury. Defense counsel objected, arguing that the prosecution interfered with the Petitioner's right to consult with his attorney and/or the attorney-client privilege. (A-50-51). The prosecution argued that the presence of a law enforcement official during the walk-through waived any right/privilege asserted by the Petitioner. (A-51-55). Defense counsel responded that there was no waiver because he was handcuffed to the law enforcement official and thus he did not "voluntarily" consent to the presence of any third party. (A-55-56). Defense counsel also argued that the videotape was prejudicial because it showed the Petitioner shackled and in jail clothes. (A-60). The trial court overruled defense counsel's objection(s), finding that the Petitioner had no reasonable expectation of privacy based on the presence of a law enforcement official. (A-57). The videotape of the walk-through was subsequently played for the jury. The prosecution relied on the tape several times during the trial – most notably during its opening statement in arguing that the Petitioner's statements to defense counsel were inconsistent with other statements that he made to law enforcement officials. (A-49) ("Now, this is the video I was talking about that's very important for you to compare to the prior video.").

At the conclusion of the trial, the jury found the Petitioner guilty of the lesser offense of second-degree murder. The trial court subsequently sentenced the Petitioner to thirty years' imprisonment.

On direct appeal, the Petitioner argued that the prosecution's covert intrusion into his trial preparations violated his Sixth Amendment right to assistance of counsel. On November 21, 2011, the Florida First District Court of Appeal *per curiam* affirmed

the Petitioner's conviction and sentence (i.e., the state appellate court did not issue a written opinion). *See Tappen v. State*, 75 So. 3d 274 (Fla. 1st DCA 2011). This Court subsequently denied the Petitioner's petition for writ of certiorari.

Thereafter, the Petitioner timely filed a petition pursuant to 28 U.S.C. § 2254. In the § 2254 petition, the Petitioner asserted that the prosecution's interference with his attorney-client relationship (by surreptitiously recording an attorney-client meeting being conducted "for purposes of trial preparation") violated his Sixth Amendment right to assistance of counsel. On February 23, 2016, the magistrate judge issued a report and recommendation recommending that the Petitioner's § 2254 petition be denied. (A-12). On May 27, 2016, the district court entered an amended order (1) accepting the report and recommendation and (2) granting a certificate of appealability on the following issue:

[W]hether admission of the surreptitious recording of the petitioner's conversation with his attorney violated the Sixth Amendment.

(A-10). On appeal, the Eleventh Circuit affirmed the district court's denial of the Petitioner's § 2254 petition. (A-3). The Petitioner's petition(s) for rehearing were denied on March 13, 2018. (A-1-2).

H. REASON FOR GRANTING THE WRIT

The questions presented are important and have a potential impact on all criminal prosecutions nationwide.

The issue in this case is whether the actions of the prosecution in interfering with the Petitioner's attorney-client relationship (by surreptitiously recording an attorney-client meeting being conducted "for purposes of trial preparation") violated his Sixth Amendment right to counsel. As stated by the district court below, "[n]either the recording nor its admission will win any awards for fairness." (A-6). "[F]airness, honesty and morality are not an undue burden on accomplished justice." *Haworth v. State*, 840 P.2d 912, 918-19 (Wyo. 1992) (Urbigkit, J., dissenting). "[T]he actions of the prosecution in this case crossed the line and amounted to a constitutional violation which this Court must redress by way of a writ of habeas corpus." *Haworth v. Shillinger*, 852 F. Supp. 961, 968 (D. Wyo. 1994).

"[T]he essence of the Sixth Amendment right is . . . privacy of communication with counsel." *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973). *See also Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (noting the government's concession that "because 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").

The attorney-client privilege is the oldest of the privileges for confidential

communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). “*Its purpose 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.” *Id.* (emphasis added). The Court in *Upjohn Co.* further stated:

The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy *depends upon the lawyer’s being fully informed by the client*. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be “to encourage clients to make full disclosure to their attorneys.” This rationale for the privilege has long been recognized by the Court, *see Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

Id.

Several courts – including this Court – have concluded the prosecution’s violation of the attorney-client privilege might lead to reversal of a resulting conviction if the defendant can show prejudice. *See, e.g., Black v. United States*, 385 U.S. 26 (1966) (remanding the case for a new trial after government agents monitored and listened to confidential conversations between defendant and his attorney); *United States v. Castor*, 937 F.2d 293, 297 (7th Cir. 1991) (“Where the sixth amendment right

to attorney-client confidentiality exists, prosecutorial violation of that privilege might lead to reversal of a resulting conviction if the defendant could show prejudice.”); *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953) (“The Constitution’s . . . guarantees of due process of law and effective representation by counsel[] lose most of their substance if the Government can with impunity place a secret agent in a lawyer’s office to inspect the confidential papers of the defendant and his advisers, to listen to their conversations, and to participate in their counsels of defense.”); Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence: Practice Under the Rules* § 5.8, at 434 (2d ed. 1999) (“It is doubtful that constitutional standards for adequacy of legal representation could be satisfied if a defendant’s communications to his attorney were subject to unrestricted scrutiny by the prosecutor.”).

In the instant case, the actions of the prosecution in interfering with the Petitioner’s attorney-client relationship resulted in a violation of his Sixth Amendment right to counsel. Prior to the trial, the Petitioner was incarcerated in the jail. Defense counsel therefore filed a motion to allow the Petitioner to be transported from the jail to his residence in order to allow the Petitioner and defense counsel to walk through the residence and discuss the circumstances of the incident “*for purposes of trial preparation.*” (A-44) (emphasis added). The motion explained that the walk-through of the residence was “necessary” for the Petitioner to “adequately assist” defense counsel in the preparation of the Petitioner’s defense so that the Petitioner could “completely explain where all events took place on the night of his wife’s passing.” (A-

44).⁵ The trial court granted the motion, but the trial court ordered that at all times during the walk-through, the Petitioner was to “remain in the custody of the Leon County Sheriff’s Department.” (A-47). The trial court further stated that “[a]ny costs affiliated with the transportation of the Defendant to his home for purposes of trial preparation shall be born [sic] by the Defendant.” (A-47). The Petitioner was subsequently transported to his residence and he engaged in a walk-through of the scene of the incident with his attorney. During the walk-through, defense counsel asked the Petitioner about what happened on the evening in question and the Petitioner answered defense counsel’s questions. However, during the walk-through, the Petitioner was *handcuffed* to the arm of a deputy (apparently due to the trial court’s order that the Petitioner remain in the custody of law enforcement officials during the walk-through). (A-55). Moreover, during the walk-through, law enforcement officials surreptitiously videotaped (with audio) the entire conversation between the Petitioner and defense counsel (i.e., the Petitioner and defense counsel were not told or informed that the walk-through would be videotaped). (A-56-57). Law enforcement officials subsequently provided the videotape to the prosecution team. During the trial, the prosecution (over objection) played the videotape for the jury and the prosecution relied on the tape in an effort to prove that the Petitioner was guilty – most notably during its opening statement in arguing that the Petitioner’s

⁵ The reason that defense counsel gave for conducting the walk-through was consistent with purpose of the attorney-client privilege – “full and frank communication” between attorney and client. *Upjohn Co.*, 449 U.S. at 389.

statements to defense counsel were inconsistent with other statements that he made to law enforcement officials. (A-49) (“Now, this is the video I was talking about that’s very important for you to compare to the prior video.”)

In support of his argument, the Petitioner relies on Steven Haworth’s case –a case where the federal district court *granted relief pursuant to a § 2254 petition after the state court had denied relief*. Mr. Haworth’s case was also a case involving a law enforcement official who overheard trial preparation discussions between a defendant and counsel:

For the weekend period immediately preceding the first day of trial on Monday, Haworth’s defense counsel made arrangements with the county sheriff’s office that enabled defense counsel to spend several hours each weekend day with Haworth in the same courtroom in which the trial was to be held. Haworth and his defense counsel used these weekend sessions to prepare for trial.

Since Haworth was unable to make bail and was in the sheriff’s custody, the sheriff required that one of his deputies remain with Haworth during these trial preparation sessions. According to Haworth’s defense counsel, and this fact is not challenged by the state, defense counsel paid the deputy sheriff’s overtime wage necessitated by this custodial security arrangement.

Haworth v. State, 840 P.2d 912, 913 (Wyo. 1992). It was later revealed during the trial that the deputy disclosed to the prosecutor the substance of Mr. Haworth’s discussions with his attorney. Mr. Haworth was subsequently convicted of aggravated assault and on direct appeal, the Wyoming Supreme Court affirmed Mr. Haworth’s conviction, finding that Mr. Haworth was not prejudiced by the deputy’s disclosure. *See Haworth*, 840 P.2d 912. Justice Urbigkit dissented and explained that the actions of the prosecution violated the standards of ethics and fairness that govern the American

criminal justice system:

This appeal tests the basic morality and integrity of the criminal trial process within Wyoming's judicial system. By this decision, I perceive Wyoming's courts to come up wanting. This case portrays hardball lawyering in a most virulent and divisive fashion. As a morality case, this appeal transcends the litigants and, for that matter, their counsel as we examine standards for Wyoming's practice of law.

What happened? Counsel for a defendant involved in a serious assault charge wanted to familiarize his jailed and non-bailed client with the courtroom atmosphere. The sheriff's officialdom agreed that they would cooperate by making available deputy sheriffs to insure custody of the defendant during the courtroom trial preparation if counsel would be responsible to compensate the deputies for the extra duty. Defense counsel states, and it is uncontroverted by any countervailing sworn evidence, that he understood confidentiality would be maintained by the deputies regarding attorney/client discussions and trial preparations in the courtroom atmosphere.

What happened next? A deputy sheriff eavesdropped on the trial preparation session and, thereafter, upon the deputy prosecutor's request, recited to him everything that had occurred between the defendant and his attorney. The prosecuting attorney then used his inside knowledge of the trial preparation session for cross-examination at trial.

Consequently, the majority blames defense counsel and excuses the unethical conduct on a substantial prejudice distillation from the abject violation of everything that is basic to an ethical and proper judicial institution. I find this approach totally abhorrent. Standards of both conduct and honesty are clearly dispossessed. This is what we know, from a high volume of present legal literature, as hardball lawyering, about which unrelenting criticism flows forth from the bench and bar as well as the public media.

We establish a result-oriented standard of conceptualization that nothing is wrong as long as you get by with it. Even Watergate and its fallout, as well as Arms-for-Iran, should have taught us something about this standard of legal ethics and morality.

To provide one partial answer, I would disabuse as acceptable the "get by with it" syndrome and reverse this conviction to require a retrial for justice to be insulated from prosecutorial abuse. I write, strongly, since we may be misperceived as signaling an approval of wired conference rooms and jail interview locations within the sheriff's control. In the past professional experience of Wyoming lawyers, this status was certainly not unknown or not at least unsuspected to seasoned trial counsel who became involved in representation of an accused lacking the

resources to bond out of the local jail. This attitude should not now be countenanced to achieve either a disposition affirming at any cost or accepting in “justice delivery” that any injustice is justified to accomplish a conviction. Competent prosecution is faced by perhaps one or, at the most, two acquittals with at least every hundred criminal charges where nine out of ten are resolved by plea and the remaining trials favor conviction. Within these few cases, fairness, honesty and morality are not an undue burden on accomplished justice.

Haworth, 840 P.2d at 918-19 (Urbigkit, J., dissenting) (footnotes omitted).

After Mr. Haworth lost his direct appeal, he filed a federal habeas petition pursuant to 28 U.S.C. § 2254. The federal district court judge (Judge Brimmer) granted the petition, finding that the actions of the prosecution in interfering with Mr. Haworth’s attorney-client relationship violated his constitutional right to counsel:

It cannot be disputed that the essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication between counsel and client. *See Glasser v. United States*, 315 U.S. 60, 62 (1942); *cf. Massiah v. United States*, 377 U.S. 201 (1964). The *Weatherford* Court interpreted its earlier decisions in *Black*⁶ and *O’Brien*⁷ as standing for the proposition that “when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, *any* of the evidence offered at trial.” [*Weatherford v. Bursey*,] 429 U.S. [545,] 552 [(1977)] (emphasis added).

The nature of the prejudice inquiry is tied to the competing public policies that are implicated. The prejudice inquiry and the prophylactic nature of the resulting rule of law are inversely related; that is, as the prejudice inquiry becomes more relaxed, the resulting rule of law becomes more of a means to deter such conduct *ab initio*. Conversely, as the prejudice inquiry heightens, the rule of law becomes less prophylactic and less likely to prevent such conduct at the outset. The more relaxed that the prejudice inquiry is, the more credence is given to the strong public policy in favor of “assur[ing] fairness in the adversary criminal process,” [*United States v. Singer*, 785 F.2d [228,] 234 [(8th Cir. 1986)]] (citing

⁶ *Black v. United States*, 385 U.S. 26 (1966).

⁷ *O’Brien v. United States*, 386 U.S. 345 (1967).

Gideon v. Wainwright, 372 U.S. 335, 344 (1963)), and attempting to deter governmental conduct that threatens the integrity and the fairness of the judicial process. On the other hand, as the prejudice inquiry becomes more rigorous, the public policy in favor of “society’s competing interest in prosecuting criminal conduct [.]” *Singer*, 785 F.2d at 234, becomes the prevailing policy goal.

In view of these observations, the Court inclines to the view that the more salutary public policy favors the adoption of a less demanding prejudice inquiry. More than just the attorney-client relationship is at stake in these situations, because apart from raising ethical and moral questions, these situations pose a serious threat to the integrity of the judicial process itself and the risk of undermining public confidence in our adversarial, and impartial, system of justice. While legitimate law enforcement efforts often require undercover work, the attempt “to acquire leverage in litigative advantage” in some cases simply crosses the line between legitimate undercover work and a disregard for certain basic, fundamental rights possessed by criminal defendants. That is what happened here – the sheriff and the prosecutor took an unconscionable advantage of the defendant by sharing the results of confidential communications. For reasons given below, and much as it pains me to find myself in disagreement with the justices of the Wyoming Supreme Court, the Court nevertheless is constrained to find that the actions of the prosecution in this case crossed the line and amounted to a constitutional violation which this Court must redress by way of a writ of habeas corpus.

Haworth v. Shillinger, 852 F. Supp. 961, 967-68 (D. Wyo. 1994) (footnotes added) (some citations omitted).⁸

⁸ Judge Brimmer added:

[W]hile the Wyoming Supreme Court found that the deputy sheriff was not placed in the courtroom during the preparatory sessions with the intent of acting as an informant (a conclusion which this Court accepts but finds mighty suspicious), the fact remains that this evidence was nonetheless disclosed at a later time. *This is the intrusive conduct that can, under certain circumstances, impermissibly offend the Sixth Amendment.*

Haworth, 852 F. Supp. at 969 (emphasis added) (citation omitted). In contrast, in the instant case, the fact that law enforcement officials surreptitiously recorded the walk-

On appeal, the Tenth Circuit Court of Appeals affirmed the district court's conclusion that Mr. Haworth's Sixth Amendment rights were violated by the prosecutor's intrusion into the attorney-client relationship, but the appellate court concluded that retrial may not properly remedy the error (i.e., the federal appellate court remanded the case for an evidentiary hearing to determine the extent of the prosecutor's intrusion in order to evaluate whether dismissal of the charges or disqualification of the prosecutor was necessary). *See Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995).⁹

The Petitioner submits that his case is factually indistinguishable from Mr. Haworth's case. In both cases, the defendants were incarcerated prior to trial and therefore deputies were required to be present during the trial preparation sessions

through (and then provided the video to the prosecution) strongly suggests that the law enforcement official attended the walk-through with specific intent of acting as an informant for the prosecution.

⁹ In its opinion, the Tenth Circuit stated:

Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment. In other words, we hold that 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, a prejudicial effect on the reliability of the trial process must be presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct.

Shillinger, 70 F.3d at 1142.

between defense counsel and the defendants. In both cases, the deputies were paid by the defense.¹⁰ And in both cases, the deputies shared the information learned from the trial preparation sessions with the prosecution (and the instant case is even *more egregious* than Mr. Haworth's case because the deputy surreptitiously recorded the meeting between defense counsel and the Petitioner). As in Mr. Haworth's case, the prosecution's intentional intrusion into the attorney-client relationship constituted a direct interference with the Petitioner's constitutional right to counsel.¹¹

¹⁰ The Petitioner submits that because the deputy was paid by the defense, the deputy became an agent of the defense. "[C]ommunications to any person whose intervention is necessary to secure and facilitate the communication between an attorney and client are privileged, [such] as communications through an interpreter, a messenger or any other intermediary." *Hendrick v. Avis Rent A Car System, Inc.*, 944 F. Supp. 187, 189 (W.D.N.Y. 1996) (citation omitted) (alteration in the original).

¹¹ Last year, Mr. Haworth's case was cited by the Honorable Julie A. Robinson in *United States v. Black*, 2017 WL 2151861, case no. 16-20032-JAR (D. Kan. May 17, 2017). The *Black* case involves a federal prosecutor who lost her job after it was discovered that she had listened to conversations between defense attorneys and their clients. See [<http://www.kshb.com/news/local-news/federal-prosecutor-out-of-job-after-recordings-found-of-opposing-attorneys-conversations>] After the Sixth Amendment violation was discovered in *Black*, Judge Robinson issued the May 17, 2017, order directing that the matter be investigated. In the order, Judge Robinson stated the following:

As the Tenth Circuit stated in *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995), "[A] prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant, and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a per se violation of the Sixth Amendment. In other words, we hold that 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, a prejudicial effect on the reliability of the trial process must be

Regarding prejudice, as found by the Tenth Circuit, the Petitioner submits that the error in this case amounts to *per se* reversible error. Alternatively, the Petitioner contends that the error in this case was not harmless. The prosecution not only relied on the surreptitiously recorded videotape in preparing for trial, but the prosecution also played the tape for the jury (and highlighted the tape in support of its argument that the Petitioner's versions of events were inconsistent).

In the opinion below, the Eleventh Circuit concluded that the Petitioner is not entitled to federal habeas relief because “*Haworth* was not a Supreme Court decision” and because “Tappen has failed to identify any Supreme Court precedent establishing that his Sixth Amendment right was violated.” (A-5). The Petitioner submits that the Eleventh Circuit is reading 28 U.S.C. § 2254(d) too narrowly. § 2254(d) states:

(d) 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

presumed. In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.” *Id.*

Black, 2017 WL 2151861 at *5 n.16. Judge Robinson added that “any waiver [of the Sixth Amendment attorney-client privilege] must be done knowingly and intelligently.” *Id.* at *8 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (“In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects ‘an intentional relinquishment or abandonment of a known right or privilege.’”).

determination of the facts in light of the evidence presented in the State court proceeding.

To obtain relief pursuant to § 2254, the Petitioner is not required to establish that this Court has granted relief on a case involving *identical* facts. If that was the standard, then virtually no one would be eligible for federal habeas relief (because very few cases have been decided by this Court). Contrary to the Eleventh Circuit's interpretation of § 2254(d), the Court has clarified that a petitioner is entitled to federal habeas relief if a "general standard" is applied by a state court in an unreasonable manner:

AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.

Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (citations and quotation marks omitted). The "general standard" at issue in the instant case is that privacy of communication between counsel and client is an inherent component of the Sixth Amendment right to counsel. *See Weatherford*, 429 U.S. at 554 n.4 ("[T]he 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"). *See also Black*, 385 U.S. 26 (remanding the case for a new trial after government agents monitored and listened to confidential conversations between defendant and his attorney). As explained by

Judge Brimmer in Mr. Hayworth's case:

It cannot be disputed that the essence of the Sixth Amendment right to effective assistance of counsel is privacy of communication between counsel and client. *See Glasser v. United States*, 315 U.S. 60, 62 (1942); *cf. Massiah v. United States*, 377 U.S. 201 (1964).

Haworth, 852 F. Supp. at 967. In the Petitioner's case, this "general standard" regarding the confidentiality of communications with counsel was applied in an unreasonable manner by the state court.

The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 8 Wall. 85, 95, 75 U.S. 85, 95 (1868). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). In *Harris v. Nelson*, 394 U.S. 286, 292 (1969), the Court stated the following regarding the "Great Writ":

There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law. This Court has insistently said that the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves: The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary.

(Citation omitted). As explained by Professors Hertz and Liebman:

As used in this country, habeas corpus has been an important means by which the availability of federal court review of the constitutionality of state-imposed incarceration checks "the prevalency of a local spirit" and the dangers to federal law and right inherent in granting "jurisdiction of national causes" to "state judges, holding their office during pleasure, or from year to year [who are] too little independent" of the local spirit "to

be relied upon for the inflexible execution of the national laws.” Moreover, the Bill of Rights – among the most fundamental of the “national laws” and the principal source of habeas corpus claims – was added to the Constitution (simultaneously with Congress’ adoption of the first habeas corpus statute), then extended 78 years later to the States (simultaneously with the extension of the habeas corpus remedy to state prisoners), in part at least to protect unpopular persons, causes, and classes, from just this “prevalency of a local spirit.” Consider, finally, the principle that “[i]n proportion to the grounds of . . . distrust of the [local] tribunals ought to be the facility . . . of [federal] appeals” – and, accordingly, the facility of habeas corpus review, which has been understood in this country from the beginning as a “clearly appellate” mechanism for reviewing incarceration and as a substitute for Supreme Court review of such incarceration when Supreme Court review is not available as of right.

Nothing, of course, is more likely to arouse a “local spirit” against an individual than his apparent commission of a crime that seriously jeopardizes or destroys the health, well-being, and safety of the community and its citizens. Notwithstanding the justifiability of that reaction, our system of government requires that even as unpopular an individual as this be protected by an “inflexible execution of the national laws” that safeguard his – and our – liberties. Accordingly, even though that system of government recognizes “a necessity for confiding the original cognizance of [criminal] causes [implicating] . . . those laws to [the state courts],” it recognizes “a correspondent necessity for leaving the door of [federal] appeals as wide as possible” – and wider yet,”[i]n proportion to the grounds of . . . distrust” of the “local spirit.”

1 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 2.5, pp. 93-95 (6th ed. 2011) (footnotes omitted).

In light of the egregious violation of the Petitioner’s attorney-client privilege/Sixth Amendment right to counsel, the Petitioner requests the Court to grant this petition for writ of certiorari in order to address the important questions presented in this case. By granting the petition for writ of certiorari, the Court will have the opportunity to (1) again address the Sixth Amendment right to counsel and the requirement that attorney-client communications remain private and (2) clarify the

proper application of the “unreasonable application of clearly established Federal law” standard set forth in 28 U.S.C. § 2254(d).

I. CONCLUSION

The Petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully Submitted,

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