
No. 24-6440

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RAMINDER KAUR,

Petitioner-Appellant,

v.

**WARDEN OF THE MARYLAND CORRECTIONAL
INSTITUTION FOR WOMEN,**

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT BALTIMORE
(Hon. George L. Russell, III)

OPENING BRIEF OF RESPONDENT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Under the deferential standard mandated by 28 U.S.C. § 2254(d), when the state appellate court concluded that Petitioner–Appellant Raminder Kaur failed to show that she suffered prejudice at her second murder trial from the prosecutors’ access to otherwise-privileged information they received in litigating Kaur’s claim of ineffective assistance of counsel from her first trial, was the state court’s conclusion neither an unreasonable application of clearly established federal law nor an unreasonable determination of fact?

STATEMENT OF THE CASE

This appeal arises from the district court’s denial of Kaur’s petition for a writ of habeas corpus under 28 U.S.C. § 2254. In her petition, Kaur challenged her convictions for the first-degree murder of Preeta Gabba and related offenses in a 2016 trial in the Circuit Court for Montgomery County, Maryland.

The 2016 trial was Kaur’s second trial for Gabba’s murder. At the first trial, in 2014, Kaur was found guilty along with her co-defendant and husband (and Gabba’s ex-husband), Baldeo Taneja. But days after that verdict, Kaur filed a motion for a new trial alleging that ineffective

assistance by her trial counsel had pervaded the representation. The litigation of Kaur’s ineffective-assistance claims entailed extensive discovery—which was judicially authorized and which Kaur did not oppose—into otherwise-privileged attorney-client communications and work product. After extensive hearings, the trial court found that Kaur had suffered ineffective assistance and granted her a new trial.

Before the second trial, Kaur moved to disqualify the prosecution team that had litigated the first trial and the motion for a new trial, due to their exposure to her otherwise-privileged information. In response, the trial court

[REDACTED]

Kaur was again convicted at her second trial. During the trial, Kaur never objected that the prosecution had used any of her privileged

information in violation of the trial court's prohibition. But on appeal, she claimed that the trial court committed reversible error by not disqualifying the prosecutors.

The Maryland Court of Special Appeals rejected her claim.¹ It observed that the claim raised “a difficult issue of first impression in Maryland” for which “definitive guidance” from Maryland's highest court was lacking. *Kaur v. State*, No. 2516, Sept. Term, 2016, 2019 WL 2407997, at *1 (Md. Ct. Spec. App. June 7, 2019) (JA 4440). Given that uncertainty, the appellate court assumed, for the sake of analysis, a “putative error on the trial court's part” in not disqualifying the prosecutors. *Id.* Even under that assumption, however, the court concluded, based on its review of the transcripts of both trials, that Kaur failed to show any realistic possibility either that she had suffered actual prejudice from the prosecutors' exposure to her privileged information or that the prosecutors benefitted from that exposure.

¹ While this case was pending in the district court, the names of Maryland's appellate courts were changed. The state's intermediate appellate court, formerly the Court of Special Appeals, is now the Appellate Court of Maryland. The state's highest court, formerly the Court of Appeals, is now the Supreme Court of Maryland. Appellee refers to the courts in this brief by their former names, which they had at all times relevant to this case.

The Court of Appeals of Maryland and the Supreme Court of the United States both denied certiorari review. Justice Sonia Sotomayor penned a separate statement joining in denial of certiorari. *Kaur v. Maryland*, 141 S. Ct. 5, 5 (2020) (Sotomayor, J., respecting denial of certiorari) (JA 4464). Although Justice Sotomayor found Kaur’s case “concerning,” *id.*, she observed that it was distinguishable from prior cases from the Supreme Court and other courts that involved a “wrongful or negligent acquisition of privileged information” by the government. *Id.* at 6. Here, in contrast, “[t]he prosecutors did not obtain Kaur’s information surreptitiously.” *Id.* Rather, “[u]nlike the defendants in those cases,” Kaur’s privileged information had been provided to the prosecution with court authorization “for the limited purpose of vindicating her right to effective assistance of counsel.” *Id.* Justice Sotomayor observed: “Few courts have had occasion to opine on whether the Sixth Amendment bars prosecutors from retrying a defendant in such circumstances.” *Id.* Thus, “[b]ecause this question could benefit from further consideration by the lower courts,” Justice Sotomayor “agree[d] with the decision to deny certiorari in this case.” *Id.*

Kaur then filed her habeas corpus petition in the district court. The district court conducted the deferential review of the state-court decision that 28 U.S.C. § 2254(d) requires, and it ruled that the Court of Special Appeals’ decision passed muster. (JA4403–4427). Observing, like Justice Sotomayor, the “lack of clear direction from the Supreme Court and the various ways the issue has been handled by the federal Circuit Courts,” the district court concluded that the state court’s legal analysis did not contravene or unreasonably apply clearly established federal law. (JA4425). And as to the Court of Special Appeals’ record-based conclusion that Kaur had not proven prejudice, the district court observed that while “Kaur disagrees with the Appellate Court’s interpretation of the facts,” she “fails to show that no reasonable jurist could have reached the conclusion that she did not demonstrate prejudice.” (JA4426). The district court granted a certificate of appealability, however, and Kaur noted this appeal. (JA4427, JA4431–4434).²

Further detail is provided below and in the Argument that follows.

² The district court also rejected, as procedurally defaulted and lacking in merit, a separate claim Kaur advanced regarding the trial court’s exclusion of a proposed defense expert witness. (JA4428–4431). The district court did not include that issue in the certificate of appealability, and Kaur does not raise it before this Court.

A. Factual Background

The evidence adduced at Kaur's second trial, included, among other matters, the following.

Preeta Gabba was shot on Crystal Rock Drive in Germantown, Maryland, on October 12, 2013, shortly before 8:00 in the morning, while walking from her home to the bus stop to go to work. (JA3199–3201, JA3206, JA3253). She was shot three times and died as a result of her injuries. (JA3902–04).

A witness, Elena Komarova, was driving on Crystal Rock Drive, when she heard sounds like “fireworks, popping loud noises.” (JA3208–3212). She saw “two ladies standing” to her left; one was off the curb. (JA3208). The one off the curb (Gabba) fell down in front of Ms. Komarova's car. (JA3208). The other woman was similar in height to Gabba and wore “a bright scarf, mainly orange color” around her head, and a “loose [brown] coat”; her skin tone was “dark.” (JA3210–3212). The woman “[ran] away before the first lady [Gabba] fell down.” (JA3212).

Ms. Komarova's son, Nicholas, was riding as a passenger in his mother's car, when he “heard like three or four gunshots.” (JA3225). At the time, he “noticed another person” that “seemed to [him] like a

woman” near Gabba. (JA3226). She had “[a]bout the same” skin tone as Gabba, “kind of light brownish,” and “just based on skin tone” he thought that both women were African-American. (JA3229–3230). The other woman’s height was similar to Gabba’s. (JA3226). The other woman was “a little bit on the heavier side” and wearing a scarf or “[s]omething like that” on her head. (JA3227, JA3229).

A third witness, Samuel Sapour, reported hearing shots and seeing a “Black” woman in a burgundy jacket run toward a black sedan and enter the sedan on the driver’s side. (JA3834).³

Years earlier, Gabba and Baldeo Taneja had married in India, where they lived until Taneja moved to the United States, while Gabba remained in India. In the United States, Taneja began an extramarital relationship with Kaur. (JA3622–3627).

By 2011, Gabba had also moved to the United States and she and Taneja became embroiled in “very contentious” divorce proceedings after Gabba learned of Taneja’s and Kaur’s relationship. (JA3050).

³ Sapour had testified at the first trial but his observations were admitted at the second trial through the notes of a detective who had interviewed him. *Kaur*, 2019 WL 2407997, at *24 n.18.

In September 2013, Taneja and Kaur, who had married after Taneja's and Gabba's divorce, were living in Nashville, Tennessee. (JA3331). At that time, Taneja and Gabba were in the midst of a contempt dispute in Maryland court over Taneja's nonpayment of alimony. (JA3064–3067; JA3925–3929).

On September 28th, Taneja and Kaur purchased two handguns, a Ruger GP100 and a Ruger LCR, at a gun store in Tennessee; Taneja completed the paperwork for the purchase. (JA3136–3140). They also purchased a cleaning cloth, a gun rod, a bottle of cleaning oil, pepper spray, a pocket holster and two boxes of ammunition. (JA3142). That same day, they went to a costume store, Performance Studios, and bought a wig. (JA3335–3336; JA3884–3887).

On October 4th, they traveled to Rockville, Maryland and stayed at a Red Roof Inn. (JA3185–3188). They paid cash for the room and left the next day. (JA3188). According to data from Taneja's Garmin GPS device, which police later recovered from Taneja's and Kaur's vehicle, their trip included a late-night stop on a road that ran parallel to Gabba's apartment complex. (JA3350; JA4003).

A week later, on October 11, 2013, Taneja and Kaur returned to the Red Roof Inn. (JA3189). The next morning—October 12th, the day that Gabba was killed at 8:00 a.m.—their GPS device did not start recording location data until 9:58 a.m. (JA3388). The expert who extracted the data from the GPS device hypothesized that the reason there was no location data until 9:58 a.m. “could be that the GPS was turned off.” (JA3388).

The GPS data from that day reflects that, about an hour after the GPS was activated, Kaur and Taneja arrived at a hotel in Washington, D.C., where an Amway conference was being held. (JA3388–3393). They met with another couple at the conference, but left the conference a short time later after texting a colleague that Kaur “was not feeling well.” (JA3397). They then drove approximately twelve hours to near Farragut, Tennessee. (JA3397–3401).

The next morning, they were arrested for Gabba’s murder as they drove away from their Nashville residence. (JA3727). A search of their vehicle resulted in the seizure of the two handguns that Taneja and Kaur had purchased on September 28, 2013—one of which, the Ruger LCR,

was identified through ballistics testing as the murder weapon.⁴ (JA3148; JA3697–3700, JA3740–3743, JA3923). Among the other items found in the vehicle were a black and gray wig⁵ and the Garmin GPS. (JA3696, JA3700, JA3740–3741, JA3747–3748).

Additional evidence that was adduced at the trial is discussed, *infra*.

B. Procedural History

1. The First Trial

On November 22, 2013, Kaur was indicted in the Circuit Court for Montgomery County, Maryland, for the first-degree murder of Gabba, conspiracy to commit first-degree murder, and a related handgun offense. (JA2356, JA2359). On that same date, Taneja was also charged with the same offenses.

Kaur and Taneja were tried together by jury in late July and early August 2014. (JA23479–2385). Kaur was represented at trial by then-

⁴ The weapon was swabbed for DNA. Taneja’s DNA was identified on the weapon, although Kaur was excluded. (JA3653).

⁵ The wig was in two layers of packaging. It was inside of a CVS-branded bag that appeared to be unopened, and the CVS bag containing the wig was inside of another bag that also “appeared to be a wig bag” from the Performance Studios costume store. (JA3740–3741).

Assistant Public Defender Alan Drew; Taneja was represented by separate counsel. On August 7, 2014, the jury found Kaur and Taneja both guilty on all charges. (JA2385).⁶

2. *The Motion for a New Trial*

On August 18, 2014, a motion for a new trial was filed on Kaur's behalf by Stephen B. Mercer, then the Chief Attorney of the Forensics Division of the Office of the Public Defender ("OPD"), who had played a consulting role in Kaur's representation, and Harry J. Trainor, an attorney in private practice who OPD had quickly appointed as panel counsel for Kaur after the trial.⁷ (JA320–325, JA2386). This motion alleged a broad range of ineffective assistance of counsel rendered by Attorney Drew. It was supported by an 11-page handwritten affidavit prepared by Attorney Mercer and signed by both Attorney Drew and

⁶ Taneja's convictions were affirmed on appeal. *Taneja v. State*, 231 Md. App. 1 (2016). The Court of Special Appeals' reported opinion in Taneja's appeal includes a summary of the evidence presented at the first trial. *Id.* at 4–9.

⁷ Attorney Trainor filed a line entering his appearance and striking Attorney Drew's the day after the motion for new trial was filed. (JA2386). Attorney Mercer withdrew his appearance in October 2014. (JA2388). Attorney Trainor represented Kaur throughout the proceedings on the motion for a new trial.

Kaur. (JA326–338). Among many other allegations, the affidavit asserted:

[REDACTED]

(See generally JA326–338). The affidavit also stated that [REDACTED]

[REDACTED]

[REDACTED] (JA328, JA336–338).

The motion and affidavit were filed on the public court docket, unaccompanied by any motion for a protective order or request for sealing

or shielding, and were personally served on the prosecutors who had represented the State at trial. (JA2386, JA325, JA327).⁸

Given the breadth of the claims of ineffective assistance that Kaur asserted and OPD's termination of Attorney Drew's employment shortly after Kaur's trial, the State filed a motion to preserve tangible evidence, asking the court to order OPD to preserve its entire trial file and other documents related to the case. (JA2387).

Subsequently, the State moved to subpoena from OPD the entire case files of Attorneys Drew and Mercer and an OPD investigator, among other documents. (JA2390–2391). Significantly, Kaur did not oppose these motions, nor did Kaur, as she now asserts, “ask[] the court to limit the scope of the materials” disclosed. (Appellant's Br. at 3). Rather, OPD—who were, by that point, Kaur's *former* counsel—moved to

⁸ Days later, the contents of the motion and affidavit were publicized in detail in an article in the *Washington Post*, which had covered the trial. Dan Morse, “Md. public defender's office says retrial is needed in Montgomery County murder case,” *Wash. Post* (Sept. 23, 2014), 2014 WLNR 26528274, available at https://www.washingtonpost.com/local/crime/md-public-defenders-office-says-retrial-is-needed-in-montgomery-county-murder-case/2014/09/23/6be9639a-3438-11e4-8f02-03c644b2d7d0_story.html.

intervene and for a protective order as to the files. (JA2449–2459; *see also* JA2460–2469).

At a hearing on February 25, 2015, counsel for OPD told the court that OPD had sought a protective order under its ethical obligation to protect its former client’s confidences; OPD’s counsel acknowledged that Kaur’s ineffective-assistance claims would entail “some waiver of privilege” but asserted the waiver would be limited by the scope of the ineffective-assistance claims at issue. (Tr. 2/25/2015 at 7).⁹ The court observed, however, that Kaur’s ineffective-assistance claims were “so broad . . . that she really opens the door then to everything the attorney did or didn’t do in preparing her defense in this case.” (Tr. 2/25/2015 at 8). Kaur’s counsel did not dispute the Court’s observation about the breadth of her claims, and confirmed that her claims encompassed “a breakdown in the attorney-client relationship, inadequate preparation, inadequate investigation, and to a certain extent, some deceit.” (Tr. 2/25/2015 at 10).

⁹ The transcript of this hearing was omitted from the Joint Appendix. It is available on the district court docket at ECF 25-11.

Given that confirmation of the “breadth . . . of those allegations,” the court ruled—without objection from Kaur or OPD—that the “cutoff” for the scope of disclosure “would be the trial” and that, up to that point, “the entire investigative file” should be disclosed, subject to exceptions for “specific . . . documents within the file that are unrelated to the issue of preparing your defense in this case.” (Tr. 2/25/2015 at 10). Accordingly, the court issued an order largely denying OPD’s motion for a protective order. (JA2397, JA2471–2472).¹⁰

The circuit court held multiple days of evidentiary hearings on the motion for new trial in July and August 2015, receiving testimony from Kaur, Attorney Drew, Attorney Mercer, and several other witnesses. (JA2400–2403).¹¹ The court heard oral arguments on August 14, 2015 (JA2404), and on November 6, 2015, the court granted Kaur a new trial

¹⁰ The court’s order authorized OPD to withhold any documents it deemed to be both privileged and irrelevant to any claim of negligent trial preparation, and authorized Kaur to direct OPD to withhold any documents she deemed met such criteria, subject to procedures for preparation of privilege logs and potential in-camera review by the court. (JA2471–2472). There is no indication in the record that either Kaur or OPD ever sought such in-camera review as to any of the documents.

¹¹ The testimony at the hearings on the motion for a new trial is summarized in the State’s brief in the Court of Special Appeals. (JA347–355). Some evidence from the hearings is discussed *infra*.

on the basis that Attorney Drew had [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(JA1545–1556). No filings in connection with litigation of the motion for a new trial were made under seal, and all of the hearings in connection with the motion for a new trial were held in open court, including the hearing at which the court delivered its ruling.¹²

3. *The Motion for Protective Order and to Disqualify the Prosecutors*

New counsel were appointed to represent Kaur for the second trial, consisting principally of attorneys from the law firm of Williams & Connolly. (JA2407, JA2409, JA2414, JA2416).¹³ On February 5, 2016, Kaur’s new counsel filed a motion for a protective order to prohibit the

¹² Soon after that hearing, the *Washington Post* published another article discussing the court’s ruling. Dan Morse, “New trial ordered in Maryland murder case with overburdened public defender,” *Wash. Post* (Nov. 23, 2015), 2015 WLNR 34749376, available at https://www.washingtonpost.com/local/public-safety/new-trial-ordered-in-maryland-murder-case-with-overburdened-public-defender/2015/11/22/d2cb50b6-8e08-11e5-baf4-bdf37355da0c_story.html.

¹³ Attorney Mercer also rejoined the defense team. (JA2406).

State from using Kaur’s privileged information, as revealed in litigating the motion for a new trial, at the second trial, and to disqualify the assistant state’s attorneys who had prosecuted the first trial and the motion for a new trial from prosecuting the second trial. (JA2408, JA2486–2508; *see also* JA2509–2581).

At a hearing on April 14, 2016, the circuit court granted, in part, the motion for a protective order. In the court’s view, Kaur had waived the attorney-client privilege when she [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (JA1565). Further, the court concluded that there was

[REDACTED]

[REDACTED]

[REDACTED] (JA1570).

Nevertheless, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (JA1565–1566, JA1570). Specifically, the court ordered that, [REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED] (JA1570–1571).

- [REDACTED]

[REDACTED] (JA1571).

The court declined, however, to [REDACTED] (JA1571). In the circuit court’s view, that step was [REDACTED]

[REDACTED]

[REDACTED] (JA1571).

Further, the court gave weight to [REDACTED]

[REDACTED]

[REDACTED]

(JA1571). It reasoned:

[REDACTED]

(JA1572).¹⁴

¹⁴ The court sealed a portion of this hearing at Kaur’s request. The transcript of the unsealed portion is at JA2891–2956, and the transcript of the sealed portion is at JA1561–1573. The point in the unsealed transcript where the sealed portion would be is at JA2949, line 8.

4. *The Motion in Limine*

In October 2016, in advance of the second trial, Kaur filed a motion in limine to limit the use of her prior testimony from the hearings on the motion for a new trial. (JA2423, JA2591–2595; *see also* JA2596–2602). The court heard Kaur’s motion on November 1, 2016, immediately before the trial began (having selected the jury the day before). Kaur’s counsel had prepared a copy of the transcript of Kaur’s testimony on direct examination from which he had redacted all testimony that he believed related to attorney-client privilege, and he asked the court to order that, in furtherance of the court’s prior ruling on the motion for a protective order, the trial prosecutor who was preparing for potential cross-examination of Kaur would be limited to using the redacted transcript in her preparation. (JA2963–2970).

Without objection, however, the court granted Kaur a more generous remedy: it ordered the prosecutor to refrain from reviewing the transcript at all, and instead to prepare for Kaur’s cross-examination entirely from memory; if the prosecutor wished to review any portion of the transcript of Kaur’s prior testimony at the hearing on the motion for new trial that she believed might be useful and non-privileged, the

prosecutor would be required to have an assistant locate that portion of the transcript for her and make a log of all portions thus reviewed. (JA2970–2973).

5. *The Second Trial*

The second trial took place in early November 2016. Kaur elected not to testify at the second trial after all. (See JA4151, JA4158, JA4230–4234). After Kaur was voir dired (at the State’s insistence) on her decision not to testify, her counsel asserted that the trial court’s earlier decisions not to disqualify the prosecution team and concerning “what materials the prosecution could review” were “part of the calculus” for Kaur’s decision not to testify. (JA4233). The court replied:

[A]s a matter of record I made a ruling with respect to not recusing the trial team. And my concern with the other is that there’ve been numerous agreements between the parties, or representations between the parties back and forth. I’m not sure that they’re all part of the record with respect to what the State had agreed to do and not do insofar as the use of any information that they had gathered or gleaned from having been the prosecutors in the first trial, and then at the hearing on the motion for a new trial.

So I’m not sure your proffer with respect to that really means anything, because it suggests a lot of facts that are not of evidence in this case.

(JA4233). In response, Kaur’s counsel told the court that he was “not meaning to supplement the record” and “not meaning to proffer any additional evidence.” (JA4233).

On November 10, 2016, the jury found Kaur guilty on all charges. (JA2436). On January 23, 2017, the circuit court sentenced Kaur to life imprisonment. (JA2439).

6. *The State Appellate Court’s Decision*

After sentencing, Kaur noted a timely appeal to the Court of Special Appeals. The principal question that Kaur presented on appeal was:

Did the trial court err in failing to protect Ms. Kaur from being tried by a prosecution team with extensive knowledge of Ms. Kaur’s privileged communications with her defense counsel, communications among counsel about trial strategy, and investigative and strategic work product?

(JA4440).¹⁵

In an unreported opinion filed on June 7, 2019, the Court of Special Appeals affirmed Kaur’s convictions. In sum, it ruled that, even assuming the trial court committed a “putative error” in failing to disqualify the prosecutors, Kaur had the burden to show actual prejudice

¹⁵ Kaur also litigated a second question that is not pertinent to the issues now before this Court.

resulting from such an error, and she had failed to show prejudice. *Kaur*, 2019 WL 2407997, at *1.

Because the Court of Special Appeals' opinion is the “last reasoned decision of a state court addressing the claim,” to which this Court must apply deferential 28 U.S.C. § 2254(d) review, *Allen v. Stephen*, 42 F.4th 223, 247 (4th Cir. 2022) (citation omitted), Appellee summarizes the state appellate court's decision in some detail below.

- i. The state appellate court found that the State did not wrongfully “intrude” on Kaur's privileged information, but rather properly acquired it through Kaur's waiver of the privilege to litigate her claim of ineffective assistance of counsel.

At the outset, the Court of Special Appeals roundly rejected Kaur's accusation that “the acquisition of her privileged information by the State was wrongful.” *Kaur*, 2019 WL 2407997, at *9. Rather, the State had “*lawfully* obtain[ed] knowledge of [Kaur's] privileged communications,” pursuant to Kaur's “waive[r] [of] the attorney-client privilege when she filed her motion for a new trial with its supporting affidavit,” presenting a claim of ineffective assistance of counsel. *Id.* at *8, *10 (emphasis in original). The “difficult” preliminary question the Court of Special Appeals faced was “[d]elineating the scope of her waiver[.]” *Id.* at *10.

- ii. The state appellate court concluded that Kaur’s waiver of privilege was an implied waiver limited to the motion for a new trial, not an express waiver for all purposes including the second trial.

As to the scope of Kaur’s waiver of privilege, the Court of Special Appeals took particular guidance from the Ninth Circuit’s decision in *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc), concerning waivers of privilege for the purpose of litigating ineffective-assistance claims. The *Bittaker* court began with the premise, which it traced back as far as *Hunt v. Blackburn*, 128 U.S. 464 (1888), that when a criminal defendant “raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer.” 331 F.3d at 716, 718. The question, again, was “the *scope* of the . . . waiver: Does it extend only to litigation of the [ineffective assistance claim], or is the attorney-client privilege waived for all time and all purposes—including the possible retrial of the petitioner, should he succeed in setting aside his original conviction or sentence?” *Id.* at 717 (emphasis in original). To address this question, the *Bittaker* court presented a rubric of “express” unconditional waivers vs. “implied” limited waivers of privilege, which the Court of Special Appeals found

instructive although Kaur's case did "not fall neatly into an express/implied waiver dichotomy." *Kaur*, 2019 WL 2407997, at *12.

The Court of Special Appeals saw "some merit" in the State's position that Kaur had unconditionally "waived the attorney-client privilege for all purposes," when, through her unilateral and unprotected public filing of the affidavit in support of the motion for a new trial, she placed "substantive information about privileged conversations between Ms. Kaur and Mr. Drew regarding her case, as well as references to trial strategy decisions and other attorney work-product" into the public domain. *Id.* at *13–14. But on balance, for similar prudential reasons to those the trial court had articulated, the Court of Special Appeals concluded that "the better approach is to treat Ms. Kaur's waiver as an implied one," limited in scope to the proceedings on the motion for a new trial. *Id.* at *14 & n.10.

- iii. The state appellate court did not decide whether the trial court erred in not disqualifying the prosecutors, but assumed a "putative error" arguendo.

With that determination of the scope of Kaur's waiver having been made (*i.e.*, that the waiver did not extend to use of her privileged

information at the second trial), the question that Kaur had presented on appeal was teed up: whether the trial court's decision to impose a protective order prohibiting any use of Kaur's privileged information at the second trial, but *not* to disqualify the prosecutors, was "sufficient to protect Ms. Kaur's constitutional rights." *Id.* at *1.

The Court of Special Appeals found that question "a difficult issue of first impression in Maryland," and declined to answer it directly. *Id.* Instead, the Court of Special Appeals effectively assumed, for the sake of argument, a "putative error" in failing to disqualify the prosecutors, *id.* at *1, and decided the issue on the lack of prejudice stemming from the hypothetical error. The Court of Special Appeals' analysis of prejudice was twofold: first, it concluded, "[i]n the absence of definitive guidance" from Maryland's highest court, that no presumption of prejudice applied and that "Kaur was obligated to demonstrate that any putative error on the trial court's part was prejudicial," *id.* at *1, *14–16; and second, after "review[ing] the transcripts from both trials," *id.* at *18, the court held "that she failed to do so." *Id.* at *1, *17–24.

- iv. The state appellate court found that no presumption of prejudice applied because the State did not acquire Kaur's privileged information wrongfully, and under Maryland law prejudice would not be presumed even from a wrongful intrusion.

On the first point, Kaur argued for a presumption of prejudice, relying on out-of-state authority. *Id.* at *14. The Court of Special Appeals rejected that claim because the cases Kaur relied on had not involved waivers of the privilege (implicit or otherwise), but rather were cases where the government had eavesdropped or otherwise illegitimately intruded on privileged communication. In other words, they were not cases “in which the prosecutor obtained access to privileged communications by means of an unsealed court paper and resort to legal process in order to prepare for a hearing on the issue whether defense counsel had been inadequate.” *Id.* at *15. The court agreed with the State that no “discussion of prejudice resulting from a governmental ‘intrusion’ or a violation of a defendant’s constitutional right to counsel” was applicable. *Id.*

Second, even in cases where government agents “*did* intrude into the attorney-client relationship,” Maryland case law would not support a presumption of prejudice. *Id.* (emphasis added). Rather, Maryland cases

have held that “even when the State acquires information by improper means, the burden is on the defendant to demonstrate ‘at least a realistic possibility of injury to the accused or benefit to the State’ before a court will find a violation of the Sixth Amendment.” *Id.* at *16 (citing cases).

Thus, the court rejected a presumption of prejudice:

Maryland decisions have not adopted a presumption of prejudice even when the State obtained the confidential information through improper means. . . . Against this backdrop, it is difficult to conceive how Maryland law, as it now stands, presumes prejudice on behalf of a defendant when the privileged information is acquired by the State through an express or implicit waiver by the defendant. . . . [W]e conclude that Ms. Kaur must demonstrate to this Court that there was ‘at least a realistic possibility’ that she was harmed in the second trial by the State’s access to her privileged information, or that the State used such information to its advantage in the second trial.

Kaur, 2019 WL 2407997, at *16.

- v. The state appellate court found, based on review of the record, that Kaur failed to demonstrate prejudice.

The Court of Special Appeals turned, finally, to whether Kaur could demonstrate that allowing the same prosecutors to retry her case actually prejudiced her. After conducting an independent, *de novo* review of the “transcripts from both trials,” the court concluded that “Kaur’s

claims of prejudice were not persuasive.” *Id.* at *17–18. Kaur alleged prejudice in five respects, all of which the court rejected.

First, the court rejected Kaur’s claim that the prosecution had been placed “on notice as to a potential ‘cultural norms’ strategy,” involving presenting Kaur’s relationship with Taneja as one of subservience, by the prosecutors’ access to privileged information. *Id.* at *18. Rather, the court recognized: “this issue was introduced at Ms. Kaur’s first trial by *defense counsel* in his opening statement,” which the court quoted at length. *Id.* (emphasis in original).

Second, the court rejected Kaur’s claim that the prosecutors’ knowledge of her privileged information effectively precluded her from testifying at the second trial “because the prosecution would have had an unfair advantage in cross-examining her.” *Id.* at *19. The court observed that the trial court had restricted the prosecutor’s preparation for cross-examining Kaur in its in limine ruling, and had said it would “address further concerns about the scope of the State’s cross-examination after the conclusion of Ms. Kaur’s direct testimony and before the State’s cross-examination.” *Id.* Therefore, it was “quite clear that the trial court was concerned about the possibility of unfair advantage to the State if Ms.

Kaur testified,” and it was “also clear that the court reserved any ruling on the scope of possible cross-examination until Ms. Kaur completed her direct testimony.” *Id.* However, “the issue became moot because Ms. Kaur eventually elected not to testify.” *Id.* “In light of this,” the court concluded, “absent a proffer of what Ms. Kaur’s direct testimony would have been,” her “bald assertion that she was prejudiced” was effectively a reprise of her argument for a presumption of prejudice, which the court had already rejected. *Id.*

Third, the court addressed Kaur’s claim that she was prejudiced because the State presented evidence at the second trial that Kaur and Taneja had purchased a second wig—a fact that had not been presented at the first trial and that, according to Kaur, the State could only have learned from privileged information. Given that it was not clear “whether the State had an independent source for the information about a possible second wig,” the court “assume[d] for purposes of analysis that Ms. Kaur is correct” as to the State’s source of the information. *Id.* at *20. Nonetheless, the court found no prejudice. Indeed, it found that, rather than prejudicing Kaur, the additional evidence about the second

wig had bolstered Kaur's theory of the case at the second trial that Taneja was the shooter, reasoning:

Ms. Kaur has provided no explanation for how she was prejudiced. The State's theory of the case did not change between trials. In each, the State theorized that Ms. Gabba's murderer could have been either Taneja or Ms. Kaur, but that it was more likely Ms. Kaur. And, in the second trial, the jury was instructed that Ms. Kaur could be found guilty as an accomplice to murder. None of the eyewitnesses to the shooting testified that the shooter was wearing a black and grey streaked wig, or, for that matter, any wig at all. Rather, the eyewitnesses all agreed that the shooter had dark hair, and possibly dreadlocks or cornrows.

Certainly, Ms. Kaur is correct that the State called Mr. Tubbs, the Performance Studio employee, in the second trial but not in the first. When he was on the stand, a prosecutor showed Mr. Tubbs the black and grey wig and the packaging. He testified that Performance Studios carried the wig depicted on the packaging in the fall of 2013, and that the packaging came from his store. But that is all the testimony the Prosecution Team elicited from Mr. Tubbs on direct examination.

On cross-examination, defense counsel elicited from Mr. Tubbs that: (1) on September 28, 2013 (the date of the receipt), his store sold only one wig of the kind pictured on the packaging, and that the receipt reflected that fact; (2) Taneja visited Performance Studios on September 28 and purchased a wig; (3) although many wigs in the store are unisex, the particular wig contained in the packaging "was intended for a man to be used"; and (4) the September 28 receipt indicated that other items were purchased at the same time by the same person, including a prosthesis designed to make one's face look older and olive-beige makeup used to change one's apparent skin color. All of this evidence supported Ms. Kaur's theory that Taneja disguised himself before fatally shooting

Ms. Gabba. In short, Mr. Tubbs’s testimony provided no support to the State’s case but significant support to Ms. Kaur’s. We fail to see how Ms. Kaur was prejudiced when the State called Mr. Tubbs.

Id. at *20–21.

Fourth, the court rejected Kaur’s claim that the State had gained unfair insight into the possible defense strategy of pinning liability on Taneja as the shooter, a strategy which was discussed in the privileged communications but that Kaur claimed had not been pursued at the first trial. The court rejected the premise of this argument, finding that, “[i]n reality, Ms. Kaur’s strategy in both trials was the same—Taneja, and not Ms. Kaur, was responsible for Ms. Gabba’s death.” *Id.* at *22. With extensive quotation of Attorney Drew’s opening statement and closing argument from the first trial, the court showed that Kaur’s defense had never been “that a third party shot and killed Ms. Gabba” but rather had been, at both trials, “that Taneja alone was responsible for the murder of Ms. Gabba, and that Ms. Kaur was his unwilling companion.” *Id.*

Fifth and finally, the court rejected Kaur’s claim that she was prejudiced because the State allegedly changed its approach to presentation of the DNA evidence between the first and second trials due to access to privileged information. Again, the court rejected the premise

of the argument, finding that “the State’s approach to the DNA evidence in both trials was consistent and, to the extent that it varied (and it didn’t in any material manner), the State’s approach in the second trial reflects the defendants’ opening statements from the first trial.” *Id.* at *24. Once more, the court supported this conclusion by comparing the opening statements of counsel at both trials and comparing the consistent testimony in both trials of the pertinent State witnesses, all of which demonstrated that the evidence at both trials was that Taneja’s DNA rather than Kaur’s was on the gun, and that the State explained this at both trials by suggesting that Taneja had transferred his DNA to the gun in the process of cleaning Kaur’s DNA off with a cleaning cloth. *Id.* at *23–24.¹⁶

In sum, the Court of Special Appeals concluded that “although the Prosecution Team admitted that it had knowledge of the privileged communications, Ms. Kaur has not demonstrated that she was prejudiced in the second trial as a result.” *Id.* at *24 (internal citation omitted).

¹⁶ Kaur does not mention the DNA evidence in her brief to this Court and so has apparently abandoned this claim of prejudice.

7. *Subsequent Appellate Proceedings*

Kaur filed a petition for a writ of certiorari in the Court of Appeals of Maryland on July 24, 2019. (ECF 25-2 at 188–211). The State filed a conditional cross-petition arguing that Kaur had expressly waived the attorney-client privilege for all purposes and that she had failed to preserve any claim that the State had violated the protective order at trial where she did not object at trial to any alleged violations. (ECF 25-2 at 212–227). The Court of Appeals denied certiorari on October 18, 2019. *Kaur v. State*, 466 Md. 225 (2019) (table).

On January 15, 2020, Kaur filed a petition for a writ of certiorari in the Supreme Court.¹⁷ The Supreme Court denied certiorari on October 5, 2020. *Kaur*, 141 S. Ct. 5.

8. *The Habeas Corpus Petition in the District Court*

Kaur filed her habeas corpus petition in the district court on July 19, 2021. (JA7–91). After briefing from the parties, the district court denied the petition in a memorandum opinion and order issued on April

¹⁷ The filings in the Supreme Court, including Kaur’s petition, the State of Maryland’s brief in opposition, and Kaur’s reply, can be accessed on the Supreme Court’s docket for the case at: <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1045.html> (last visited Sept. 12, 2024).

15, 2024. (JA4403–4434). The court “assume[d] that the Sixth Amendment extends to a violation of the attorney-client privilege.” (JA4425). The district court observed, however, that “the Supreme Court [has] provided no definitive test on the necessary proof for a successful Sixth Amendment claim” of this sort, that the federal circuit courts “have had various interpretations of what proof is required to establish a violation of the right,” and that the issue is particularly “murk[y]” in the Fourth Circuit. (JA4424–4425). The district court noted that, “[l]ike most of the federal Circuit Courts,” the Maryland Court of Special Appeals had required Kaur to “prove that her defense had been prejudiced by the invasion of her attorney-client privilege.” (JA4425). And, “[g]iven the lack of clear direction from the Supreme Court and the various ways the issue has been handled by the federal Circuit Courts,” the district court could not “say that the Appellate Court’s decision is contrary to federal law,” applying review under 28 U.S.C. § 2254(d). (JA4425).

Turning to the state appellate court’s prejudice analysis, the district court ruled that it likewise passed § 2254(d) muster:

The Court also cannot say that the Appellate Court’s application of the facts to the law was unreasonable. Kaur

advances the same arguments in her habeas petition that she did on direct appeal as to why she was prejudiced by the prosecution's access to her defense file. Kaur disagrees with the Appellate Court's interpretation of the facts, but fails to show that no reasonable jurist could have reached the conclusion that she did not demonstrate prejudice. The failure to meet this standard is fatal to her claim.

(JA4426) (internal citations omitted). But, noting that it was “sympathetic to Kaur's dilemma,” the court granted a certificate of appealability. (JA4426–4427, 4434).

SUMMARY OF THE ARGUMENT

The decision of the Court of Special Appeals readily satisfies the deferential standard of review under 28 U.S.C. § 2254(d).

Weatherford v. Bursey, 429 U.S. 545 (1977), on which Kaur relies, simply does not apply. *Weatherford* does not address the scenario that this case presents: one where the defendant waived her attorney-client privilege for the purpose of litigating an ineffective-assistance claim. As the litigation of Kaur's petition for certiorari in the Supreme Court reflects, there is no clearly established federal law—that is, no holding of the Supreme Court—that governs that scenario or establishes when, if ever, prosecutors who received a defendant's otherwise-privileged information through such a waiver must be disqualified.

Nevertheless, because the state appellate court assumed a “putative error” by the trial court in not disqualifying the prosecutors, and rejected Kaur’s claim on the basis of her failure to prove prejudice, resolution of this appeal turns on the Court of Special Appeals’ prejudice analysis. Appropriately applying deferential review, the district court correctly held that the state appellate court’s record-based determination that Kaur failed to show prejudice was eminently reasonable under § 2254(d). Affirmance is required.

STANDARD OF REVIEW

This Court reviews “*de novo* the district court’s assessment . . . under § 2254(d).” *Torrence v. Lewis*, 60 F.4th 209, 213 (4th Cir. 2023). In doing so, the Court is “guided and restricted by the statutory language of 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 [(AEDPA)], and a wealth of Supreme Court precedent interpreting and applying this statute.” *Bowman v. Stirling*, 45 F.4th 740, 752 (4th Cir. 2022) (citation and quotation marks omitted).

AEDPA prohibits a federal court from granting habeas relief unless the state-court decision under review suffers from one of three potential defects. Habeas relief may be granted only if the petitioner demonstrates

that the state-court decision: (1) is “contrary to” “clearly established federal law, as determined by the Supreme Court of the United States”; (2) involves “an unreasonable application of” that law; or (3) relies on an “unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“The starting point for cases subject to § 2254(d)(1) is to identify the ‘clearly established Federal law, as determined by the Supreme Court of the United States’ that governs the habeas petitioner’s claims.” *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013) (per curiam). “Clearly established Federal law, as determined by the Supreme Court of the United States” refers to “the holdings, as opposed to the dicta,” of the Supreme Court’s decisions at the time of the relevant state-court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). The federal habeas court must then “train its attention on the particular reasons—both legal and factual—why [the] state court[] rejected [the] state prisoner’s federal claims,’ and . . . give appropriate deference to that decision.” *Wilson v. Sellers*, 584 U.S. 122, 125 (2018) (citations omitted).

The deference that a federal habeas court must give to state-court decisions is “formidable.” *Burt v. Titlow*, 571 U.S. 12, 19 (2013). A federal

habeas court cannot reject a state court's legal reasoning unless it was "so lacking in justification that there was an error well understood and comprehended in existing [Supreme Court holdings] beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 419-20 (2014). This type of mistake far exceeds routine reversible error or even so-called "clear error," both of which are familiarly applied on a direct appeal. *Id.* After all, as the Supreme Court has now said in numerous separate opinions, federal habeas review "exists as 'a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted).

Likewise, "[f]actual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). If "reasonable minds reviewing the record might disagree about the finding in question," a federal habeas court may not conclude that the

state-court decision was based on an unreasonable determination of the facts. *Wood v. Allen*, 558 U.S. 290, 301 (2010). That is, a “state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Id.* When a state court “explain[s] its reasoning with some care, it should be particularly difficult to establish clear and convincing evidence of [AEDPA factual] error.” *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010).

ARGUMENT

THE STATE APPELLATE COURT’S RULING—THAT KAUR FAILED TO ESTABLISH PREJUDICE RESULTING FROM ANY PUTATIVE ERROR IN NOT DISQUALIFYING THE PROSECUTORS—PASSES AEDPA REVIEW.

The state appellate court’s decision readily passes AEDPA review. The state court’s legal analysis neither contravened nor unreasonably applied any clearly established Supreme Court precedent. This is readily apparent from the fact that—as jurists at every stage of this case have noted and as Kaur herself acknowledged in her bid for Supreme Court review—the Supreme Court simply has not addressed the standards that should apply when the government acquires a defendant’s otherwise-

privileged information as a result of the defendant's waiver of privilege to litigate an ineffective-assistance claim. Although Kaur now touts *Weatherford v. Bursey*, 429 U.S. 545 (1977), as providing the governing standard, *Weatherford* and its progeny did not involve the government's acquisition of information via a defendant's waiver of privilege.

In any event, the state appellate court assumed *arguendo*, in Kaur's favor, that the trial court erred by allowing the prosecutors who had been exposed to Kaur's otherwise-privileged information to conduct her second trial. The "particular reason[]" why the appellate court nevertheless rejected Kaur's claim—the reason on which this Court must "train its attention" under AEDPA review, *Wilson*, 584 U.S. at 125 (citation omitted)—is that Kaur failed to show any resulting prejudice. As the district court correctly ruled, that record-based assessment was not founded on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Under the deferential review of state-court decisions that the AEDPA mandates, the state court's detailed and thorough decision here easily passes muster.

A. *Weatherford* does not clearly establish a standard requiring the disqualification of prosecutors who have been exposed to a defendant's otherwise-privileged information under a limited waiver of privilege.

Because the Court of Special Appeals assumed *arguendo* that the prosecutors should have been disqualified, and instead rejected Kaur's claim based on her failure to establish any prejudice resulting from the failure to do so, it is to somewhat beside the point for purposes of AEDPA review whether there is a clearly established Sixth Amendment right to disqualification of prosecutors in similar circumstances. To be clear, however, there is no such clearly established right.

Rather, it has "long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer." *Bittaker*, 331 F.3d at 716; *see, e.g., United States v. Pinson*, 584 F.3d 972, 978 (10th Cir. 2009) ("Given the ample, unanimous federal authority on point, we hold that when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim."); *State v. Thomas*, 325

Md. 160, 174 (1992) (“[W]e adopt the universally accepted rule that the privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance and those communications, and the opinions based upon them are relevant to the determination of the quality of counsel’s performance.”); accord *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005); *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001).

And the Supreme Court has not squarely addressed—and thus has made no clearly established law concerning—the effect of such a waiver on subsequent proceedings and the extent, if any, to which prosecutors who gained knowledge of a defendant’s otherwise-privileged information through such a waiver should be disqualified from subsequent proceedings.

Indeed, Kaur acknowledged as much in her petition for certiorari. There, she urged the Supreme Court to take up her case to provide “clarification on the contours of the protection that [the Sixth] Amendment affords to a criminal defendant’s attorney-client privilege” because the “Court has not yet provided guidance on the contours of this

right when privileged communications are disclosed or on how the right may be vindicated.” (Cert. Pet. 16–17).

The lack of a clearly established Supreme Court holding on point was underscored by Justice Sotomayor’s statement regarding the denial of certiorari, where she observed that “[f]ew courts have had occasion to opine on whether the Sixth Amendment bars prosecutors from retrying a defendant in such circumstances,” where the defendant’s otherwise-privileged information is disclosed to “prosecutors for the limited purpose of vindicating her right to effective assistance of counsel.” *Kaur*, 141 S. Ct. at 6 (statement of Sotomayor, J.). Justice Sotomayor opined that “this question could benefit from further consideration by the lower courts” before the Supreme Court addressed it. *Id.*; *cf. Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”). Under AEDPA review, where the sole source of “clearly established federal law” is “the holdings, as opposed to the dicta,” *Williams*, 529 U.S. at 412, of Supreme Court decisions (and

not “circuit precedent[,] . . . state-court decisions, treatises, or law review articles,” *Kernan v. Cuero*, 583 U.S. 1, 8 (2017)), the lack of an on-point Supreme Court holding is conclusive.

In an effort to identify an applicable font of clearly established federal law for AEDPA review, Kaur has seized on *Weatherford* and its progeny. But to the extent that *Weatherford* clearly establishes a Sixth Amendment rule, it is not a rule that applies to this case.

Weatherford involved an “undercover agent for a state law enforcement agency” who was present for conversations between a defendant and the defendant’s counsel about trial strategy while “maintain[ing] his undercover status” as a co-defendant of the defendant. *Weatherford*, 429 U.S. at 547. The agent later served as a government witness against the defendant, although he “communicated nothing at all to his superiors or to the prosecution about [the defendant’s] trial plans or about the . . . trial” in advance. *Id.* at 556. The Supreme Court held that there was *no* Sixth Amendment violation, observing that it was “not a situation where the State’s purpose was to learn what it could about the defendant’s defense plans and the informant was instructed to intrude on the lawyer-client relationship,” *id.* at 557, nor was there

“tainted evidence in this case, [or] communication of defense strategy to the prosecution[.]” *Id.* at 558.

Weatherford simply did not involve or address a scenario where a defendant provided otherwise-privileged material to the government under a waiver of the attorney-client privilege in order to litigate a claim of ineffective assistance of counsel. Nor did any of the federal appellate decisions on which Kaur relies to distill a standard from *Weatherford*. (See Appellant’s Br. at 13–14 & n.4 (collecting cases)). None of them concerned the government’s acquisition of attorney-client communication in judicial proceedings via the defendant’s waiver of the privilege, or anything remotely like this case.¹⁸

¹⁸ This Court’s decision in *United States v. Brugman*, 655 F.2d 540 (4th Cir. 1981), on which Kaur heavily relies, involved a co-defendant who attended “a joint meeting among defense counsel and their clients” and later testified against his co-defendants under a plea agreement (a scenario where this Court found no Sixth Amendment violation). *Id.* at 545–46. All of the others are equally unlike this case. See *United States v. Dyer*, 821 F.2d 35, 36–37 (1st Cir. 1987) (seizure under search warrant of defendant’s notebook allegedly containing notes from conferences with attorney); *United States v. Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979) (informant sat in on defendant’s meetings with counsel), *adhered to on reh’g*, 615 F.2d 10 (2d Cir. 1980); *United States v. Levy*, 577 F.2d 200, 202 (3d Cir. 1978) (defense counsel was jointly representing two co-defendants, one of whom was a government informant); *United States v. Diaz*, 941 F.3d 729 (5th Cir. 2019) (informant recorded conversations

Notwithstanding Kaur’s attempts to shoehorn her case into the *Weatherford* line of cases by describing the prosecutors’ receipt of her information pursuant to her waiver of the privilege as a “purposeful intrusion,” both Justice Sotomayor and the Court of Special Appeals correctly recognized that it was nothing of the sort. *See Kaur*, 141 S. Ct. at 6 (statement of Sotomayor, J.) (observing that Kaur’s case was “[u]nlike” cases involving “a prosecutor’s wrongful or negligent acquisition of privileged information,” because Kaur’s information was disclosed “for the limited purpose of vindicating her right to effective assistance of counsel” and the “prosecutors did not obtain [it] surreptitiously”); *Kaur*, 2019 WL 2407997, at *15 (agreeing that “discussion of prejudice resulting from a governmental ‘intrusion’ or a violation of a defendant’s constitutional right to counsel is inapplicable” in a “scenario in which the prosecutor obtained access to privileged

with represented defendant in which informant asked about attorney-client communication); *United States v. Singer*, 785 F.2d 228, 231 (8th Cir. 1986) (prosecutors obtained copy of defendant’s attorney-client file from informant); *United States v. Danielson*, 325 F.3d 1054, 1059 (9th Cir. 2003) (informant made extensive recordings of conversations with represented defendant about privileged trial strategy); *Shillinger v. Haworth*, 70 F.3d 1132, 1134–35 (10th Cir. 1995) (deputy sheriff present as security for attorney-client trial prep sessions informed prosecution about their content); *United States v. Roper*, 874 F.2d 782 (11th Cir. 1989)

communications by means of an unsealed court paper and resort to legal process in order to prepare for a hearing on the issue whether defense counsel had been inadequate”) (cleaned up).

Indeed, though there is no on-point clearly established Supreme Court holding that the Maryland courts contravened, in the decision of this Court that is closest to this case, this Court endorsed a procedure much like the state courts afforded Kaur here. In *United States v. Nicholson*, 611 F.3d 191, 216 (4th Cir. 2010), the defendant’s privileged information was revealed in litigation that established a conflict of interest by his trial counsel, entitling him to resentencing. Citing *Bittaker*, this Court ruled that “on remand for resentencing, Nicholson should be entitled to *a protective order prohibiting the Government from using privileged information* revealed by [defense counsel] in litigating Nicholson’s actual conflict of interest claim.” *Id.* at 217 (emphasis added). But this Court did not suggest that, beyond such a protective order (like the one the trial court gave Kaur), disqualification of the prosecutors on remand would be necessary.

In sum, there is no clearly established federal law holding that the Sixth Amendment requires disqualification of the prosecutors in a

scenario like this, or establishing a standard for when such disqualification would be necessary.

B. The state appellate court’s conclusion that Kaur failed to show prejudice from a putative error in not disqualifying the prosecutors was not based on an unreasonable determination of the facts.

Nonetheless, the Court of Special Appeals assumed *arguendo* that the prosecutors should have been disqualified—but it rejected Kaur’s claim on the basis that she failed to show resulting prejudice. Kaur’s challenges to that decision are unavailing. None of her arguments reveals any error by the state court “beyond any possibility for fairminded disagreement,” *Harrington v. Richter*, 562 U.S. 86, 103 (2011), which is her heavy burden under AEDPA review.

Kaur first claims that the State altered its presentation of evidence at the second trial regarding [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19

[REDACTED]

[REDACTED]

Kaur next renews her claim that the prosecutors' awareness of her privileged information "effectively prevented [her] from testifying in her own defense in her Second Trial." (Appellant's Br. at 25–28). But the Court of Special Appeals rejected this claim specifically on the basis of Kaur's failure to develop a record in support of it. The court recognized that, because Kaur did not testify, "absent a proffer of what Ms. Kaur's direct testimony would have been, her bald assertion that she was prejudiced is nothing more than an invitation . . . to presume that she was prejudiced[.]" *Kaur*, 2019 WL 2407997, at *19. This ruling was far from unreasonable.

Kaur claims that the impact on her right to testify was evident from remarks by the prosecutor, which Kaur describes as [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Indeed, under the court’s protective order, the State was [REDACTED]

[REDACTED]

[REDACTED] (JA1570–1571).²⁰ And the trial court went further still, prohibiting the prosecutors from directly reviewing the transcript of Kaur’s testimony *at all* in preparation for the second trial. (JA2970–2973). Both orders were entered before Kaur’s on-the-record election not to testify. Far, then, from showing that Kaur’s right to testify at the second trial was adversely affected by the prosecutor’s knowledge

²⁰ [REDACTED] (JA1571).

of privileged information, the prosecutor's remarks make clear that Kaur already had ample strategic reason not to testify at either trial, regardless of the State's access to any privileged matter. It thus confirms the reasonableness of the Court of Special Appeals' refusal to presume prejudice where Kaur made no record as to what she supposedly would have testified about but for the State's access to privileged information.

Kaur argues that she should not have been required to "show that the outcome of the trial might have been different in the absence of the disclosure of privileged information." (Appellant's Br. at 23). But that is no more than an attempt to relitigate the state appellate court's conclusion that she was not entitled to a presumption of prejudice. Kaur did not challenge that aspect of the state court's ruling in the district court and thus did not preserve it for appeal. Rather, she argued solely that she "demonstrat[ed] tangible manifestations of the prejudice she faced at her second trial." (ECF 27 at 18). *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("Appellant may not argue a [particular] theory in this court because he did not raise the issue in the district court below.").

Lack of preservation aside, the state court did not contravene or unreasonably apply clearly established federal law in ruling that Kaur was required to prove prejudice, because there is no Supreme Court decision holding that no showing of prejudice is needed. As noted, there is no Supreme Court decision regarding when or whether a prosecutor's receipt of privileged information due to waiver of privilege necessitates disqualification at all. *Kaur*, 141 S. Ct. at 6 (statement of Sotomayor, J.) (recognizing that "many federal and state courts have struggled to define what burden, if any, a defendant must meet to demonstrate prejudice" even from a prosecutor's wrongful acquisition of privileged information, but here the State's acquisition of Kaur's information was not wrongful).

In sum, the state court's ruling that Kaur failed to demonstrate prejudice passes AEDPA review.²¹

²¹ If, however, this Court were to conclude that the Court of Special Appeals' prejudice finding does not withstand AEDPA scrutiny, de novo review of her claim would be required. And if de novo review is necessary, it should be conducted in the first instance by the district court on remand.

This is so because the state appellate court, in resolving Kaur's claim based on failure to show prejudice, either decided or assumed arguendo multiple preliminary contested points, many of which are record-intensive. For instance, the state court ruled that Kaur had not made an express waiver of privilege, even for the affidavit that she

voluntarily disclosed to the prosecutors and filed on the public docket unsealed along with her motion for a new trial. *Kaur*, 2019 WL 2407997, at *13–14. The state court declined to find that Kaur had failed to preserve her claims by not objecting to a violation of the protective order when the State ostensibly used her privileged information at trial. *Id.* at *9 & n.7. The state court assumed *arguendo* that the prosecutors’ knowledge of the second wig came from privileged matter. *Id.* at *20. And the state court assumed a “putative error” in not disqualifying the prosecutors. *Id.* at *1. All of these points and more would be subject to debate on *de novo* review, and have not yet been briefed by the parties in this Court or in the district court, which solely conducted review under the AEDPA standard. The district court would be the appropriate forum in which to first litigate them.

CONCLUSION

The judgment of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Respondent-Appellee does not request oral argument.

Date: September 12, 2024

Respectfully submitted,

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/s/ Jer Welter

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, I certify that the “Opening Brief of Respondent–Appellee” was prepared in Microsoft Word for Microsoft 365; is proportionally spaced; has a typeface of 14 points in Century Schoolbook; and contains 11,776 words, excluding the cover page and the parts of the brief exempted by Fed. R. App. P. 32(f), in accordance with the computer program’s word count upon which the undersigned relies in making this certification.

/s/ Jer Welter

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 12, 2024, I electronically filed the foregoing “Opening Brief of Respondent–Appellee” with the Clerk of the Court using the CM/ECF system, which will send notice of such filing all counsel of record.

/s/ Jer Welter

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