No. 23-6496

In the Supreme Court of the United States

IRVIN HARRIS JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court's factual findings that the note seized from petitioner's jail cell was not directed to counsel or prepared for counsel were clearly erroneous.

2. Whether, even if the note were protected by the attorney work-product doctrine and implicated the Sixth Amendment, petitioner is entitled to post-trial relief without establishing prejudice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is unreported. The order of the trial court denying petitioner's motions for a new trial (Pet. App. 17a-92a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2023. A petition for rehearing was denied on August 17, 2023 (Pet. App. 94a). On November 8, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 15, 2023. On December 5, 2023, the Chief Justice further extended the time to and including January 12, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

Following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on two counts of first-degree murder while armed, in violation of D.C. Code §§ 22-2102 and 22-4502 (2011); five counts of possessing a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b) (2011); two counts of assault with intent to kill while armed, in violation of D.C. Code §§ 22-401 and 22-4502 (2011); two counts of unlawfully possessing a firearm, in violation of D.C. Code § 22-4503(a)(1) (2011); two counts of carrying a pistol without a license outside the home or business, in violation of D.C. Code § 22-4504(a) (2011); one count of destroying property, in violation of D.C. Code § 22-303 (2011); and one count of aggravated assault while armed, in violation of D.C. Code §§ 22-404.01 and 22-4502 (2011). Judgment 1-3. Petitioner was sentenced to 82 years of imprisonment, to be followed by five years of supervised release. Judgment 1. The District of Columbia Court of Appeals affirmed. Pet. App. 1a-16a.

1. On June 21, 2011, petitioner got into a fistfight with Nick Kennedy because of a dispute that petitioner had with Kennedy's friends. Pet. App. 1a. After the fight, Kennedy told petitioner that he had no vendetta against him, but petitioner responded, "it ain't never over." *Id.* at 1a-2a.

Later that night, petitioner and another person fired guns at Kennedy and one of his friends, hitting several cars and an apartment window. Pet. App. 2a. Officers recovered 10mm and .45 caliber bullet casings from the scene. *Ibid.* Cell-phone tower data showed that petitioner was within a one-mile radius of the shooting when it occurred. *Id.* at 2a.

A few weeks later, on the morning of July 9, 2011, three of Kennedy's friends were shot—and two killed—during a craps game. Pet. App. 2a. One of petitioner's friends, Steven Harden, testified that he saw petitioner with the three victims at the game and then later heard gunshots. *Ibid.* Richard Shores, another witness, testified that he saw petitioner shake hands with one of the victims and moments later heard several gunshots from their direction. *Ibid.* The next day, Shores told another witness that "Irvin" (petitioner's first name) was the shooter. *Ibid.*

Police recovered numerous 10mm bullet casings from the July 9 shooting that matched the casings recovered from the June 21 shooting. Pet. App. 2a. Cell-phone-tower data showed that petitioner was within a one-mile radius of the July 9 shooting when it occurred. *Ibid.* The cell-phone data also showed that petitioner was typically in a different one-mile area and that his phone went inactive the day after the July 9 shooting. *Ibid.*

Two days later, petitioner stopped reporting to his probation officer and stopped living at home. Pet. App. 3a. Over the next few weeks, petitioner lived with various acquaintances and family members around Northwest DC but was not seen in his old neighborhood. *Ibid.* In late August 2011, petitioner arrived unannounced at his aunt's house in Calvert County, Maryland. *Ibid.* Police found petitioner there on September 9, and they arrested him after he unsuccessfully tried to flee out a window. *Ibid.*

While in jail before his trial, petitioner told an inmate in a neighboring cell that he shot two people while attempting to rob another man. Pet. App. 3a. Petitioner also told the inmate that he was worried that the

government would have cell-phone-tower evidence and that after the shooting he had gone to his aunt's house to avoid detection. *Ibid.*

2. A grand jury charged petitioner with offenses relating to the June 21 and July 9 shootings, including the first-degree murder of the two victims who had died. Indictment 1-6. At trial, the government presented a number of witnesses who testified about the June 21 fight between Kennedy and petitioner, the shooting later that night, and the July 9 shooting in which the murders occurred. Pet. App. 1a-2a. The witnesses included Shores, who had previously identified petitioner as the shooter. *Id.* at 2a. The government also introduced some video evidence and, through experts, cell-phone-tower data and ballistics evidence. *Ibid.*

In addition, the government introduced a handwritten note (Exhibit 458) that had been seized from petitioner's jail cell during the execution of a search warrant in an unrelated case. Pet. App. 10a.[1] Petitioner objected on foundation and hearsay grounds; the trial court overruled the objection, and the note was displayed before the jury. *Id.* at 11a; 2/13/13 Tr. 500-503. The lefthand side of the note contained four boxes that stated: "Jug Chris cuz," "June 20," "J-roc mafia scussa woo," and "Berk K D-Tay His girl." Pet. App. 129a. Next to the boxes, the note stated: "That beef was sq," "where was the sc located and how many * * * "; "Did I, or was someone else"; "4th July also known gambling spot in the hood from spring rd to the building to * * * is 3500." *Ibid.* On the righthand side, the note stated: "If I suppose to have on a hat and glasses. How can you

[1] Before trial, petitioner had unsuccessfully moved to suppress the note and other materials seized from his cell on Fourth Amendment grounds. Pet. App. 11a.

recognize me. All of my pictures from 2002-2008 I weighed 150 pounds." *Ibid.*

When the jail-cell note was introduced at trial, petitioner passed a message to his counsel stating that he had written the note for her. Pet. App. 11a. The next day, the government questioned a detective about the note, and petitioner moved, for the first time, to exclude the note on attorney-client privilege grounds. 2/14/13 Tr. 678-679. The trial court denied the motion, and the detective read portions of the note out loud. *Id.* at 678-679, 682-683. Petitioner later filed a supplement to his oral motion, arguing that the note was protected by attorney-client privilege. Pet. App. 11a. The government observed that petitioner had never previously claimed that the note was written for counsel, and the court again denied the motion. 2/19/13 Tr. 821-830.

In its closing argument, which took up 42 pages of transcript overall, the government mentioned the note three times. The government observed that the note showed that petitioner "is familiar with some of the relevant details" of the crime and that he was referring to the shooter "in the first person." 2/19/13 Tr. 851-852. The government then stated: "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 852. The government also mentioned the note in arguing that one of the defense witnesses was not credible because he lied about his nickname ("Chris Cuz"), which was used in the note. *Id.* at 918. The government otherwise spent most of the closing argument discussing the witnesses, the cell-phone-tower evidence, the video evidence, and the shell casings. See *id.* at 833-857, 903-922.

The jury found petitioner guilty of 15 counts, including the two first-degree murder counts. Judgment 1-3. The trial court sentenced petitioner to 82 years of imprisonment, to be followed by five years of supervised release. Judgment 1.

3. Petitioner filed a motion for a new trial on the theory that his counsel was constitutionally ineffective. Pet. App. 3a. He argued, among other things, that his counsel failed to adequately contest the admission of the jail-cell note based on attorney-client privilege and the attorney work-product privilege. *Id.* at 18a, 47a, 56a. Petitioner also filed a post-hearing brief in which he argued that the government interfered with his Sixth Amendment right to counsel by using a taint team to review the documents seized from his cell. *Id.* at 58a.

a. The trial court held an evidentiary hearing in which petitioner and his trial attorneys, Liyah Brown and Maro Robbins, testified. Pet. App. 3a. At the evidentiary hearing, Brown (petitioner's lead counsel, *id.* at 23a) testified that petitioner did not tell her about the seizure from his cell of a note or questions for her; instead, the only seized material that petitioner had brought up were lists of names and phone numbers and photographs. *Id.* at 25a. Brown also testified that, prior to trial, petitioner never identified the note as intended for counsel or intended for the purpose of seeking legal advice, even when the note had been included in the discovery the defense received from the government. *Id.* at 26a-29a.

Brown further testified that when petitioner passed her a message during trial saying that he had written the note for her, she believed that his statement was false. Pet. App. 29a; see *id.* at 30a. Brown testified that she instead viewed the jail-cell note, and other notes

that petitioner wrote, as notes to himself or "musings" that were not directed to a particular person. *Id.* at 27a, 29a-30a. Robbins likewise testified that he had not discussed the note with petitioner until it was presented as an exhibit at trial. *Id.* at 32a.

b. In a 75-page opinion, the trial court denied the motion for a new trial. Pet. App. 17a-92a. In doing so, the court credited the defense attorneys' testimony regarding the jail-cell note in full, and it did not credit petitioner's testimony regarding his purpose in creating the note. *Id.* at 46a.

The trial court acknowledged that the note was a "recitation of [petitioner's] impressions and his reactions to the information he learned at his preliminary hearing and from the affidavit supporting his arrest warrant." Pet. App. 47a. But the court found that petitioner "was not directing his reaction to counsel or to any person in particular, but only to himself." *Ibid.* The court observed that Brown had testified "persuasively" that petitioner "frequently wrote notes to himself," that he "was very smart and focused on his own case," and that he "knew how to relate specific concerns to her if he needed to." *Ibid.*

The trial court additionally found that petitioner had not established that the note was what he had referenced in a January 11, 2012 meeting with Robbins as a list of "written questions for L. Brown." Pet. App. 48a; see *id.* at 25a n.4. The court explained that the note on its face "is not a list of written questions" and that "[t]here is nothing about its appearance that would suggest that it is or was intended by its author to be a list of questions or set of notes written to or for counsel." *Id.* at 48a. The court recognized that the note stated, "If I suppose to have a hat and glasses how can you

recognize me." *Id.* at 49a. But the court found that petitioner had testified that this was a rhetorical question to himself. *Ibid.* The court similarly observed that the note stated, "where was the sc located and how many thorax" and "did I- or was someone else," but the court again relied on petitioner's own testimony that those lines reflected his own thoughts on how to refute the DNA, firearms, and witness identification evidence. *Ibid.*

The trial court accordingly concluded that defense counsel were not deficient in their representation as to any attorney-client privilege claim regarding the note. Pet. App. 56a. The court similarly found that counsel were not deficient in failing to argue that the note was protected by the attorney work-product privilege. *Ibid.* Among other things, the court relied on petitioner's acknowledgment that counsel never asked or told him to make notes to aid their investigation or representation of him. *Ibid.*

The trial court also found that even if counsel's representation were constitutionally deficient, petitioner was not prejudiced because the note "is cryptic, and its meaning very difficult to glean from the face of the document." Pet. App. 57a. The court recognized that the government had discussed the note in closing, but it observed that those arguments offered "little to enlighten the jury as to the ways in which [the note] might be incriminating." *Ibid.* The court additionally found that the government's evidence against petitioner was "overwhelming," such that there was no "reasonable probability" that the jury would have acquitted without the note's introduction. *Id.* at 57a-58a.

Finally, the trial court explained that the government's use of a taint team did not violate petitioner's

right to counsel because the note "was not in fact privileged" and "there was nothing on the face of the document" that would have "alerted" the members of the taint team that it was privileged. Pet. App. 58a.

4. The court of appeals affirmed. Pet. App. 1a-16a.

At the outset, the court of appeals explained that petitioner's ineffective assistance of counsel claim and his claim that the government interfered with his Sixth Amendment right to counsel hinged on whether the jail-cell note was privileged. Pet. App. 10a. The court further explained that under its precedent, a "trial court's findings of fact relevant to the essential elements of a claim of attorney-client privilege will not be overturned unless clearly erroneous." *Id.* at 12a (citation and internal quotation marks omitted).

Applying that standard, the court of appeals found that petitioner had not met his burden of showing that the jail-cell note (Exhibit 458) was an attorney-client communication. Pet. App. 12a-13a. The court of appeals declined to disturb the trial court's factual finding that, before trial, petitioner "did not tell Brown that he wrote Exhibit 458 for her or otherwise single out Exhibit 458 for her attention." Pet. App. 12a. The court of appeals likewise declined to disturb the trial court's factual finding that "the note's appearance did not suggest 'to reasonable counsel seeing it that it was an attorney-client privileged document.'" *Ibid.* The court of appeals also found that the record supported the trial court's finding that Exhibit 458 was a recitation of petitioner's impressions, not a list of questions for counsel. *Ibid.* And the court mentioned that "[f]urther, [the note] does not, on its face, mention counsel or otherwise indicate that it was intended for their eyes." *Id.* at 13a.

The court of appeals next rejected petitioner's Sixth Amendment claim premised on his assertion that the note was protected attorney work product. Pet. App. 13a-15a. The court observed that the note was not within the "core" of the work-product doctrine—which exists to protect "the mental processes of the attorney," *id.* at 13a (quoting *United States* v. *Nobles*, 422 U.S. 225, 238 (1975))—because it "was not prepared 'by or for the attorney,'" *id.* at 14a (quoting *In re Public Def. Serv.*, 831 A.2d 890, 911 (D.C. 2003)). And the court of appeals again pointed to the trial court's factual findings, which encompassed petitioner's and Brown's testimony, credited by the trial court, that defense counsel did not instruct petitioner to write any questions or notes for counsel. *Ibid.* The court of appeals acknowledged that petitioner relied on "non-binding authority" to argue that the work-product doctrine might cover documents created by a defendant "on his own initiative" to suggest defense strategy. *Ibid.* But the court declined to reach that question, because it found that the note's admission at trial did not prejudice petitioner in any event. *Ibid.*

The court of appeals explained that the contents of the note "did not betray some subtle legal theory or defense strategy." Pet. App. 14a. The court observed that the note's "most contested" sentence "merely indicates that [petitioner] wanted to challenge [Shores'] identification of him," and it is "not surprising that a defendant would want to discredit an eyewitness who placed him at a shooting." *Ibid.* The court thus found that the government "did not gain an unfair advantage" by seeing the note's statement to that effect. *Ibid.*

The court of appeals additionally explained that petitioner's claim that he was prejudiced by the government's treatment of the note as a confession during

closing arguments was "tenuous at best." Pet. App. 14a. It agreed with the trial court that the note itself was "'cryptic'" and noted that "the jury was told that the government's statements in closing were not evidence." *Ibid.* And it emphasized that another witness (Harden) had identified petitioner "as being at the craps game with far more certainty than any inferences to be drawn from [petitioner's] scrawled note." *Id.* at 14a-15a.

ARGUMENT

Petitioner contends that the government's use of the jail-cell note at trial violated his Sixth Amendment right to counsel. The court of appeals correctly rejected that contention, and its fact-bound determination—which was based on factual findings subject to the highly deferential clear-error standard of review—does not conflict with any decision of this Court, a court of appeals, or another state court of last resort. Petitioner additionally contends that the court of appeals erred by requiring him to show prejudice in order to obtain relief on his Sixth Amendment claim that the note was attorney work product. The court of appeals' rejection of his claim was correct, and its decision does not implicate any disagreement in the lower courts. No further review is warranted.

1. The lower courts correctly found that petitioner had not met his burden of showing that the note was a privileged attorney-client communication, based on the trial court's factual findings that the note was not a "communication" and was not "directed to counsel to seek legal advice." Pet. App. 13a. That fact-bound finding vitiates any claim based on attorney-client privilege and differentiates this case from any decision of another court of appeals or state court of last resort that has granted relief on an attorney-client privilege claim.

a. The court of appeals observed that to "establish that a writing is an attorney-client communication, [petitioner] must show, among other things, that it is a communication to an attorney made for the purpose of seeking legal advice." Pet. App. 12a. The court then determined that the trial court's factual findings under that standard, which were based on credibility determinations, were not clearly erroneous. *Id.* at 12a-13a.

Petitioner does not address, much less dispute, the understanding that the clearly-erroneous standard of review applies to the trial court's factual findings as a matter of D.C. law. And he does not argue that the trial court's findings were clearly erroneous. Instead, petitioner argues (Pet. 16-17) that the court of appeals "appeared to adopt a rule that requires non-lawyer pretrial detainees to use the sort of privilege headers that attorneys are trained to use" or to wait "until a specific meeting with counsel is imminent." That is incorrect.

The fact that the note did not "on its face" mention counsel and the fact that petitioner did not have a meeting scheduled with counsel were merely two details that supported the trial court's overall finding that the note was not a communication to an attorney made for the purpose of seeking legal advice. See Pet. App. 12a-13a. The court of appeals also relied on the trial court's findings, backed by credibility determinations, that petitioner did not tell his attorney at any time before trial that he wrote the note for her and did not otherwise bring it to her attention. *Id.* at 12a. The court of appeals additionally relied on the trial court's finding 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]."

Ibid. And the court of appeals further relied on the trial court's finding that defense counsel credibly testified that petitioner "frequently wrote notes to himself, that he was very smart and focused on his own case, and essentially that he knew how to relate specific concerns to her if he needed to." *Ibid.*

This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Indeed, "under what [the Court] ha[s] called the 'two-court rule,' th[at] policy has been applied with particular rigor when," as here, "[the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see, *e.g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

b. Petitioner asserts (Pet. 7-10) that lower courts disagree about when the government's seizure of a defendant's notes and the subsequent use of those notes at trial violates the Sixth Amendment. According to petitioner (Pet. 7), four courts hold that a defendant's notes are protected "so long as they are prepared for discussions with counsel." And he asserts that two courts, including the court of appeals below, hold that "there is no Sixth Amendment violation unless the government ignores explicit privilege markings on the face of the document." *Ibid.* But again, that is not the legal standard that the court of appeals applied.

Rather, the court of appeals required petitioner to show that the note was "a communication to an attorney made for the purpose of seeking legal advice." Pet. App. 12a; see p. 12, *supra*. That standard is not meaningfully distinct from the legal standard that petitioner requests: notes "prepared for discussion with counsel and

kept private." Pet. 2. The lower courts simply made a fact-specific determination that petitioner's note was not prepared for discussion with counsel.

Nor does the standard the court of appeals applied conflict below with the decisions of other courts of appeals or state courts of last resort. In *Bishop* v. *Rose*, 701 F.2d 1150 (6th Cir. 1983), for example, the district court had found that the defendant, "at the request of his defense counsel," had "drafted a handwritten statement detailing his activities" during the relevant period. *Id.* at 1151. The district court also found that the defendant's counsel "had requested [the defendant] to draft the statement to help in preparation of [his] defense" and that the "statement was a crucial tool for [counsel] in preparing [his] defense." *Id.* at 1151 & n.2; see *id.* at 1154. That finding was based on defense counsel's testimony at an evidentiary hearing, *id.* at 1154, and stands in stark contrast to the trial court's factual findings about the disputed note here. Moreover, the issue on appeal in *Bishop* was whether the defendant had been prejudiced by the use of the statement at trial, not whether it was privileged. See *id.* at 1155-1557.

In *United States* v. *DeFonte*, 441 F.3d 92 (2006) (per curiam), the Second Circuit applied the same legal standard that the court of appeals applied here. Quoting this Court's decision in *Fisher* v. *United States*, 425 U.S. 391 (1976), the Second Circuit explained that "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *DeFonte*, 441 F.3d at 95. The court emphasized that the notes must be a "*communication*," and thus that "[a] rule that recognizes a privilege for any writing made with an eye toward legal representation would be too broad." *Id.* at 95-96. The court also stated that "an

outline of what a client wishes to discuss with counsel," if it "is subsequently discussed with one's counsel," would fit within the scope of the privilege. *Id.* at 96. But the lower courts found no such circumstances in this case. See Pet. App. 48a-49a; *id.* at 12a.

The findings of the courts below also differentiate this case from *State* v. *Robinson*, 209 A.3d 25 (Del. 2019). There, the trial court had reviewed seized documents and determined that they included "privileged attorney-client communications and [the defendant's] handwritten notes containing trial strategy." *Id.* at 33. The State "did not dispute" that "the documents it seized contained trial strategy," *id.* at 33 n.38, and the government paralegal who reviewed the documents testified that the notes "reflected information that [the defendant] received from [his counsel]," *id.* at 34. And soon after the papers were seized, the defendant notified his counsel that the Department of Corrections "had seized his legal papers." *Id.* at 34-35. The evidence in *Robinson* thus differs markedly from the evidence here. Moreover, as in *Bishop*, the actual issue on appeal was whether the defendant was prejudiced, not whether the documents were privileged. See *id.* at 46.

The issue on appeal in *State* v. *Lenarz*, 22 A.3d 536 (Conn. 2011), cert. denied, 565 U.S. 1156 (2012), was likewise whether the defendant was prejudiced, not whether the documents in question were privileged. See *id.* at 538, 541-542. The State "did not dispute that the documents contained trial strategy," the defendant testified that "he had communicated the documents to his attorney," and the trial court had found that the documents were protected. *Id.* at 541. And the Connecticut Supreme Court noted that "it could not have been more obvious on the face of a number of the documents that

they were intended to be communications to the defendant's attorney" because, for example, one document expressly requested that an attorney review the following "confidential" material and that the attorney schedule an appointment to discuss the "case," and another document was labelled "Strategy Issues." *Id.* at 552-553.

Finally, in *State* v. *Perrow*, 231 P.3d 853 (2010), the Washington Court of Appeals—an intermediate appellate court, not the state supreme court—upheld the trial court's finding that certain papers were protected by the attorney-client privilege based on unchallenged factual findings that the defendant's attorney had asked him to write down the information contained in the papers and that the defendant had discussed the information with his attorney. *Id.* at 856. Like the other cases cited by petitioner, *Perrow* conflicts neither with the legal standard that the court of appeals applied nor with its determination, based on trial-court findings that were not clearly erroneous, that petitioner's particular note was not attorney-client privileged.[2]

2. Petitioner additionally contends (Pet. 20-23) that the court of appeals erred by requiring him, in the context of his assertion of an attorney work-product claim, to show prejudice, rather than presuming prejudice. This Court has recently denied review of similar claims. See *Esformes* v. *United States*, 144 S. Ct. 485 (2023)

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[2] Petitioner also contends that the decision below conflicts with another decision of the District of Columbia Court of Appeals that was subsequently vacated and is currently before the en banc court. Pet. 18 (citing *Moore* v. *United States*, No. 19-CF-0687, 2023 WL 3674377 (May 25, 2023) (per curiam)). But any internal inconsistency in the decisions of the court of appeals would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

(No. 23-95); *Orduno-Ramirez* v. *United States*, 144 S. Ct. 388 (2023) (No. 23-5034). It should follow the same course here.

a. In general, constitutional errors do not justify a remedy unless they prejudice the defendant. See, *e.g.*, *Chapman* v. *California*, 386 U.S. 18 (1967). Likewise, "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984); see *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981). Although "[i]n certain Sixth Amendment contexts, prejudice is presumed," *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984), those contexts are limited, see, *e.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 190 (2004), and do not include circumstances like those in petitioner's case.

In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), for example, this Court rejected a "*per se*" rule that a Sixth Amendment violation occurs and a new trial is necessary "'whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship.'" *Id.* at 549-550 (citation omitted). The Court explained that such a "*per se* rule [would] cut[] much too broadly" because it would require invalidating a conviction even where prejudice was clearly absent—for instance, where the government agent had merely participated in attorney-client conversations about "the weather or other harmless subjects." *Id.* at 557-558. The Court accordingly held that an undercover agent's presence at confidential attorney-client meetings could not violate the Sixth Amendment where the agent had not "communicated the substance of the [attorney-client] conversations and thereby created at least a

realistic possibility of injury to [the defendant] or benefit to the State." *Id.* at 558.

In doing so, the Court noted that the case might be different if the overheard conversations between the defendant and his counsel disclosed trial strategy or led to evidence used at trial. *Weatherford*, 429 U.S. at 552, 554. But the Court had no occasion to, and did not, decide what showing is necessary for a Sixth Amendment claim that might present that circumstance—let alone adopt a per se rule of prejudice that would encompass petitioner's case.

Petitioner contends (Pet. 21-22) that courts have nonetheless understood *Weatherford* to mean that when confidential information is actually disclosed to the prosecution, prejudice is presumed. But his cited cases—the Connecticut Supreme Court's decision in *Lenarz* and the Third Circuit's decision in *United States* v. *Levy*, 577 F.2d 200, 208 (1978)—involved circumstances distinct from those at issue here.

In particular, both courts presumed prejudice where an attorney-client privileged communication "contains details of the defendant's trial strategy." *Lenarz*, 22 A.3d at 543; see *Levy*, 577 F.2d at 207-208. Here, however, the court of appeals found that petitioner's note "did not betray some subtle legal theory or defense strategy"; at most, it suggested that, unsurprisingly, petitioner sought to discredit the testimony of a key eyewitness. Pet. App. 14a.

Petitioner instead contends (Pet. 22-23) that he was prejudiced by the government's portrayal of the note as a "confession" during closing argument. Whether the government's explicit use of a piece of evidence at trial prejudiced the defendant is the type of prejudice analysis that courts routinely undertake. It does not place an

impossible burden on defendants to show how the government's undisclosed strategy was affected by a privileged communication.

And here, the court of appeals reasonably found that petitioner's claim of prejudice from the government's use of the note at trial was "tenuous at best." Pet. App. 14a. As the court observed, the note was cryptic; the jury was instructed that the government's statements in closing were not evidence; and Harden's direct identification of petitioner at the scene of the shooting was more definitive than any inferences to be drawn from the note. *Id.* at 14a-15a.[3]

b. The decision below does not implicate the lower-court conflicts petitioner alleges (see Pet. 11-15). At the outset, petitioner has identified no cases applying a presumption of prejudice for a Sixth Amendment claim premised solely on a violation of the attorney work-product doctrine, much less one premised on documents created by the defendant on his own initiative. See *ibid.* That alone precludes him from showing that any other court would have granted him relief on the facts here.

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[3] Petitioner states that during deliberations the jury "asked to see the legal note." Pet. 5; see, *e.g.*, Pet. 23 (the note "was dramatic enough that the jury asked to see it"). But the jury did not ask to see the note specifically. Rather, the jury asked "if we can get prosecutors' exhibits from closing." 2/19/13 Tr. 964. As the trial court and the parties discussed upon receiving the request, it was not clear what the jury was referring to. *Id.* at 964-967. The court ultimately told the jury that it believed the jury was asking for the demonstrative exhibits that the government used during closing, but those were not admitted into evidence, so the jury could not have them. *Id.* at 967. Instead, the court sent back multiple large-sized photographs, including a photograph of the note, that had been admitted into evidence. *Id.* at 968.

Petitioner contends that some courts have applied a "presumption of prejudice when the government *intentionally* intrudes on confidential attorney-client communications." Pet. 11-12 (emphasis added); see *Shillinger* v. *Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995); *Levy*, 577 F.2d at 208; *State* v. *Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000); *Ellis* v. *State*, 660 N.W.2d 603, 608 (N.D. 2003); see also *United States* v. *Danielson*, 325 F.3d 1054, 1071, 1074 (9th Cir. 2003). But any such presumption is premised on deterrence of prosecutorial misconduct. See *Danielson*, 325 F.3d at 1072-1073; *Shillinger*, 70 F.3d at 1142; but see *United States* v. *Orduno-Ramirez*, 61 F.4th 1263, 1275-1276 (10th Cir.) (limiting the application of *Shillinger*'s per se rule even in deliberate-intrusion cases), cert. denied, 144 S. Ct. 388 (2023). That concern is not applicable here, where the court of appeals merely assumed a violation of the work-product doctrine that was not within the "core" of the doctrine—which, as this Court has explained, exists to shield "the mental processes of the *attorney*," *United States* v. *Nobles*, 422 U.S. 225, 238 (1975) (emphasis added). See Pet. App. 14a-15a.

Petitioner additionally contends (Pet. 13) that courts have applied a rebuttable presumption of prejudice based on the ostensible difficulty of determining how the prosecution's use of privileged information influenced the outcome of the case. But any such presumption is premised on the view that it is not possible for a defendant to know how the prosecution's possession of privileged defense strategy affected the government's own, undisclosed, trial strategy. See *Danielson*, 325 F.3d at 1070; *United States* v. *Mastroianni*, 749 F.2d 900, 908 (1st Cir. 1984); *State* v. *Bain*, 872 N.W.2d 777, 790-791 (Neb. 2016); *Lenarz*, 22 A.3d at 544-548; cf.

Kaur v. *Maryland*, 141 S. Ct. 5, 7 (2020) (Sotomayor, J., concurring in denial of certiorari). As explained, that concern is not present here because the note did not reveal confidential defense strategy. See p. 18, *supra*. Instead, petitioner argues that the government's overt use of the note at trial caused prejudice—but that argument merely requires assessing the evidence at trial, and it is accordingly the sort of prejudice claim that lower courts routinely analyze. See pp. 18-19, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2024