No. 05-3532

DEATH PENALTY CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re GREGORY LOTT,

Petitioner-Appellant.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

BRIEF FOR *AMICUS CURIAE* INNOCENCE NETWORK
Supporting Issuance of the Writ and Supporting Lott

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS* PURSUANT TO FED. R. APP. P. 29(c)(3)

Amicus curiae Innocence Network ("the Network") respectfully submits this brief in support of petitioner-appellant Gregory Lott and in support of the issuance of a writ of mandamus to the court below. This brief is accompanied by a motion for leave to file pursuant to Fed. R. App. P. 29(a).

The Network is an association of nonprofit legal clinics and criminal justice resource centers. Nationwide, the Network includes more than 30 affiliated Innocence Projects—four within the jurisdiction of the Sixth Circuit—each of which provides *pro bono* legal services to indigent prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The Network pioneered the litigation model that has to date exonerated at least 159 innocent persons by post-conviction DNA testing alone, serving as counsel in the majority of these cases. Countless innocent persons have been vindicated in total, allowing the authorities to pursue the true perpetrators.

Nationwide, the Network receives tens of thousands of requests for representation each year. To further its goal of clearing the wrongfully convicted, the Innocence Network relies heavily on candid conversations with clients and potential clients. Thus, *amicus* has a highly significant interest in maintaining the privileges and protections that traditionally have been accorded to discussions between attorneys and their clients.

ARGUMENT

I. THERE IS NO SUPPORT IN DOCTRINE OR HISTORY FOR THE DISTRICT COURT'S CONCLUSION THAT HABEAS PETITIONERS PURSUING CLAIMS OF ACTUAL INNOCENCE IMPLICITLY WAIVE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION

The attorney-client privilege is the oldest evidentiary protection recognized by the common law. The privilege dates back nearly half a millennium to Elizabethan England, *see, e.g.*, *Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 1577), and was immediately recognized by the earliest American courts, *see, e.g.*, *Murry v. Dowling*, 17 F. Cas. 1047 (C.C.D.C. 1803) (No. 9,959). The protection continues today, still governed by the common law and a strong underlying policy that has endured for hundreds of years. *See, e.g.*, *Ward v. Graydon, Head & Ritchey*, 770 N.E.2d 613, 618 (Ohio Ct. App. 2001) (noting that the common law of attorney-client privilege still applies in Ohio); Fed. R. Evid. 501 ("[T]he [attorney-client] privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.").[1]

[1] Fed. R. Evid. 501 goes on to note that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Fed. R. Evid. 501. Lott's claims of actual innocence and violations of *Brady* derive from the U.S. Constitution, but the standards for conviction—essential to both *Schlup* (note continues)

Given this settled history, it is rare for a court dramatically to redefine the boundaries of the privilege. But the court below did just that by finding a broad waiver of attorney-client privilege and work product protection whenever a habeas petitioner asserts a claim of actual innocence. This development cannot be justified by the long-standing policies that undergird the right of clients to converse freely with their attorneys. And despite the long history, there is no support for the district court's judgment in the well-developed doctrine of waiver of privilege. Accordingly, this errant order should be quashed by granting Lott's petition for mandamus, and the privileged relationships between Lott and his counsel should be restored fully.

A. A Strong Attorney-Client Privilege Is Essential To Our System Of Ordered Justice, And Its Policy Rationales Militate Strongly Against A Finding Of Waiver

The attorney-client privilege is grounded in "the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of [persons] skilled in jurisprudence." *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620 (Ch. 1833). Although there is no question that courts could acquire information by rifling through the files of attorneys and probing their

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and *Herrera* claims—rely upon Ohio state law, creating a choice-of-law question. However, because both Ohio and federal law retain the common law of privilege, *amicus* takes no position as to which law should apply and believes the answer to be inconsequential.

minds, "[t]he continued existence of the privilege is justified on the grounds of social policy. . . . The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of evidence in specific cases." Model Code of Evid. R. 210 cmt. Our adversarial system presupposes that by promoting "full and frank communications between attorneys and their clients," we will be able to achieve "broader public interests in the observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)); *see also Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) ("A fully informed lawyer can more effectively serve his client and promote the administration of justice."). So it is no surprise that the Supreme Court has described the "need for confidence and trust" driving the attorney-client privilege as "imperative," *Trammel v. United States*, 445 U.S. 40, 51 (1980), while lower courts repeatedly maintain that "as in every lawsuit, it would be useful and convenient for [one party] to obtain [the other's] privileged material . . . . But those are not reasons to void the attorney-client privilege." *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 81 (S.D.N.Y. 1986).

Similarly, work product protection stems from an understanding that the "historical and the necessary way in which lawyers act within our system of

jurisprudence to promote justice and to protect their clients' interests" demands that an attorney "prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). As Justice Jackson noted, "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him." *Id.* at 516 (Jackson, J., concurring).

With these systemic goals in mind, the policies of the privilege[2] would be damaged considerably by the district court's order. The privilege cannot be recalibrated inconsequentially at the end of each case. To the contrary—and true to its longstanding tradition—the privilege represents a settled judgment that only a consistent shield that is predictable in advance will allow attorneys to acquire the information they need to vindicate the rights of their clients. *See, e.g.*, *Upjohn*, 449 U.S. at 393; *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("An uncertain privilege—or one which purports to be certain, but rests in widely varying applications by the courts—is little better than no privilege.") (quoting *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987)). A criminal defendant faced with the possibility that any disclosures made to his attorney could be discovered by the prosecution under procedural circumstances beyond his control

[2] In the interest of brevity, subsequent discussions will use the term "privilege" broadly to refer both to attorney-client privilege and work product protection.

would rationally withhold information from his attorney. Defendants whose candor could implicate a relative or whose innocence involves embarrassing or unsavory details might choose to stay quiet, thereby limiting their defenses. In short, the interests of justice require a strong, predictable, and reliable privilege.

B. Attorney-Client Privilege May Be Implicitly Waived Only In A Narrow Set Of Circumstances, None Of Which Applies Here

The parties do not dispute that privilege protects the communications at issue; the only disagreement is whether implied waiver somehow attaches to Lott's claim of actual innocence. Consistent with the policies of the attorney-client privilege previously discussed, nothing in this case supports a finding of waiver.

There is no general principle that a litigant waives attorney-client privilege merely by asserting the correctness of his legal position. If such an exception existed, the privilege would be illusory for any litigation on the merits. To this end, courts have held that filing a complaint in Tax Court need not require taxpayers to disclose their attorneys' advice. *See Bernardo v. Commissioner*, 104 T.C. 677, 690-91 (1995). Litigants seeking to enforce contracts do not waive privilege, even though attorneys may have information as to the intended interpretation of contractual terms. *See Uniroyal Chem Co. v. Syngenta Crop Protection*, 224 F.R.D. 53, 56 (D. Conn. 2004). And a criminal defendant does not waive privilege merely by denying criminal intent. *United States v. White*, 887 F.2d 267, 270 (D.C. Cir. 1989) ("A rule thus forfeiting the privilege upon denial of

mens rea would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions; it would therefore undermine the animating purpose of the privilege."). These cases rest on the doctrinal tradition that privilege is implicitly waived only when a party makes the performance of his attorney a substantive issue in the case.

The rule providing for waiver when a litigant voluntarily injects his attorney's performance into a case has no application to the matter of Lott's innocence. The "at issue" doctrine exists because it would be unfair for a defendant to assert that his attorney's conduct immunizes him from liability without allowing his adversaries to know anything about that conduct. Thus, as a number of courts have noted, privilege cannot be used both as a shield and as a sword. *See In re Keeper of Records*, 348 F.3d 16, 24 (1st Cir. 2003); *In re von Bulow*, 828 F.2d 94. But as Lott aptly notes in his brief, "Lott has not used his privileged information as a sword to advance his claim." Lott Br. at 18.[3] After

[3] The Warden oddly ignores this fatal flaw by citing *Nix v. Whiteside*, 475 U.S. 157 (1986). The holding of *Nix*, which forbids an attorney from presenting evidence he knows to be false, is conceptually independent from the attorney-client privilege. *Nix* governs the duty of attorneys to the court—an issue that has no bearing on this case. *See* Model Rules of Prof'l Conduct R. 3.3 (outlining duties of attorneys). But the privilege belongs to the client and can be waived only by the client. *In re Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997); *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994). The Warden's unsubstantiated hypothetical in which Lott's counsel have suborned perjury, Warden's Br. at 4-5, cannot possibly justify the fishing expedition the district court has authorized.

ignoring the premise of the "at issue" doctrine, the court below simply imposed the consequences without proper consideration of the underlying logic. *See Lott v. Bradshaw*, No. 1:04-CV-822, Slip op. at 11 (N.D. Ohio Mar. 29, 2005).

The district court assumed that the relevance of the evidence sought is dispositive on the issue of implied waiver. *Id.* But as other courts have uniformly maintained:

> Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.
>
> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served.

Rhone-Poulenc Rorer, 32 F.3d at 864; *accord THK America, Inc. v. NSK, Ltd.*, 917 F. Supp. 563, 567 (N.D. Ill. 1996) ("[T]he attorney client privilege applies even when attorneys' opinions are relevant."); *High Tech Commc'ns, Inc. v. Panasonic Co.*, 1995-1 Trade Cas. (CCH) ¶ 70,976 (E.D. La. 1995) ("[A]n otherwise privileged communication is not discoverable merely because it discloses facts relevant to the litigation."). These holdings are consistent with the policy goals guiding the law of privilege because "[a]ny inequity in terms of access to information is the price the system pays to maintain the integrity of the privilege."

Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1494 (9th Cir. 1989). This court should hold that except to the extent information in the possession of the attorney is a substantive issue in the case, conversations between attorney and client remain privileged.

II. THE DISTRICT COURT'S ORDER JEOPARDIZES THE CORE BENEFITS OF PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS WHILE HINDERING THE TRUTH-SEEKING CAPABILITIES OF THE COURTS

The potential adverse consequences of the district court's order are substantial. The order would shackle attorneys and expand to other areas of the law while providing little, if any, probative evidence.

A. Without The Protection Of The Privilege, Attorneys Would Be Hampered In Their Ability To Vindicate The Rights Of The Wrongfully Accused And The Wrongfully Convicted

The interests of justice require advocates who clear the wrongfully charged and who vindicate the wrongfully convicted. Public confidence in our criminal justice system demands that attorneys be able to fulfill these important duties. But the district court's order would severely hamper efforts to find and free the wrongfully imprisoned and to apprehend the true perpetrators that have escaped the consequences of their acts. Public confidence in our criminal justice system would suffer.

The level of certainty required to convict in a criminal case reflects our understanding that not every defendant accused of a crime is guilty. But the

system is not error-proof. With the advent of DNA testing, it has become increasingly clear that despite our best intentions, the innocent are sometimes wrongfully convicted. A recent study counted at least 340 exonerations between 1989 and 2003, including 205 wrongful convictions for murder and 74 death sentences wrongfully imposed. Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 524, 529 (2005).

As the Supreme Court has recognized, "the quintessential miscarriage of justice is the execution of a person who is entirely innocent," *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995). But fear among Americans that innocent people are being executed is widespread—80 percent of U.S. citizens polled in 2000 believed that an innocent person had been executed in the previous five years.[4] Am. Bar Assoc., *Clemency and Consequences* 3 (2002), *available at* http://www.abanet.org/crimjust/juvjus/jdpclemeffect02.pdf. In today's America, it is difficult to deny that "[o]ur capital system is haunted by the demon of error: error in determining guilt, and error in determining who among the guilty deserves to die." Governor George Ryan, Address at Northwestern University School of Law (Jan. 11, 2003). Given the importance of avoiding tragic mistakes, both the

[4] Acknowledgement of this phenomenon is now so widespread that the St. Louis prosecutor's office has reopened a 25-year-old murder case, acting on new evidence that an innocent man may have been put to death for the crime. *See* Kate Zernike, *In a 1980 Killing, a New Look at the Death Penalty*, N.Y. Times, July 19, 2005, at A15.

efforts of trial counsel and post-conviction counsel are forever linked to our notions of fairness and justice.

The order below is debilitating for trial counsel acting in the pursuit of truth. If defendants can no longer be guaranteed protected discussions with trial lawyers, client disclosure will be chilled. Trial lawyers will find themselves without the necessary facts to help juries distinguish guilt from innocence, leading to less accurate results and even greater public distrust in the process.

Similarly, the lower court's order profoundly impacts the work of the Network's member organizations and other attorneys providing post-conviction representation. The Network's organizations represent inmates whose guilt or innocence can conclusively be established by testing physical evidence that either was unavailable at trial or has not yet been subjected to new scientific tests. The Network and similar groups greatly enhance public faith in the ultimate resolution of the cases they handle. To date, 159 individuals have been exonerated based on irrefutable DNA evidence—sometimes leading to the true perpetrator—while others have had their convictions reaffirmed when new tests provided inculpating proof. Adding the prisoners exonerated using conventional evidence, the results are staggering.

The attorneys working for the Network and its affiliates advance the ideals of justice and fairness by helping ensure that individuals who have been convicted

are truly guilty and that individuals who are truly guilty are pursued and convicted. But this work is imperiled if potential clients—each of whom wishes to advance a claim of actual innocence—cannot comfortably and candidly consult with their potential representatives. The Network receives thousands of requests for assistance each year, but only by intensively screening these requests can the Network pursue the cases most likely to result in the discovery of exculpatory evidence. Network attorneys can screen their clients only by asking questions that elicit candid—but confidential—responses, an option now endangered by the court below.

B. If Merely Asserting One's Innocence Effects A Waiver Of Attorney-Client Privilege, The Privilege Is Similarly Imperiled In All Litigation

The district court's ruling follows logic that threatens to erode the privilege in all litigation, both civil and criminal. The essence of the district court's analysis is that privilege must be cast aside because (1) Lott has made his actual innocence an issue in the case; (2) his attorneys might know something about Lott's actual innocence; and (3) it could help the Warden's case to find out what Lott's attorneys know. If the logic of the district court is embraced, transactional attorneys can be haled into court when the true meaning of a contractual agreement is needed; litigators can be deposed when class-action plaintiffs want to know how product liability defendants described their predicaments to their lawyers; and

nothing will be sacred when defamation defendants raise the affirmative defense of truth. The same logical pattern adopted below applies to any number of cases. And neither the court below nor the Warden has indicated what is unique about the circumstances of this case that would prevent the extension of this troublesome doctrine.

1. Because Discovery Is Especially Restrictive In Habeas Cases As Compared To Civil Cases Generally, There Is Reason To Believe That The Waiver Found Below Would Extend Broadly To Civil Cases

This case cannot be distinguished from civil cases more generally, where it is common for litigants to assert that their positions are factually truthful, attorneys may have inside information, and adversaries would value this information. Under the district court's logic, any civil litigant averring a fact would implicitly waive privilege to the extent necessary for his adversary to defend the claim. It would, after all, always be helpful to know whether your adversary had contradicted himself to his attorney. But this would leave a hollow privilege and a feeble civil bar, unable to assist clients in the exercise of their rights.

No distinction justifying the waiver of privilege in actual innocence cases but not in other civil cases with truth as an issue can be drawn by comparing the scope of available discovery. In fact, habeas cases operate under special rules with sharply curtailed rights of discovery. Habeas Rule 6(a) provides access to discovery—normally automatic under the Federal Rules of Civil Procedure—only

"if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rules Governing § 2254 Cases R. 6(a). This Court has emphasized that the scope of habeas discovery is narrowly circumscribed. *See Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001) ("Habeas petitioners have no right to automatic discovery. A district court has discretion to grant discovery in a habeas case upon a fact specific showing of good cause under Rule 6."); *see also In re Pruett*, 133 F.3d 275, 281 (4th Cir. 1997) ("Habeas Rule 6(a) establishes the Federal Rules of Civil Procedure 26-37 as the outer boundary of the extent and manner in which Section 2254 petitioners may conduct discovery.").[5] Discovery is most restrictive in the habeas context, so if the adversary's interest is strong enough to breach privilege notwithstanding limited discovery, it will be strong enough elsewhere.

The distinction between an actual innocence claim and a claim based on truth or accuracy in other civil litigation cannot rest on the subject matter of the dispute. It would be perverse to suggest that the district court's order could be

[5] Not only does Rule 6 require an application to the judge and a showing of good cause before discovery will be permitted, a review of the case law suggests that Habeas Rule 6 contemplates discovery conducted by the petitioner only and *not* the State. *See, e.g., Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997) (noting that "a habeas *petitioner* may 'invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise'" (quoting Rules Governing § 2254 Cases R. 6)).

justified on the theory that the courts would have a special interest in *preventing* defendants who received constitutionally unfair trials from proving their innocence.

2. Because Innocence Is Frequently At Issue In Criminal Cases, There Is Reason To Believe That The Waiver Found Below Would Extend Broadly To Criminal Cases

It is not clear that the decision below is limited in temporal scope to assertions of innocence raised on habeas. In fact, the court's reasoning may suggest that a discovery request similar to that submitted by the state could be served on a criminal defendant who states his intention to maintain his innocence at trial. If the claim of innocence *itself* waives the privilege, why wouldn't the State be able to respond to a pre-trial claim of innocence by deposing defendant's counsel to discover whether he has made any statements to his attorney that tend to undermine his claim? The fact that the defendant is in a defensive stance, with the burden on the State, before trial and in an affirmative stance, bearing the burden as the petitioner, afterwards, should make no material difference in this regard. To be sure, some of the individuals who claim innocence are in fact guilty, and it is possible that deposing their attorneys might result in evidence that the state could use to counter that claim. But courts do not invite deception by respecting the privilege: Attorneys are never allowed to sponsor testimony they know to be false, *see Nix v. Whiteside*, 475 U.S. 157 (1986), so the risks the Warden presents are

unfounded. It would be anathema to our system of adversarial justice to allow a prosecuting attorney to essentially deputize a defendant's counsel. The ruling below could lead to just such an outcome.[6]

C. There Is No Indication That The New Rule Announced By The Court Below Would Lead To Any Reliable New Evidence Either In This Case Or In Future Similar Cases

The damage that would follow should the lower court's judgment be sustained is certain, but the benefits the lower court claims are speculative and ephemeral. The limited evidentiary value of piercing privilege—both in

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[6] In fact, the district court's order actually exhibits a preference for the criminally accused and convicted who do not claim innocence of the crime. The Warden argues that "[i]f there is harm in permitting discovery into otherwise privileged material, Lott has brought that harm onto himself." Warden's Br. at 4. But the only thing that Lott has done is assert his innocence. In this way, the lower court's order singles out, and imposes a special burden upon, individuals who claim that they are innocent. Suppose a criminal defendant, convicted and sentenced, properly presents a set of claims on appeal in courts of the state in which he was convicted. He then seeks relief in federal court pursuant to 28 U.S.C. § 2254, offering any number of claims, but never asserting his innocence. The petitioner could lose in his first attempt to secure habeas relief, but later file a successor petition pursuant to 28 U.S.C. § 2244(b)(2), which allows for successor petitions only when the Supreme Court has expressly held that a new rule of criminal procedure must be applied retroactively, *see Tyler v. Cain*, 533 U.S. 656, 662 (2001). Under the district court's order, such a petitioner without a claim of actual innocence would be permitted to retain confidentiality, while another petitioner—similarly situated but for his claim of innocence—would be required, as a result of the nature of his claim, to turn over to his opponents all of his communications with his attorneys, and, perhaps, himself be subject to deposition. The lower court's order thus singles out and unfairly burdens habeas petitioners who claim that they are innocent.

subsequent cases that would apply the lower court's rule and in the case at bar—further counsels against the Warden's position.

Recognizing that attorneys will conform their conduct to the applicable rules, courts strive to create predictable rules of privilege. It follows that attorneys will adapt their behavior to this court's decision. The Supreme Court recognized this phenomenon when considering the discoverability of work product generally in *Hickman*, noting:

> Were such [work product] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

329 U.S. at 511.

For Lott, any materials discovered by dissolving the privilege would hardly be probative with respect to Lott's claim of actual innocence. For example, the court below ordered production of documents from the offices of Lott's trial co-counsel, Elmer Guiliani. Slip op. at 12-13. It is unclear what value could be found by rummaging through the trial preparations and mental notes of Lott's trial lawyers. Neither Guiliani's impressions of his client nor his assessments of the strength of his client's legal arguments bear on whether a jury could have found Lott guilty. Guiliani's notes were not prepared for outside readers, leaving the

court to draw inferences from whatever notes he left. And Guiliani has since died, *id.* at 12, so these conjectures can be neither confirmed nor denied. It would hardly build faith in our justice system if Lott's life hinged on a postmortem analysis of his counsel's margin notes or back-of-the-envelope ruminations.

In short, the actual innocence inquiry as to what a reasonable juror would conclude[7] would shift toward speculation as to how documents never intended for public inspection—and that no juror would ever see—should be reconstituted. There are many reasons why we insist that fact-finders consider only reliable evidence and these arguments are at their strongest when the lives of the potentially innocent are on the line.

III. THE DISTRICT COURT'S FINDING OF IMPLIED WAIVER OFFEND THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Finally, the lower court's order threatens to undermine the constitutional norms served by the Sixth Amendment to the United States Constitution. By breaching the privilege at its very core, the district court's actions violate Lott's Sixth Amendment rights. Although the attorney-client privilege possesses constitutional dimensions, and courts in a number of circuits have found that egregious violations of the attorney-client privilege offend the Sixth Amendment

[7] The Supreme Court's resolution of *House v. Bell*, 386 F.3d 668 (6th Cir. 2004), *cert. granted*, 125 S. Ct. 2991 (2005) (No. 04-8990), should clarify what evidence is relevant to actual innocence review.

right to counsel. *See, e.g.*, *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995) (holding that "[b]ecause . . . a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant . . . absent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment"); *see also Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985) ("Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right. In some situations, however, government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights" (citations omitted)); *United States v. Noriega*, 752 F. Supp. 1032, 1033 (S.D. Fla. 1990) ("The attorney-client privilege is not per se a constitutional right; however, the privilege takes on a constitutional aspect when, as here, it serves to protect a criminal defendant's Sixth Amendment right to effective assistance of counsel by ensuring unimpeded communication and disclosure by the defendant to his attorney."). This Court has itself recognized that the privilege may enjoy quasi-constitutional status. In *Bishop v. Rose*, 701 F.2d 1150, 1151 (6th Cir. 1983), for example, this Court found that the use of confidential attorney-client communications for purposes of impeachment, where the communication at issue was a confidential letter seized by jail personnel and used at trial, violated the defendant's Sixth Amendment right to counsel. The court

held that "when the prosecution gets evidence before the jury which is based on confidential communications between the defendant and his attorney it . . . impinges on the Sixth Amendment right to counsel." *Id.* at 1157. The State pressed the argument that because evidence obtained in violation of the Fourth Amendment was still admissible for purposes of impeachment, the court should apply the same rule to the use of confidential attorney-client communications. The court, however, distinguished the Fourth Amendment's exclusionary rule from what it suggested was the more fundamental right to assistance of counsel: "In this case we are not dealing with the scope of the judge-made exclusionary rule which is a remedy for a constitutional violation. Our concern is with a constitutional right which is at the heart of our adversary system of justice." *Id.*

At issue here, of course, is an invasion of the attorney-client relationship not during the course of trial but many, many years later.[8] But the passage of time does not alter the basic truth that Lott's relationship with his trial counsel was protected by the Sixth Amendment, guaranteeing Lott not just "Counsel for his defence," U.S. Const. amend. VI, but also "effective assistance of counsel,"

[8] *Amicus* does not propose that the Sixth Amendment right to counsel attaches to Lott's relationship with his current habeas counsel. It is well-settled that there is "no constitutional right to effective assistance of counsel in the preparation of [an] original federal [habeas] petition," *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th Cir. 1993) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 566-67 (1987)), and no cases suggest that such a right attaches at the successor petition stage.

Strickland v. Washington, 466 U.S. 668, 686 (1984). Invasion of the attorney-client relationship for the sole purpose of amassing evidence to be used against Lott in his efforts to prove his innocence would effect a violation of the attorney-client privilege sufficiently egregious to implicate the Sixth Amendment. Lott's trial counsel's remaining documents and recollections are the preserved manifestations of his constitutionally protected relationship with Lott's trial attorney, and the discovery authorized by the lower court's order impinges on Lott's Sixth Amendment rights.

The Warden's "no harm, no foul" argument—"[i]f Lott is truly innocent, then the discovery that we have requested from him will produce no documents," Warden's Br. at 2—is willfully blind to the essential values at stake in this case. The safeguards of the Fourth, Fifth, and Sixth Amendments exist to protect the innocent and reflect an understanding that this pursuit requires that we all enjoy their safeguards. If constitutional violations are permitted based on the false reasoning that Lott will suffer injury only if he is guilty, then the very rights we have sought to protect are no more.

CONCLUSION

For the reasons stated above, a writ of mandamus should be issued to the United States District Court for the Northern District of Ohio instructing the court to vacate its discovery order.

Dated: July 25, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on Monday, July 25, 2005, he caused two copies of the BRIEF FOR *AMICUS CURIAE* INNOCENCE NETWORK SUPPORTING ISSUANCE OF THE WRIT AND SUPPORTING LOTT to be served upon the persons indicated on the attached service list by United States mail, first-class, postage prepaid.

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CERTIFICATE OF COMPLIANCE

The undersigned, one of the attorneys for *amicus curiae* Innocence Network, hereby certifies that the brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i). The brief was prepared using Microsoft Word 2002 software in Times New Roman font. According to the Microsoft Word count, the brief contains ____ words.

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