No. 11-451

In the Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

PATRICK J. LENARZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF FOR RESPONDENT IN OPPOSITION

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KEVIN C. FERRY
PETER G. BILLINGS
Law Office of Kevin C. Ferry, LLC
77 Lexington Street
New Britain, CT 06052
(860) 827-0880

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether, in the context of a violation of the Sixth Amendment right to counsel, a rebuttable presumption of prejudice arises when the prosecutor reads privileged communications between the defendant and the defendant's attorney that discuss the defendant's planned trial strategy.

2. Whether dismissal of the charges was an appropriate remedy on the facts of this case, where the evidence showed that the prosecutor had irrevocably tainted trial witnesses based upon his knowledge of the defendant's privileged trial strategy.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
A. Initial Proceedings 1
B. The Trial Court's Denial Of The Motion To Dismiss 3
C. The Appeal And Decision Below 4
1. Prejudice 5
2. Remedy 10
3. The Dissent 13
ARGUMENT 13
I. THE LOWER COURT'S DETERMINATION THAT A REBUTTABLE PRESUMPTION OF PREJUDICE APPLIES ON THE FACTS OF THIS CASE DOES NOT WARRANT REVIEW. 13
A. There Is No Conflict Among The Lower Courts Concerning The Application Of A Rebuttable Presumption Of Prejudice When A Prosecutor Obtains The Defendant's Privileged Trial Strategy Information. 15
B. This Case Is A Poor Vehicle For Consideration Of The Question Presented. 22

TABLE OF CONTENTS—continued

Page

1. Respondent Suffered Actual Prejudice From The Prosecutor's Violation. 23

2. The State's Invasion Of The Privilege Was Intentional. 24

II. THE LOWER COURT'S HOLDING THAT DISMISSAL WAS THE APPROPRIATE REMEDY IS CLOSELY TIED TO THE PARTICULAR FACTS OF THIS CASE AND DOES NOT MERIT REVIEW.................... 26

A. Dismissal Of The Charge Is Consistent With This Court's Jurisprudence And The Holdings Of Other Lower Courts. 29

1. There Is No Conflict With United States v. Morrison. 29

2. There Is No Conflict Among The Lower Courts. 31

B. The Dissent's Disagreement With Respect To Remedy Rests On A Dispute About The Facts.. 32

III. THE BASIC DISAGREEMENT BETWEEN THE MAJORITY AND THE DISSENT RELATES TO DISPUTES ABOUT STATE LAW PROCEDURE AND THE INFERENCES TO BE DRAWN FROM THE FACTUAL RECORD. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Cutillo v. *Cinelli*,
485 U.S. 1037 (1988) 22

Ellis v. *State*,
660 N.W.2d 603 (N.D. 2003) 21

Fellers v. *United States*,
540 U.S. 519 (2004) 14

Massiah v. *United States*,
377 U.S. 201 (1964) 14

Ott v. *State*,
627 S.W.2d 218 (Tex. Ct. App. 1981) 21

Shillinger v. *Haworth*,
70 F.3d 1132 (10th Cir. 1995) 20

State v. *Quattlebaum*,
527 S.E.2d 105 (S.C. 2000) 20

State v. *Webbe*,
94 P.3d 994 (Wash. Ct. App. 2004) 21

United States v. *Aulicino*,
44 F.3d 1102 (2d Cir. 1995) 18

United States v. *Costanzo*,
740 F.2d 251 (3d Cir. 1984) 20, 22

United States v. *Danielson*,
325 F.3d 1054 (9th Cir. 2003) 16, 17, 19, 22

United States v. *Davis*,
226 F.3d 346 (5th Cir. 2000) 17

United States v. *Ginsberg*,
758 F.2d 823 (2d Cir. 1985) 18

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Irwin*,
612 F.2d 1182 (9th Cir. 1980) 22

United States v. *Kelly*,
790 F.2d 130 (D.C. Cir. 1986) 19

United States v. *Levy*,
577 F.2d 200 (3d Cir. 1978) 12, 16, 17, 18, 31

United States v. *Mastroianni*,
749 F.2d 900 (1st Cir. 1984) 18, 22

United States v. *McDaniel*,
482 F.2d 305 (8th Cir. 1973) 31

United States v. *Morales*,
635 F.2d 177 (2d Cir. 1980) 18

United States v. *Morrison*,
449 U.S. 361 (1981) 11, 28, 29, 30

United States v. *Schwimmer*,
924 F.2d 443 (2d Cir. 1991) 18

United States v. *Steele*,
727 F.2d 580 (6th Cir. 1984) 18, 22

United States v. *Voigt*,
89 F.3d 1050 (3d Cir. 1996) 17

Weatherford v. *Bursey*,
429 U.S. 545 (1977) 15, 16, 19

OTHER AUTHORITIES

U.S. Const., Amend. VI .... passim

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Pet. App. A1-A157) is reported at 301 Conn. 417, 22 A.3d 536 (2011).

JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on July 19, 2011, and the petition for a writ of certiorari was filed on October 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

Petitioner contends that this case presents two legal questions for review. But the determinations below are tied closely to the particular facts of this case, and do not conflict with any decision of this Court or of a lower court. Indeed, the disagreement between the majority and dissent rests principally on starkly different views of the factual record. Review by this Court plainly is not warranted.

A. Initial Proceedings

In 2003, respondent was charged with allegedly improperly touching two children at the karate school in Granby, Connecticut, where he worked as an instructor. R31, R64.[1] In 2004, while these charges were pending, respondent came under investigation by the police in Simsbury, Connecticut, for allegedly improperly touching a friend of his daugh-

[1] "R" refers to the record filed in the Supreme Court of Connecticut.

ter's while the friend was a guest at respondent's home. R65.

The latter investigation led the Simsbury police on November 17, 2004, to obtain an arrest warrant and to execute a search warrant for respondent's home, which resulted in the seizure of his personal computer. Pet. App. A3. The computer contained numerous privileged communications between respondent and his attorney regarding the pending charges involving the students at the karate school in Granby. Pet. App. A4-A5 and n.5.

The next day, at respondent's arraignment on the Simsbury charges, respondent's counsel told the court that certain materials in the seized computer were subject to the attorney-client privilege. Pet. App. A3. The judge promptly entered an order forbidding the police and prosecutors from reading or publishing any attorney-client privileged materials. *Ibid.*

The Simsbury police sent respondent's computer to the Connecticut Forensic Science Laboratory for analysis. The police and prosecutor provided the keywords used to search respondent's computer, which included the names of both the Simsbury and Granby accusers. Def. App. A146; R111. The state laboratory's searches returned "voluminous written materials containing detailed discussions of the defendant's trial strategy" with respect to the Granby cases. Pet. App. A4. The laboratory employees "read and copied much of this material" and transmitted it to the Simsbury police department, which in turn forwarded the materials to the prosecutor. *Ibid.*

At some point in September 2005—approximately ten months after seizure of the com-

puter—the prosecutor met with respondent's counsel and gave him a copy of the privileged materials. Pet. App. A4. Respondent's counsel immediately requested a meeting with the trial judge to advise him that the prosecutor had read attorney-client privileged materials. *Ibid*. The judge ordered the police departments and prosecutor to turn over any "questionable" materials in their possession and placed the materials under seal. *Ibid*.

It is undisputed, however, that the prosecutor read the attorney-client privileged materials at some time prior to surrendering them. Pet. App. A4-A5 n.4.

B. The Trial Court's Denial Of The Motion To Dismiss

Respondent moved to dismiss the Granby charges on the ground that the prosecution had invaded the attorney-client privilege in violation of respondent's right to counsel under the Sixth Amendment. Pet. App. A5.[2] Respondent contended that the documents "were detailed, identified key persons with knowledge, involved trial strategy, important details of fact, questions for witnesses, and rebuttals to allegations." Pet. App. A9 n.7; see also pages 6-10, *infra* (discussing specific documents).

The prosecution admitted that it had read all of the privileged materials and did not dispute that the

[2] Although respondent did not seek dismissal of the charge stemming from his alleged conduct in Simsbury, the only charge for which he was eventually convicted stemmed from his alleged conduct with respect to one of the students at a karate school in Granby—and that charge was covered by the motion to dismiss.

documents contained trial strategy. Pet. App. A5. The trial court agreed that the materials were privileged but concluded that the prosecution's intrusion was not intentional because the documents were not expressly in the form of letters or emails between respondent and his counsel. Pet. App. A6. The court further concluded that because the Simsbury police had not shared the material with the Granby police, respondent did not suffer prejudice with respect to the Granby charges. R144. The trial court did not address whether respondent had suffered prejudice from the prosecutor's review and knowledge of the privileged trial strategy materials. *Ibid.*

At trial in early 2007 the jury acquitted respondent on eight of nine charges. The jury returned a guilty verdict on one count of risk of injury to a minor, involving one of the students at the karate school in Granby. Pet. App. A7.

C. The Appeal And Decision Below

Respondent appealed to the Connecticut Appellate Court. The Appellate Court ordered the trial court to articulate whether it had considered respondent's argument that "the [prosecutor] received and reviewed the documents covered by the attorney-client privilege," and "[w]hat prejudice, if any, it found that the defendant suffered as a result of the [prosecutor's] access to those documents." Pet. App. A7-A8.

In response, the trial court stated that respondent "failed to introduce sufficient credible evidence for the court to make factual findings as to the timing, nature and extent of the receipt, review and possible dissemination by the [prosecutor] of the docu-

ments covered by the attorney-client privilege." Pet. App. A8.

The Connecticut Supreme Court subsequently transferred the appeal to itself from the Appellate Court. Pet. App. A2 n.1.

In a lengthy opinion written by Chief Justice Rogers and joined by three other Justices, the court reversed respondent's conviction and remanded the case with instructions that the count of conviction be dismissed. Pet. App. A43-A44.[3] The court focused on two issues relating to the Sixth Amendment violation: (1) whether respondent was obligated to adduce facts establishing prejudice or whether a presumption of prejudice arose because the prosecutor had reviewed privileged trial strategy materials; and (2) the appropriate remedy on the facts of this case for the violation of the Sixth Amendment.

1. Prejudice

The court held that "prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney-client privilege was intentional." Pet. App. A9. The court explained that "because the disclosure of such [trial strategy] information is *inherently prejudicial*, prejudice should be presumed," and that "[t]he subjective intent of the government and the identity of the party responsible for the disclosure simply have no bearing on th[e] question" of

[3] The court ordered respondent released from prison on the day that it heard oral argument. At that time, respondent had served all but sixteen weeks of his four-year term of imprisonment.

what prejudice a defendant sustains from a prosecutor's access to his privileged trial strategy information. Pet. App. A24-A25.

The court expressly limited the presumption to cases in which the prosecutor reviews privileged trial strategy communications: "In cases in which the communications do not contain the defendant's trial strategy, the burden is on the defendant to establish a sixth amendment violation by showing that he was prejudiced by the government's intrusion into the communications." Pet. App. A12 n.8.

The court concluded that this presumption of prejudice in the access-to-privileged-trial-strategy context is rebuttable. Pet. App. A9-A10. If, for example, the prosecution shows "that it notified the defendant and the court immediately of the intrusion, that it ensured that no government official with knowledge of the information had any contact with witnesses or investigators and that it ensured that no such person was involved in the prosecution of the case, the disclosure could well be harmless." Pet. App. A25 n.14. The court "emphasize[d]" that it was not concluding "that the mere unintentional intrusion into privileged information containing trial strategy constitutes a sixth amendment violation." *Ibid*.

Applying these standards to the facts of this case, the court concluded that "even a cursory review of the materials" revealed that a presumption of prejudice was appropriate "because the privileged materials contained a highly specific and detailed trial strategy." Pet. App. A27.

The court observed that the sole count of conviction "was based entirely on the complainant's ac-

count of the defendant's conduct" and that there was "no physical evidence or eyewitness testimony to corroborate the complainant's account." Pet. App. A27 and n.15. The privileged trial strategy materials, in turn, "contained highly specific facts relating to the credibility of the complainant and the adequacy of the police investigation" that "went to the heart of the defense." Pet. App. A27.

The court further determined that, on the facts of this case, the State could not rebut the presumption of prejudice—it found, rather, that the factual record supported a finding of prejudice. Pet. App. A27. The court focused much of its inquiry on an aspect of prejudice that the trial court failed to address—the prejudice stemming from the exposure of the prosecutor (as opposed to the police departments) to the privileged strategy materials—and the prosecutor's use of this information to his advantage at trial, including with respect to the prosecutor's examination of the complainant, with whom the prosecutor met "'a lot of times.'" Pet. App. A37 n.22.

One of the privileged documents contained respondent's description of an educational presentation given by a Granby police captain—who had interviewed the complainant and was a witness at trial—about the importance in child assault cases of having a specially trained interviewer conduct a single interview of a child victim "to make sure that the child is not picking up clues about what the investigators are looking for." Pet. App. A35 n.21. The privileged communication from respondent described how the captain had not followed this procedure when investigating this case (and that the complainant "had been interviewed multiple times by untrained inter-

viewers, and the interviews had not been recorded"). Pet. App. A35 n.21.

The court explained that the prosecutor specifically tailored his questioning of trial witnesses precisely to anticipate this line of cross-examination. Pet. App. A35-A36 n.21.

The court reached the same conclusion with respect to another privileged communication—entitled "Strategy and Questioning"—in which respondent explained that the complainant's allegations were untruths motivated by her desire to stop attending karate classes anymore because she was falling behind the skill levels of her peers. Pet. App. A37 n.22. The court stated that the prosecutor's questioning anticipated this line of cross-examination, delving very specifically into whether the complainant had fallen behind her peers. *Ibid.*

Based on this analysis, the court concluded that "the prosecutor drew on his knowledge of the privileged communications when examining the accusing witness * * * to anticipate and thereby neutralize what otherwise might been a devastating cross-examination of that witness." Pet. App. A36-A37. More generally, the court concluded that its "review of the record strongly suggests that the prosecutor did, in fact, use the materials to anticipate and forestall the defendant's defense strategy." Pet. App. A28 n.16.[4]

---

[4] The court accepted "the prosecutor's conclusory and unsworn representation that he had not commenced any further investigation, had not interviewed any additional witnesses and had not requested anything further from the defendant by way of discovery after he had read the privileged materials." Pet. App.

Finally, although the court declined to reach a conclusion with respect to respondent's argument that the prosecutor's intrusion was intentional, it was "extremely troubled by the prosecutor's conduct in this case." Pet. App. A29.

The court stated 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." Pet. App. A29. For example, one of the documents at issue was entitled "Strategy Issues" and referred to a court appearance in the very first sentence and to three "objective[s]" to be accomplished. Pet. App. A31. Another of the documents stated near the top of the first page:

> The following material is confidential and I would ask that you review it. If this is a case you believe you would have success in defending, I would like to schedule [an] appointment to discuss it.

A28 n.17. But it found that representation insufficient to rebut the presumption of prejudice:

> [e]ven if the prosecutor did not use his knowledge of the privileged communications to develop *new evidence* against the defendant, * * * the prosecutor made no representations at the time of the hearing on the motion to dismiss, which took place more than one year after the prosecutor revealed that he had read the documents, that his knowledge of the defendant's trial strategy had not affected and would not affect his trial preparations, including discussions with witnesses and investigators, or his decisions on jury selection, witness selection, examination of witnesses, or any of the other innumerable decisions that he was required to make in preparation for and during trial.

Id. at A28-A29 n.17 (emphasis added).

Ibid. Still another document referred to instructions "by our original attorney . . . to keep a log of any events that we thought might pertain to this case." *Ibid*.

It was therefore "crystal clear on the face of a number of the documents that they were intended to be communications to the defendant's attorney, notwithstanding the fact that they were not formatted as letters or e-mails." Pet. App. A30 n.18. "We simply find it incredible that a trained attorney, who was on notice that the seized documents could contain privileged materials, would fail to recognize that, at the very least, it was highly probable that these documents were privileged." Pet. App. A31 n.18.

Thus, the court concluded that "the prosecutor either knew or should have known immediately upon beginning to read these statements that the documents were privileged and that he should have stopped reading at once and notified the defendant and the court immediately that they were in his possession." Pet. App. A31. But here, the court noted, the prosecutor "did not notify the defendant and trial court immediately upon reading" the privileged trial strategy materials and, even after being alerted to the defendant's claim about the intrusion, the prosecutor "tried the case to conclusion," and "made no efforts to discontinue his discussions with the witnesses and investigators or to insulate himself in any manner from the prosecution of the case." Pet. App. A25 n.14.

2. Remedy

With respect to the standard for determining the appropriate remedy, the court held that "when a prosecutor has intruded into privileged communica-

tions containing a defendant's trial strategy and the state has failed to rebut the presumption of prejudice, the [trial] court, sua sponte, must immediately provide appropriate relief to prevent prejudice to the defendant." Pet. App. A10. It noted that "although dismissal of criminal charges is a drastic remedy, * * * the remedy of dismissal is required when there is no other way to cure substantial prejudice to the defendant." Pet. App. A32-A33 (citations omitted).

The court below acknowledged this Court's guidance that "'remedies should be tailored to the injury suffered from the constitutional violation,'" Pet. App. A32 (quoting *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)), and that even dismissal may be appropriate if there has been a substantial threat of or demonstrable prejudice from a violation of the Sixth Amendment. Pet. App. A32 ("'*absent demonstrable prejudice, or substantial threat thereof*, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.'" (quoting *Morrison*, 449 U.S. at 365) (emphasis added by court below)).

The court considered but rejected the possibility of a retrial with a new prosecutor. It noted that a "new prosecutor would necessarily have access to the transcript of the original trial," Pet. App. A39, and that "the testimony of tainted witnesses at the first trial could be admissible in a second trial as prior inconsistent statements." Pet. App. A38. Accordingly, the court concluded that "even if the case were to be retried by a prosecutor who has not read the privileged communications, it would be impossible for the courts or the defendant to have any confidence that a second trial with a new prosecutor would be untaint-

ed by the constitutional violation in the first trial * * *." Pet. App. A38-A39.

"'The disclosed information is now in the public domain,'" and "'public confidence in the integrity of the attorney-client relationship would be ill-served by devices to isolate new government agents from information which is now in the public domain.'" Pet. App. A39 (quoting *United States* v. *Levy*, 577 F.2d 200, 208 (3d Cir. 1978)).

The court explained that the particular facts of this case established that dismissal was the only appropriate remedy:

> An objective review of the basic facts of the case * * * shows that the prosecutor had been warned that the defendant's computer contained privileged documents and had been ordered not to review them; the prosecutor read in their entirety documents that clearly were privileged on their face; the privileged documents went to the heart of the defense; the prosecutor failed to notify the defendant and the trial court immediately that he had read the documents; the prosecutor had knowledge of the contents of the privileged documents for well over one year before trial, during which time he discussed the case repeatedly with state witnesses; and the prosecutor's questions to various witnesses at trial strongly support the conclusion that the prosecutor had discussed the contents of the privileged documents with the witnesses before trial.

Pet. App. A43 n.16. The court concluded that "[u]nder these circumstances, any remedy other than the dismissal of the criminal charge of which the de-

fendant was convicted would constitute a miscarriage of justice." Pet. App. A43.

3. The Dissent

Justices Richard Palmer and Peter Zarella dissented. Pet. App. A45-A157. They argued that the majority erred by engaging in factfinding and by resting its decision on an argument not advanced by the defendant. They also disagreed strongly with the conclusions that the majority drew from the factual record. With respect to the legal issues, the dissent stated that no court "ever has presumed a sixth amendment violation on the basis of a government's unintentional breach of the attorney-client relationship, and no federal or state court ever has dismissed criminal charges due to such a breach." Pet. App. A45.

ARGUMENT

I. THE LOWER COURT'S DETERMINATION THAT A REBUTTABLE PRESUMPTION OF PREJUDICE APPLIES ON THE FACTS OF THIS CASE DOES NOT WARRANT REVIEW.

It is undisputed that, despite the court order prohibiting him from reading any privileged documents stored on the defendant's computer, the prosecutor in fact received and read privileged documents discussing details of defendant's trial strategy. Pet. App. A5 n.4. The holding of the court below—that in the extraordinary circumstances of a prosecutor's review of privileged trial strategy communications there is a rebuttable presumption of prejudice—does

not conflict with the decision of any lower court and is fully consistent with decisions of this Court.[5]

Moreover, even if there were a conflict, this case would be a poor vehicle for review of the presumption-of-prejudice issue for two reasons. First, the facts establish beyond cavil that there was actual prejudice to respondent. Accordingly, eliminating the presumption would not result in a different outcome in this case. Second, the facts make clear that the prosecutor acted purposefully and recklessly; this case provides no occasion for addressing the State's claim with respect to standards of prejudice governing inadvertent invasions of a defendant's privileged trial strategy communications.

---

[5] The circumstances here are extraordinary because most investigation-stage violations of the right to counsel under the Sixth Amendment have nothing to do with the government acquiring a defendant's attorney-client privileged trial strategy information. The government typically violates the Sixth Amendment right to counsel when, without a defendant's waiver or counsel, it deliberately elicits any offense-specific statements from a represented defendant after the initiation of formal adversary proceedings and regardless whether the statements are privileged or relate to trial strategy. See, *e.g.*, *Fellers* v. *United States*, 540 U.S. 519, 523 (2004) (government post-indictment interview of defendant at his home); *Massiah* v. *United States*, 377 U.S. 201 (1964) (government use of informer to elicit incriminating statements from represented defendant).

A. There Is No Conflict Among The Lower Courts Concerning The Application Of A Rebuttable Presumption Of Prejudice When A Prosecutor Obtains The Defendant's Privileged Trial Strategy Information.

In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court considered a claim that a defendant's right to counsel under the Sixth Amendment was violated when a government informant participated in pre-trial meetings between the defendant and his trial counsel. The informer attended the meetings at the invitation of the defendant and his counsel, because refusing to attend could have exposed his role as an informant. *Id.* at 547-548.

The Court declined to adopt a *per se* rule that such an intrusion required automatic reversal of the defendant's conviction. The Court noted that "[a]t no time did [the informant] discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff any details or information regarding the [defendant's] trial plans, strategy, or anything having to do with the criminal action." *Id.* at 548 (internal quotation marks omitted). It concluded that "unless [the informant] 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, there can be no Sixth Amendment violation." *Id.* at 558.

Notably, the Court observed that the defendant "would have a much stronger case" had "the prosecution learned from [the informant] * * * the details of the [attorney-client] conversations about trial preparations" or "had those overheard conversations been used in any other way to the substantial detriment"

of the defendant. *Id.* at 554. But "[t]here being no tainted evidence in this case, *no communication of defense strategy to the prosecution*, and no purposeful intrusion by [the informant], there was no violation of the Sixth Amendment * * * ." *Id.* at 558 (emphasis added).

Consistent with *Weatherford* and its emphasis on the inherent prejudicial effect of the disclosure of defense strategy to the prosecution, not one of the lower court cases cited in the State's certiorari petition in this case required a defendant affirmatively to demonstrate prejudice from the government's acquisition of the defendant's privileged trial strategy information.

1. Several of the cases cited by the State adopt the same standard as the court below in this case, presuming prejudice where, as here, the government acquired privileged trial strategy information. See *United States* v. *Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003) (once defendant shows a "government informant * * * acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information," then "the burden shifts to the government to show that there has been . . . no prejudice to the defendant[] as a result of these communications"); *United States* v. *Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (presuming prejudice because "[w]e think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case").[6]

---

[6] The court in *Levy* interpreted *Weatherford* to mean that "a sixth amendment violation would be found where, as here, de-

In all of the other cases cited by the State, the courts declined to find prejudice because of *the absence of evidence that the prosecutor or his agents actually obtained any privileged trial strategy information.*[7] Those decisions are plainly inapposite here,

fense strategy was actually disclosed *or* where, as here, the government enforcement officials sought such confidential information." 577 F.2d at 210 (emphasis added). Thus, *Levy* makes clear that a finding of prejudice in the disclosure-of-trial-strategy context does not depend upon whether the government intentionally invaded the attorney-client relationship. Although *Danielson* involved an intentional intrusion that resulted in the receipt by the government of trial strategy information, that fact was not critical to the court's recognition of a presumption of prejudice. Rather, the presumption arose upon a showing that "the government informant * * * acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information." 325 F.3d at 1071 (internal quotation marks omitted). That test is clearly satisfied here, where the government acted affirmatively in obtaining the privileged trial strategy materials from respondent's computer and delivering those materials to the prosecutor, who then read them.

In *Shillinger* v. *Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995), the court held that an *irrebutable* presumption of prejudice applies when the state obtains privileged trial strategy information "because of its purposeful intrusion into the attorney-client relationship" without "a legitimate justification for doing so." The court did not address the applicable standard when trial strategy information is obtained through non-purposeful conduct.

[7] See *United States* v. *Davis*, 226 F.3d 346, 353 (5th Cir. 2000) (no prejudice from seizure of allegedly privileged documents because the defendant "does not point to even one document that he contends would have revealed his trial strategy or harmed him in any other articulable way"); *United States* v. *Voigt*, 89 F.3d 1050, 1069, 1071 (3d Cir. 1996) (no prejudice from government contacts with corporate attorney because "the record is wholly devoid of any evidence that the government was or should have been aware of a personal attorney-client relationship between [defendant's alleged counsel] and [defendant] dur-

ing that time" and because "[i]f any privileged information was disclosed to the government in this case, it concerned the workings of the [corporate] Trust, not [defendant's] legal strategy in responding to the criminal investigation into his activities," and distinguishing *Levy* on the ground that "[t]he record in this case demonstrates that the government was scrupulous in its effort to avoid procuring confidential defense strategy"); *United States* v. *Aulicino*, 44 F.3d 1102, 1117 (2d Cir. 1995) (no prejudice from cooperator's meetings with co-defendants and their counsel as "[t]he government presented evidence of the steps it took to insulate the attorneys prosecuting the case from any knowledge gained by [the cooperator] from his contacts with the codefendants" and "[d]efendants did not present any evidence to suggest that [the cooperator] revealed any privileged information to the government"); *United States* v. *Schwimmer*, 924 F.2d 443, 447 (2d Cir. 1991) (no prejudice where privileged information obtained by government agents from defendant's accountant was not reviewed by prosecutors before trial, and "[t]he hearing evidence demonstrated that no preview of defense strategy was derived from the workpapers and that no other violative use of privileged information had occurred"); *United States* v. *Ginsberg*, 758 F.2d 823, 833 (2d Cir. 1985) (no prejudice where defendant "alleged essentially only the presence of a government informant at defense conferences" but not "specific facts that indicate communication of privileged information to the prosecutor and prejudice resulting therefrom"); *United States* v. *Mastroianni*, 749 F.2d 900, 907-908 (1st Cir. 1984) (no prejudice from informant's meetings with defendants and their counsel as his reports of these meetings "did not in any way tend even to suggest appellants' defense strategy to the government," and noting that once a defendant shows "that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting," then "the burden shifts to the government to show that there has been and there will be no prejudice to the defendants as a result of these communications"); *United States* v. *Steele*, 727 F.2d 580, 586 (6th Cir. 1984) (no prejudice from informant who overheard jailhouse conversations of defendant and his attorney as the informant was instructed not to report on any matters that he overheard and there was "no communication of defense strategy to the prosecution"); *United States* v. *Morales*, 635 F.2d 177,

where the prosecutor did obtain and review privileged trial strategy information.

2. The distinction drawn by the lower courts—applying a rebuttable presumption of prejudice where a prosecutor has reviewed privileged trial strategy communications between the defendant and his counsel—accords with common sense. In cases where a constitutional violation enables the prosecution to obtain a particular piece of evidence, such as contraband or an inculpatory statement, it is one thing—and the usual rule—to place the burden on a defendant to show prejudice from its admission. See *Danielson*, 325 F.3d at 1070. But "[i]n cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle," as "it will often be unclear whether, and how, the prosecution's improperly obtained information about the defendant's trial strategy may have been used, and whether there was prejudice." *Ibid.* "More important, in such cases the government and the defendant will have unequal access to knowledge. The prosecution team knows what it did and why. The defendant can only guess." *Ibid.*

178-179 (2d Cir. 1980) (no prejudice from cooperator's contacts with represented co-defendants as trial court's inquiry "disclosed no conversations between [cooperator] and the DEA relating in any way to this litigation," and co-defendants "have made no showing that the Government breached the confidences exchanged by [the co-defendants] with their attorneys"); see also *United States* v. *Kelly*, 790 F.2d 130, 137 (D.C. Cir. 1986) (remanding for fact finding concerning prejudice and declining to rule "what combination of [*Weatherford*] factors is necessary to make out a sixth amendment violation"). For discussion of the state cases cited by the State, see note 8 and accompanying text, *infra*.

3. Outside the context of either actual disclosure of privileged trial strategy to the prosecution or affirmative proof of prejudice, the lower courts may well be divided about whether a violation of the Sixth Amendment depends on the intentionality or wrongfulness of the government's action. Indeed, this Court has "left open the question of whether intentional and unjustified intrusions upon the attorney-client relationship may violate the Sixth Amendment *even absent proof of prejudice*." *Shillinger*, 70 F.3d at 1140 (emphasis added).

Thus, lower courts have grappled with whether intentional misconduct may serve as a proxy for prejudice. *Ibid.* (noting that "[t]he Third Circuit has adopted the rule that intentional intrusions by the prosecution constitute *per se* violations of the Sixth Amendment," that "[t]he Second and District of Columbia Circuits, on the other hand, have recognized that prejudice may not be required when an intrusion is intentional" and that "[t]he First, Sixth, and Ninth Circuits have held that something beyond the intentional intrusion itself is required to rise to the level of a Sixth Amendment violation"); see also *United States* v. *Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984) (the Sixth Amendment "is * * * violated when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; *or* (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant") (emphasis added); *State* v. *Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000) (stating that "[d]eliberate prosecutorial misconduct raises an irrebutable presumption of prejudice" but that "[i]n cases involving unintention-

al intrusions into the attorney-client relationship, the defendant must make a prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced").[8]

But that question is not implicated here, because any disagreement among the lower courts relates to cases, unlike this one, in which the prosecutor *did not* actually read and review the defendant's privileged trial strategy information before securing a conviction of the defendant at trial. The petition does not cite and we are not aware of any case declining to conclude that, at the least, a rebuttable presumption of prejudice arises upon proof that a prosecutor—whether intentionally or inadvertently—acquired information revealing a defendant's privileged trial strategy. No cases that we are aware of place the burden of persuasion on a defendant after it has been shown that the prosecutor read his privileged trial strategy documents.[9]

---

[8] The other state court decisions cited by petitioner are not relevant to this case. Two of them did not involve privileged trial strategy information that went to the prosecution before the trial. See *Ellis* v. *State*, 660 N.W.2d 603, 609 (N.D. 2003) (no prejudice where law enforcement officers seized papers belonging to defendant's investigator *after* the trial had taken place); *Ott* v. *State*, 627 S.W.2d 218, 223-224 (Tex. Ct. App. 1981) (no prejudice where the prosecutor obtained and refused to return the defendant's trial notes on the day before the trial ended). In the remaining state case cited by petitioner, the issue was whether defendant had established a claim of ineffective assistance of counsel, and the court expressly distinguished cases involving purposeful government intrusion on the attorney-client relationship in violation of the Sixth Amendment. *State* v. *Webbe*, 94 P.3d 994, 1001 (Wash. Ct. App. 2004).

[9] To the extent that some cases might be read to suggest an irrebuttable presumption of prejudice from a prosecutor's access

4. The State also misplaces its reliance on Justice White's dissent from denial of certiorari in *Cutillo* v. *Cinelli*, 485 U.S. 1037 (1988). Notwithstanding some variation in how the federal courts of appeals describe their approaches, none of the cases cited in Justice White's dissent hold or otherwise endorse the proposition that prejudice should not be presumed when the prosecution acquires privileged trial strategy information.[10] There is no disagreement among the lower courts regarding a legal principle relevant to the facts of this case.

B. This Case Is A Poor Vehicle For Consideration Of The Question Presented.

Even if there were a conflict among the lower courts regarding the rebuttable presumption of prejudice in the context of a prosecutor's review of privileged trial strategy communications, which there is not, review would not be warranted because that question is not properly presented in this case for two reasons. First, the record makes clear that respondent did suffer actual prejudice from the prosecutor's review of the privileged trial strategy communications. Second, the record leaves no doubt that the prosecutor's intrusion into respondent's attorney-client relationship was intentional.

---

to privileged trial strategy, any dispute among the lower courts about that standard is not presented here where the Connecticut Supreme Court concluded more narrowly that the presumption is subject to rebuttal.

[10] Justice White's dissent relies on three cases cited and distinguished above: *Mastroianni*, *Steele*, and *Costanzo*. It also cites another First Circuit decision agreeing with *Mastroianni* and a Ninth Circuit case (*United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980)) with analysis that has been superseded by the *Danielson* case cited above.

1. Respondent Suffered Actual Prejudice From The Prosecutor's Violation.

The court below explained that "the prosecutor clearly invaded privileged communications that contained a detailed, explicit road map of the defendant's trial strategy." Pet. App. A42. The court, for example, pointed to one document that included statements such as: "[w]hen we are questioning [the complainant]"; "[w]e should be able to exploit this at all levels during testimony at the trial"; "[n]ow is where we can start questioning [Bennett's] integrity and duty"; "[w]e need to point out to the jury that [the investigator's] job is to investigate"; "[w]e need to lead her to a statement that her job is to conduct unbiased interviews"; and "[w]e want to hammer this point over and over in front of the jury." Pet. App. A37-A38.

These statements "relat[ed] to the credibility of the complainant and the adequacy of the police investigation in that case * * * ." Pet. App. A27. The information was extremely valuable to the prosecutor in "preparing for trial." Pet. App. A35; see also pages 7-8, *supra*.

Moreover, the prosecutor had access to this information for an extended period of time. Pet. App. A4. "Compounding the problem [of the intrusion], the prosecutor not only failed to inform the defendant and the trial court of the invasion immediately, but also continued to handle the case, to meet repeatedly with witnesses and investigators and ultimately to try the case to conclusion more than one year after the invasion occurred." Pet. App. A42-A43. The court stated that "[i]t is reasonable to conclude that, during that period, wittingly or unwittingly, the prosecutor revealed the strategy to witnesses and investi-

gators to whom the new prosecutor necessarily would have access." Pet. App. A34 n.20.

The trial record makes clear that the privileged trial strategy information was in fact used by the prosecutor. "[T]he prosecutor's questions to various witnesses at trial strongly support the conclusion that the prosecutor had discussed the contents of the privileged documents with the witnesses before trial." Pet. App. A43 n.26. The court cited multiple examples to support this conclusion, including one in which both the complainant's parents separately gave the same response at trial to "the prosecutor's open-ended question," refuting a point made by respondent in his privileged documents about the government's manner of interviewing them and strongly suggesting that the prosecutor had discussed the issue raised in the documents with the witnesses. Pet. App. A35-A36 n.21. In short, "the communications went to the heart of the defense." Pet. App. A27.

There simply can be no doubt that respondent suffered significant, actual prejudice from the prosecutor's review—and use—of the privileged strategy information. For that reason, respondent would prevail on his Sixth Amendment claim even in the absence of the rebuttable presumption recognized by the court below.

2. *The State's Invasion Of The Privilege Was Intentional.*

Moreover, the record establishes that the prosecutor's invasion of the privileged information was intentional. To the extent petitioner asserts that a presumption of prejudice could only be appropriate in that circumstance (see Pet. 17-19), the facts of this case make its legal argument irrelevant and confirm

that the case is a poor vehicle to address the question presented.

The day after it seized the computer, the State was on notice that the computer contained privileged communications—from the representations of respondent's counsel—and it was subject to an order prohibiting the prosecutor from reading those communications. See page 2, *supra*. Rather than ensuring that the state laboratory used greater caution in identifying relevant information contained in respondent's computer, the police and prosecutor provided the lab with search terms spanning both the Simsbury and Granby cases. R111, R113. The State's search terms guaranteed that privileged material—which the State knew was contained in the computer—would be included within the material captured by the lab and turned over to the prosecutor. Moreover, the state lab noted that the documents it found "primarily dealt with the strategy to be used during the trial." *Ibid.*[11]

Based on its review of the documents, the court below concluded that "it could not have been more

---

[11] Although respondent's documents were communicated to his attorney prior to their seizure (R134), the court noted that the trial court and the dissent had erroneously assumed that documents clearly meant to be communicated to an attorney may not be privileged if they were not actually sent, and for that reason excused the prosecutor's examination of some of the trial strategy documents. Pet. App. A29-A31 n.18. The court stated that it was clear that all of the documents were meant to be communicated to an attorney, and "[w]e * * * have concluded as a matter of law that documents that are intended to be communicated to an attorney are subject to the attorney-client privilege regardless of their format or whether they have actually been provided to the attorney." Pet. App. A30 n.18.

obvious on the face of a number of the documents that they were intended to be communications to [respondent's] attorney." Pet. App. A29. "We simply find it incredible that a trained attorney, who was on notice that the seized documents could contain privileged materials, would fail to recognize that, at the very least, it was highly probable that these documents were privileged." *Id.* at A31 n.18. Accordingly, "the prosecutor either knew or should have known immediately upon beginning to read these statements that the documents were privileged and * * * he should have stopped reading at once and notified the defendant and the court immediately that they were in his possession" (Pet. App. A31) which, of course, is what the trial court's order required.

For good reason the court was "extremely troubled by the prosecutor's conduct in this case." Pet. App. A29. The fact that the court below found no need to decide the issue, *ibid.*, does not eliminate the ample support in the record for a finding that the prosecutor acted intentionally.[12] That too makes this case a poor vehicle for addressing the question presented in the petition.

II. THE LOWER COURT'S HOLDING THAT DISMISSAL WAS THE APPROPRIATE REMEDY IS CLOSELY TIED TO THE PARTICULAR FACTS OF THIS CASE AND DOES NOT MERIT REVIEW.

Petitioner significantly mischaracterizes the Connecticut Supreme Court's holding in asserting

---

[12] The majority observed that the trial court "applied an incorrect legal standard" in determining that the invasion of the privilege was not intentional. Pet. App. A31 n.18.

that the court adopted "a presumption that dismissal of the charges is the appropriate remedy * * * where the government inadvertently acquired access to privileged attorney-client defense strategy information." Pet. 23. In fact, the court below announced no such presumption-of-dismissal. To the contrary, it stated in far more limited terms that when the prosecution has failed to rebut prejudice, a court must provide "appropriate relief" (Pet. App. A10) and "devise a remedy adequate to cure any prejudice to the defendant." Pet. App. A42.

The court then explicitly—and repeatedly—relied on the extraordinary facts of the case in determining remedy of dismissal was appropriate. Thus, it stated that "[u]nder the circumstances of the present case" a remand was not required because "it clearly would be impossible to eliminate the potential for prejudice to the defendant with any other sanction." Pet. App. A34, A35. And it rested the latter determination on a series of conclusions relating to the facts of this case:

- "[t]he prosecutor had had knowledge of the defendant's trial strategy during the one and one-half years preceding trial and, therefore, could use the information in preparing for trial";
- "the information in the privileged communications went to the heart of the defense";
- "the record strongly suggests that the prosecutor may have revealed the defendant's trial strategy to witnesses and investigators";
- "the record strongly suggests that the prosecutor drew on his knowledge of the

privileged communications when examining [the principal complaining witness] to anticipate and thereby neutralize what otherwise might have been a devastating cross-examination of that witness";

- "even if the case were to be retried by a prosecutor who has not read the privileged communications, it would be impossible for the courts or the defendant to have any confidence that a second trial with a new prosecutor would be untainted by the constitutional violation in the first trial, particularly because the new prosecutor would necessarily have access to the transcript of the original trial";
- "[e]ven if new case agents and attorneys were substituted, we would still have to speculate about the effects of the old case agents' discussions with key government witnesses."

Pet. App. A35-A39 (footnotes and internal quotation omitted).

That fact-bound ruling is entirely consistent with this Court's decision in *United States* v. *Morrison*, 449 U.S. 361 (1981), and with the decisions of other lower courts. Indeed, petitioner does not even assert a conflict among the lower courts. Review by this Court is not warranted.

A. Dismissal Of The Charge Is Consistent With This Court's Jurisprudence And The Holdings Of Other Lower Courts.

1. There Is No Conflict With United States *v.* Morrison.

The Connecticut Supreme Court held that, if the State has failed to rebut the presumption of prejudice that arises from the intrusion into the privileged defense strategy, the burden is then on the State to show that any prejudice to the defendant can be cured by a remedy less drastic than dismissal. Pet. App. A33. Petitioner claims that this conflicts with this Court's holding in *Morrison*, because *Morrison* assertedly "placed the burden on the defendant to demonstrate that, as a result of any prejudice suffered from the Sixth Amendment violation, the only appropriate remedy would be dismissal of the charges." Pet. 25. That is a misreading of *Morrison*.

This Court in *Morrison* reviewed a lower court's decision to order dismissal of charges as a result of an attempt by two DEA agents to interview a criminal defendant without her counsel. 449 U.S. at 362. This Court noted that "at no time did [the defendant] agree to cooperate with them, incriminate herself, or supply any information pertinent to her case," and that her motion to dismiss the case contained "no allegation" that the agents' actions "had resulted in the prosecution having a stronger case against her, or had any other adverse impact on her legal position." *Id.* at 362-363.

Assuming without deciding that the agents' conduct violated the Sixth Amendment, this Court concluded that dismissal of the charges was "plainly inappropriate" because of the lack of any showing of

prejudice. 449 U.S. at 365. It noted the proper "approach" should be "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Ibid.*

Because *Morrison* involved no prejudice at all—much less facts involving prosecutorial access to a defendant's privileged trial strategy—it is plainly distinguishable. Moreover, nothing in *Morrison* categorically places off-limits the remedy of dismissal of charges. Indeed, *Morrison* stated that dismissal would not be appropriate "absent demonstrable prejudice, or substantial threat thereof," *ibid*, thereby implying that specific prejudice might well warrant dismissal. Here, as amply shown above, both a substantial threat of and demonstrable prejudice existed on the facts of this case.

The Connecticut Supreme Court was well within its discretion to conclude that—given the extraordinary facts of this case—the remedy of dismissal was appropriate. The court acknowledged that the remedy was "drastic" (see Pet. App. A34), but carefully explained why it was appropriate in this case. See pages 27-28, *supra.*[13] There is no reason for this Court to reassess the record and overturn the care-

---

[13] Petitioner faults the Connecticut Supreme Court for putting the burden on the State to show, by "clear and convincing evidence," that a remedy short of dismissal would be adequate to cure the prejudice to defendant. Pet. 26. However, this standard was not central to the majority's resolution of the case. The court held that "it clearly would be impossible to eliminate the potential for prejudice to the defendant with any other sanction" than dismissal. Pet. App. A35. It did not indicate that the "clear and convincing" standard was essential to that conclusion.

fully considered, case-specific judgment of the Connecticut Supreme Court.

2. There Is No Conflict Among The Lower Courts.

Petitioner's failure even to assert a conflict among the lower courts is not surprising—a review of the relevant decisions demonstrates that the holding below accords fully with the legal standards applied by other lower courts in determining the appropriate remedy.

In *Levy*, for example, the Third Circuit ordered dismissal of the charges as the remedy for a Sixth Amendment violation involving review by the government of privileged trial strategy information. 577 F.2d at 210. Similarly, in *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), the question before the court of appeals was whether to remand the case to the district court for a second evidentiary hearing to determine whether the prosecutor had wrongly used testimony that was protected by a grant of immunity, or whether to dismiss the case. It chose dismissal, on the grounds that "the government's burden of proof [was] virtually undischargeable. Another remand for yet another evidentiary hearing would be a futile gesture." *Id*. at 312.

Indeed, the situation in *McDaniel* is analogous to that of the instant case. The Eighth Circuit was presented with an issue "not likely to reoccur with any degree of frequency"; there should have been a hearing before trial, but the question was "not ventilated until after the trial"; and although it was not possible for the court to measure precisely how the prosecutor's use of the privileged testimony had affected the trial, the court could still be confident that it had had

an effect on the prosecutor. *Ibid.* It therefore concluded that dismissal of the charges was appropriate. *Ibid.*

The decision below is thus consistent with the approach taken by other lower courts when a prosecution has been significantly contaminated with constitutionally protected information. There simply is no reason for this Court to review that determination.

B. The Dissent's Disagreement With Respect To Remedy Rests On A Dispute About The Facts.

The view of the dissenting justices below that the majority erred in concluding that dismissal was the appropriate remedy rests on the dissenting justices' different conclusions regarding the underlying facts.

For example, the dissent faulted the majority for concluding that the prosecutor may have revealed the defendant's trial strategy to witnesses and investigators, on the ground that there was "only one transcript reference" to support this inference. Pet. App. A133 n.50; compare Pet. App. A35-A36 n.21 (contrary view of majority). The dissent also challenged the majority's conclusion that the prosecutor's knowledge of the defendant's trial strategy may have affected his selection of witnesses and his approach to cross-examination, and rebuked the majority for relying on "only one" document in drawing this conclusion. Pet. App. A134 n.51; compare Pet. App. A37-A38 n.22 (contrary view of majority).

These factbound disputes do not warrant this Court's review.[14]

III. THE BASIC DISAGREEMENT BETWEEN THE MAJORITY AND THE DISSENT RELATES TO DISPUTES ABOUT STATE LAW PROCEDURE AND THE INFERENCES TO BE DRAWN FROM THE FACTUAL RECORD.

The petition points to sharp language in the dissenting opinion in arguing that the questions presented warrant review by this Court. See, *e.g.*, Pet. 21-22. But the lion's share of the dissenting opinion

---

[14] Similarly factbound is the question whether the defense should have requested a new prosecutor immediately after it discovered that the prosecution had intruded upon the attorney-client privilege. The majority explained that "[n]either the state nor the trial court suggested at that time that the appointment of a new prosecutor would be an appropriate remedy," that it was "incumbent on the court, sua sponte, to devise a remedy adequate to cure any prejudice to the defendant," and "[t]he fact that the defendant believed that no remedy short of dismissal would be adequate * * * did not relieve the trial court of this obligation." Pet. App. A41-A42. "If the trial court had offered an adequate remedy short of dismissal and the defendant had expressly rejected it, our conclusion might be different," the court cautioned. Pet. App. A42 n.5. And it observed that in this case "[i]n any event, * * * it is unlikely that the appointment of a new prosecutor would have been an adequate remedy even before trial" (Pet. App. A42) because of the risk that during the eighteen months that the prosecutor had knowledge of the privileged trial strategy information he "wittingly or unwittingly * * * revealed the strategy to witnesses and investigators to whom the new prosecutor necessarily would have access" (Pet. App. A34 n.20).

is devoted to disagreements with the majority regarding issues of state procedure and the conclusions to be drawn from the factual record in this case.

For example, the dissent asserted that the majority erred by basing its decision on a claim not raised by respondent (Pet. App. A62-A76), that the majority engaged in "improper fact finding" (Pet. App. A76-A83), and that the majority should have remanded for a hearing to allow the State to introduce new facts to rebut the presumption of prejudice and to allow the trial court to address the question of the appropriate remedy (Pet. App. A127-A128, A137-A138).

The majority, in turn, noted that the respondent asserted prejudice throughout his brief (Pet. App. A8, A8-A9 n.7) and during oral argument (Pet. App. A23-A24, n13), and that the trial court erred in not finding prejudice based on the facts presented. Pet. App. A33-A34. Moreover, in light of the extent of the prejudice, remand was simply unnecessary in the circumstances of this case. See pages 27-29, *supra*.

The dissent's disagreement with the majority's analysis of the factual record is similarly extensive. See Pet. App. A48-A57, A76-A83, A132-A136. And it is difficult to escape the conclusion that the dissent's conclusion regarding the "radical" nature of the majority's ruling rests to a significant extent on these procedural and factual disagreements that are distinct from issues of federal law subject to review by this Court. [15]

---

[15] Indeed the fact-bound nature of the Connecticut Supreme Court's decision is confirmed by the absence of any *amicus* support for the petition. If there were a disagreement among the lower courts warranting this Court's attention, it is likely that

CONCLUSION

The petition for a writ of certiorari should be denied.

---

other States would have supported a grant of review in this case.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

KEVIN C. FERRY
PETER G. BILLINGS
Law Office of Kevin C. Ferry, LLC
77 Lexington Street
New Britain, CT 06052
(860) 827-0880

ANDREW J. PINCUS
Counsel of Record
CHARLES ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

DECEMBER 2011