No. _____

IN THE

# Supreme Court of the United States

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OMAR FRANCISCO ORDUNO-RAMIREZ
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

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On Petition for Writ of Certiorari
To The United States Court of Appeals for The Tenth Circuit

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## Petition for a Writ of Certiorari

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## QUESTION PRESENTED

In *Weatherford v. Bursey*, this Court held that an undercover agent did not cause structural ("per se") Sixth Amendment error when he sat in on a defendant's attorney-client meetings but did not convey the details of the meetings to the prosecution. 429 U.S. 545 (1977). This Court nonetheless cautioned that "had the prosecution learned" the details of the meetings, the defendant "would have a much stronger case." *Id.* at 554. This is that "much stronger case." For years, prosecutors in the Kansas United States Attorney's Office secretly engaged in a "systematic practice of purposeful collection, retention, and exploitation of" recorded communications between defense counsel and their detained clients. *United States v. Carter*, 429 F.Supp.3d 788, 900 (D. Kan. 2019). And yet the Tenth Circuit has now held that when such intrusions into attorney-client communications occur between a guilty plea and sentencing, they do not violate the Sixth Amendment unless the defendant is prejudiced. Pet. App. 24a-25a. The question presented is:

When prosecutors intentionally and without any legitimate law-enforcement justification access confidential attorney-client communications before sentencing, do the prosecutors thereby commit structural Sixth Amendment error?

## RELATED PROCEEDINGS

*United States v. Orduno-Ramirez*

D.Kan. No. 2:14-cr-20096-JAR-7 (criminal proceeding; judgment filed 01/12/2017)

D.Kan. No. 2:19-cv-2166-JAR-JPO (28 U.S.C. § 2255 proceeding; judgment denying § 2255 relief filed 01/03/2022)

10th Cir. No. 15-3195 (affirming detention order 11/12/2015)

10th Cir. No. 17-3010 (affirming sentence on direct appeal 12/28/2017)

10th Cir. No. 22-3019 (affirming denial of § 2255 relief 03/10/2023)

*In re CCA Recordings 2255 Litigation*

D.Kan. No. 2:19-cv-02491-JAR-JPO (consolidated 28 U.S.C. § 2255 proceeding; consolidated order predicating judgment in petitioner's individual § 2255 case filed 12/10/2021)

*United States v. Carter*

D.Kan. No. 2:16-cr-20032-JAR (criminal proceeding in which Special Master investigation took place; order predicating petitioner's 28 U.S.C. § 2255 filed 08/13/2019)

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Omar Francisco Orduno-Ramirez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The Tenth Circuit's panel opinion was published as *United States v. Orduno-Ramirez*, 61 F.4th 1263 (10th Cir. 2023); it is included as Appendix A. The Tenth Circuit's unpublished order denying rehearing en banc is included as Appendix D. The district court orders appealed from are included as Appendix B and Appendix C.

## JURISDICTION

The United States District Court for the District of Kansas had jurisdiction over the petitioner's motion to vacate his sentence under 28 U.S.C. § 2255. The petitioner timely appealed the district court's denial of his motion to the United States Court of Appeals for the Tenth Circuit, which granted a certificate of appealability (thereby establishing jurisdiction for the appeal) under 28 U.S.C. § 2253(c)(1)(B). The Tenth Circuit affirmed in a published decision. The Tenth Circuit denied the petitioner's petition for rehearing on April 3, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

For untold years, the United States Attorney's Office for the District of Kansas engaged in a secret and "systematic practice of purposeful collection, retention, and exploitation of calls from . . . detainees to their attorneys." *United States v. Carter*, 429 F.Supp.3d 788, 849-54, 900 (D. Kan. 2019). This practice was so entrenched and longstanding that it has been "impossible . . . to identify or even quantify the number of calls obtained in . . . cases investigated or prosecuted by the USAO." *Id*. at 847. This practice culminated in the USAO's collection, through broad records requests in a single conspiracy investigation, of at least 74 audio recordings of attorney-client phone calls and over 700 soundless video recordings of attorney-client meetings at a local detention center. *Id*. at 835, 849.[1]

This practice only came to light because prosecutors tried to exploit the videos to bully a defense attorney into withdrawing from a case, and failed to remove the phone calls from a massive discovery dump distributed to multiple counsel. *Id*. at 810, 837-42. When the district court investigated, the USAO resisted, engaging in a "wholesale strategy to delay, diffuse, and deflect" the court's inquiry. *Id*. at 800. The USAO's conduct caused the public to wonder "how this could be"; it "outraged" the defense bar; and it devastated the already-precarious trust our clients had in their lawyers, not to mention the system at large. *United States v. Carter*, D. Kan. 16-cr-20032,

[1] The district court found that these videos, despite being soundless, "visually captured meaningful communication between attorneys and clients." 429 F.Supp.3d at 833. A viewer "could easily observe non-verbal communications, including the communicants' use of their hands, fingers, and other body language." *Id*. And a viewer could use the viewing software to zoom in, for instance, on a document. *Id*. at 834.

Doc.560 at 68-69 (Aug. 2, 2018). And yet the government has refused to concede in *any* case that any of its prosecutors ever violated the Sixth Amendment with this practice. *See, e.g., Carter*, 429 F.Supp.3d at 800 (district court noting, three years into its inquiry, that government continued to assert that the communications it collected were fair game and that prosecutors could unilaterally decide to access them).

Against this egregious backdrop, the Tenth Circuit has now held that a prosecutor who intentionally and without a legitimate law-enforcement justification accesses confidential attorney-client communications between a defendant's guilty plea and sentencing *does not violate the Sixth Amendment* unless the intrusion prejudices the defendant. Pet. App. 24a-25a. This elevation of individual case outcomes over institutional legitimacy and deterrence interests destabilizes a core constitutional right and harms the rule of law itself.

This Court should grant certiorari and put some teeth into the Sixth Amendment right to confidential attorney-client communications. When prosecutors intentionally and without any legitimate law-enforcement justification access confidential attorney-client communications before sentencing, those prosecutors commit structural Sixth Amendment error, justifying a remedy regardless of prejudice.[2]

[2] We use the "structural error" label here to mean constitutional error not subject to any prejudice (or harmless-error) inquiry. Below, the courts and the parties sometimes used that label, but more often conveyed the same meaning by speaking of conclusive presumptions of prejudice and "per se" Sixth Amendment violations, following *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (conclusively presuming prejudice and finding "a per se violation of the Sixth Amendment" where prosecutor intentionally and unjustifiably became privy to attorney-client communications before trial), and *Weatherford*, 429 U.S. at 552 (rejecting "per se rule" requiring reversal based on undercover agent's attendance at attorney-client meeting where agent did not convey details of meeting to prosecutor). *See, e.g.,* Pet. App. 10a. & n.4.

**1. District Court Proceedings**

a. In 2016, Mr. Orduno-Ramirez pleaded guilty as charged to a drug conspiracy. R2.43, 68. After he pleaded guilty, but six months before he was sentenced, the Kansas USAO secretly collected detention-center video footage (during an unrelated investigation in a case called *Carter*) that included soundless videos of five of Mr. Orduno-Ramirez's attorney-client meetings. R1.596, 603; *Carter*, 429 F.Supp.3d at 835. Mr. Orduno-Ramirez was ultimately sentenced after a contested evidentiary hearing to 144 months' imprisonment followed by 5 years of supervised release. R2.62-63, 92. Mr. Orduno-Ramirez appealed his sentence, and the Tenth Circuit affirmed. *United States v. Orduno-Ramirez*, 719 Fed.Appx. 830 (10th Cir. 2017).

b. While Mr. Orduno-Ramirez was appealing his sentence, a Special Master appointed by the district court in the *Carter* case was investigating the USAO's collection of attorney-client communications. This investigation would ultimately comprise over three years of litigation, one mandamus action, and a protracted evidentiary hearing during which over a dozen federal prosecutors testified. 429 F.Supp.3d at 805; *In re United States*, No. 18-3007 (10th Cir. Feb. 26, 2018) (denying government's petition for mandamus requesting termination of Special Master investigation; limiting scope of investigation in part).

At one point, the local United States Attorney and the Federal Public Defender negotiated an end to the litigation by agreeing to sentence reductions for still-incarcerated defendants whose attorney-client communications the government had collected. 429 F.Supp.3d at 805. But the DOJ abruptly reneged the settlement,

advising that the government would "either negotiate or litigate each claim individually." *Id.*

After the Special Master completed his investigation, the district court issued an extensive written order making a number of disturbing findings. The district court found that for years, the USAO had engaged in a "systematic practice of purposeful collection, retention, and exploitation of calls from CCA detainees to their attorneys." 429 F.Supp.3d at 849-54, 900. This practice culminated in the USAO's collection in the *Carter* case of tens of audio recordings of attorney-client phone calls and hundreds of soundless video recordings of attorney-client meetings. *Id.* at 835, 849. When caught, "the Government evaded the [district court's] questions and denied that its practices implicated the Sixth Amendment or the attorney-client privilege." *Id.* at 799.

The prosecutors did not just collect these communications; they used them. Two prosecutors exploited the USAO's possession of videos of attorney-client visits in an effort to disqualify an appointed lawyer in a criminal case. *Id.* at 837-38. And multiple other prosecutors "unilaterally determined that recorded attorney-client calls were available for review, without approval from the court or notice to the defense." *Id.* at 858. The record was "clear" that "upon receiving recordings, prosecutors and their agents reviewed the calls." *Id.* at 848. In one particularly egregious case, a prosecutor secretly exploited the contents of a defendant's attorney-client communications to induce the defendant to take a plea, and then later lied to a federal judge about listening to the calls. *Id.* at 853.

The USAO kept this practice secret for years. Prosecutors "intentionally avoided any judicial determination" of whether the calls they routinely collected were protected by the Sixth Amendment "by not disclosing to defendants that they had obtained their attorney-client calls." *Id*. at 861. The USAO's "regular practice was to not disclose to defense counsel that they had acquired and/or accessed attorney-client calls." *Id*. at 862. For nearly a decade without detection, the USAO retained "attorney-client calls[] during the duration of the case rather than returning or destroying them." *Id*. at 866.

The district court also found that the USAO went to great lengths to frustrate the court's investigation into possible Sixth Amendment violations. For instance, the prosecutor who collected the videos, Special Assistant United States Attorney Erin Tomasic, "did not respond with candor" to the district court's initial questions "about whether there were video recordings of the attorney visitation rooms." *Id*. at 836. Tomasic and another prosecutor, Assistant United States Attorney Kim Flannigan, along with a law-enforcement agent who was working with them, all denied using the videos. *Id*. at 839. The district court found none of their testimony credible. *Id*. Tomasic also lied about listening to calls in another criminal case. *Id*. at 851-52. And the USAO knew about her lie for over a month before alerting the district court. *Id*. at 852. Lead counsel in that case, (Assistant United States Attorney David Zabel, who also prosecuted Petitioner Orduno-Ramirez), later denied knowing that Tomasic had listened to the calls, but the district court also found his credibility "lacking." *Id*. at 852. n.355. Yet another prosecutor, Assistant United States Attorney Tanya

Treadway, "lied about listening to . . . calls in a court proceeding" before a different district court judge. *Id.* at 853. Her lie did not surface in that case, but rather in the Special Master investigation. *Id.* at 854. Treadway retired, *id.* at 852, and Tomasic was ultimately terminated, *id.* at 827, but they were not the only ones covering their tracks.

For instance, after assuring the district court that the USAO had "locked down" its office's computer hard drives, the USAO violated its duty to preserve the one hard drive necessary to determine whether any USAO staff had viewed the videos before the district court impounded them. *Id.* at 870-74. Instead, the USAO allowed that drive to be reformatted during a cyclical upgrade. *Id.* at 871. But the district court found no reason for the upgrade "unless the objective was to destroy the data." *Id.* The USAO refused to preserve other evidence as well, eventually revealing that it had delayed imposing a formal litigation hold to preserve emails, documents, and other data until late 2018, despite its awareness that "we are losing some stuff in the interim." *Id.* at 822. Tomasic later testified that she "knew people were recording [internal USAO] phone calls [and] . . . people were printing out e-mails every night and taking them home in binders because they did not trust the people they worked with." *Id.*; *id.* at 847 (district court noting that prosecutors who collected calls often left "no paper trail"). The district court found that the USAO's "misrepresentations, delays, and lack of transparency about the state of its preservation efforts in this matter ma[d]e it impossible to conclude with certainty what information has been lost and cannot be restored." *Id.* at 873. The district court "easily" found that the

USAO "willfully violated myriad Court orders and Special Master directives," and concluded "that the Government acted with intent to deprive the Special Master and the FPD of evidence in this investigation." *Id*. at 799, 874.

c. In the wake of the Special Master investigation, Petitioner Orduno-Ramirez joined over a hundred 28 U.S.C. § 2255 movants who challenged their convictions and sentences based on the USAO's collection of their attorney-client communications. R1.114, 116-18, 366. Mr. Orduno-Ramirez alleged that the government's post-plea, pre-sentencing intrusion upon his confidential attorney-client communications violated the Sixth Amendment. R2.297, 310-312. He argued that once he established that the government had intentionally and without a legitimate law-enforcement justification become privy to his confidential attorney-client communications, he had established a Sixth Amendment violation and was entitled to a remedy regardless of the presence or absence of prejudice. R2.312, 387. And he asked the district court to remedy this Sixth Amendment violation by vacating his sentence and imposing a reduced term of imprisonment. R2.290.

The district court consolidated the § 2255 cases for discovery and other case-management purposes. R1.114. After much litigation over the petitioners' discovery requests, the government notified the district court that, notwithstanding the district court's discovery orders, the government, upon a directive from the DOJ, refused to provide further discovery. R1.365. The district court found that this blatant violation of its orders "prejudiced petitioners' ability to meaningfully develop their motions for evidentiary hearing without any valid justification." R1.377. And the district court

held in all of the § 2255 cases that, because the government had intentionally violated orders designed to discover whether prosecutors had accessed communications that the USAO had collected, the court would adopt an adverse-inference finding that they had, "either by watching or listening to them or by directly or indirectly obtaining information about them from someone who did." R1.365, 377. Noting that "proof of this element rests almost entirely within the government's control," the district court stated that it would enter this finding in all of the § 2255 cases. R1.377-78.

As it turned out, the district court did not need to rely on any adverse inference in the first § 2255 case to proceed to an evidentiary hearing. In that case, the district court independently found that Assistant United States Attorney Terra Morehead had collected and intentionally listened to a recorded attorney-client call and then taken "steps to conceal that tactical advantage"—facts that Morehead later tried to "minimize, deflect, and obfuscate." *In re CCA Recordings 2255 Litigation*, No. 2:19-cv-2166-JAR-JPO, Doc. 1033 at 49-50 (D. Kan. Dec. 9, 2021). The district court found that Morehead's conduct was "consistent with the litigation philosophy of USAO prosecutors" who believed it was permissible to listen to recordings of attorney-client phone calls from the detention center when they came across them. *Id*. And the district court found that Morehead's conduct was consistent with "the official litigating position" of the USAO that it could unilaterally decide whether or not an attorney-client communication was fair game. *Id*.

Just how many prosecutors sought this tactical advantage in how many cases remains unknown because most of the § 2255 cases never made it to an evidentiary

hearing. Instead, the district court held in a consolidated order that—even assuming that the government had intentionally and without a legitimate law-enforcement justification become privy to the movants' confidential attorney-client communications—movants whose communications were collected between their guilty pleas and their sentencing hearings (as opposed to before trial) would have to show prejudice to establish a Sixth Amendment violation and justify a remedy. R1.658-60. Applying this new rule in Mr. Orduno-Ramirez's case, the district court denied relief without an evidentiary hearing, on grounds that Mr. Orduno-Ramirez would be unable to show prejudice. R2.266, 550.

**2. Tenth Circuit Proceedings**

Mr. Orduno-Ramirez appealed, along with nine other § 2255 movants whose Sixth Amendment claims were based on post-plea, pre-sentencing intrusions and had been dismissed for lack of prejudice. The Tenth Circuit partially consolidated the appeals and then abated all but Mr. Orduno-Ramirez's. *United States v. Orduno-Ramirez*, No. 22-3018 (10th Cir. Order filed March 10, 2022). The Tenth Circuit then granted Mr. Orduno-Ramirez a certificate of appealability to address whether the district court erred in holding that post-plea, pre-sentencing intrusions—even if intentional and unjustified—do not violate the Sixth Amendment unless they prejudice the defendant. *United States v. Orduno-Ramirez*, No. 22-3018 (10th Cir. Order filed June 16, 2022).

The Tenth Circuit affirmed. Pet. App. 26a. The Tenth Circuit acknowledged that "the Government does not dispute the district court's findings that (1) its acquisition

of the video footage intruded on attorney-client communications or (2) the intrusion lacked a legitimate law-enforcement purpose." Pet. App. 17a. And the Tenth Circuit shared the district court's "deep concern about the USAO's systemic intrusions into many attorney-defendant communications at the CCA," recognizing that "the USAO's systemic conduct may point to the need for a 'prophylactic rule.'" Pet. App. 23a (citation omitted). But the Tenth Circuit concluded that when prosecutors engage in these intrusions between a defendant's guilty plea and sentencing, they do not violate the Sixth Amendment unless they succeeded in prejudicing the defendant. Pet. App. 23a-24a.[3]

Mr. Orduno-Ramirez petitioned for both panel rehearing and rehearing en banc. The Tenth Circuit denied both petitions. Pet. App. 66a.

## REASONS FOR GRANTING THE WRIT

### 1. Deliberate and systemic prosecutorial intrusions into the defense camp undermine the legitimacy of our adversarial system and cry out for this Court's attention.

This Court has called deliberate prosecutorial interceptions of attorney-client communications "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa v. United States*, 385 U.S. 293, 306 (1966). And this Court has warned prosecutors that particularly egregious or repeated misconduct might justify a remedy even absent prejudice. *See, e.g., United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981) (holding that agents' interference

[3] The Tenth Circuit also found that the government had affirmatively shown that its intrusion did not prejudice Mr. Orduno-Ramirez at sentencing. Pet. App. 24a-26a. This finding is irrelevant to the question presented, which asks solely whether prejudice in individual cases ought to be on the table in the first place.

with defendant's attorney-client relationship did not justify dismissing indictment absent prejudice, but noting that "a pattern of recurring violations . . . might warrant the imposition of a more extreme remedy in order to deter further lawlessness"); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988) (holding that, "as a general matter," prosecutorial misconduct before the grand jury must be prejudicial to justify dismissing indictment, but distinguishing cases "with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process"); *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993) (noting that habeas relief might be warranted absent prejudice for "deliberate and especially egregious" trial misconduct or "a pattern of prosecutorial misconduct"); *cf. United States v. Russell*, 411 U.S. 423, 432-33 (1973) ("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction").

It's time for this Court to put some teeth into these warnings. A criminal-justice system can only earn the public's deference and assistance through its own moral credibility. Paul H. Robinson, *Criminal Law's Core Principles*, 14 Wash. U. Jurisprudence Rev. 153 (2021); *Cf. Williams v. Pennsylvania*, 579 U.S. 1, 15-16 (2016) (holding that appellate judge's failure to recuse was structural error in part because "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself"). Cheating is

wrong, especially by those who wield the significant power of prosecutors. Prosecutors who cheat undermine the credibility of the system, which presupposes two equal opponents acting within a clear set of rules. And prosecutors who cheat by spying on the defense camp commit the "grossest kind" of intrusion, *Hoffa*, 385 U.S. at 306, "strik[ing] at the center of the protections afforded by the Sixth Amendment." *Shillinger*, 70 F.3d at 1141.

This Court's intervention is critical given the Kansas USAO's years-long "systematic practice of purposeful collection, retention, and exploitation of calls," 429 F.Supp.3d at 849-54, 900; its full-bore grab of video and audio recordings in *Carter*, *id*. at 835, 848-49; its "intent to deprive the Special Master and the FPD of evidence" during the ensuing investigation, *id*. at 874, and its blatant violation of discovery orders in the consolidated § 2255 cases, R1.377. To this day, the Kansas USAO denies any Sixth Amendment violations. The legal implications of the Kansas USAO's misconduct matter not only to the Kansas defendants whose communications were collected, but also to the courts, the bar, and the public as a whole.

The Tenth Circuit has now twice announced that it "condemn[s] the conduct of the Kansas U.S. Attorney's Office." *United States v. Spaeth*, 69 F.4th 1190, 2023 WL 3940537 at *1 (10th Cir. 2023); *accord* Pet. App. 23a (stating that "we share" the district court's "deep concern about the USAO's systemic intrusions"). But condemnation without consequences is an empty gesture. As the venerable Judge Frank once warned: "Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking.

The practice of [denouncing prosecutors without reversing their victories]—recalling the bitter tear shed by the Walrus as he ate the oysters—breeds a deplorably cynical attitude towards the judiciary." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

This Court and only this Court can correct that cynical attitude by granting certiorari and holding that when prosecutors access confidential attorney-client communications before a defendant is sentenced, and do so intentionally and without any legitimate law-enforcement justification, those intrusions are structural Sixth Amendment violations justifying a remedy regardless of prejudice. Such a rule would not be unfair to the government—after all, it is completely within every prosecutor's control to avoid such intrusions. *Cf. Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("In certain Sixth Amendment contexts, prejudice is presumed," including "various kinds of state interference with counsel's assistance" that, "because the prosecution is directly responsible," are "easy for the government to prevent"). Review is necessary for institutional reasons and to protect the rule of law.

**2. How to identify structural constitutional error is a question of exceptional importance to both federal and state courts.**

In *Chapman v. California*, 386 U.S. 18 (1967), this Court held that most constitutional errors are subject to harmless-error analysis; that is, they will not justify a remedy unless they prejudiced the defendant. This Court nonetheless recognized that some constitutional errors can never be treated as harmless. *Id.* at 23. Ever since *Chapman*, courts have struggled to identify which errors fall into which category. *See* Justin Murray, *Policing Procedural Error in the Lower Criminal*

*Courts*, 89 FORDHAM L. REV. 1411, n.98 (2021) ("These labels are not helpful."); Zachary L. Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. 965 (2020) (canvassing cases); David McCord, *The "Trial"/"Structural" Error Dichotomy: Erroneous, and Not Harmless*, 45 U. KAN. L. REV. 1401 (1997) (discussing "rampant confusion" over how to identify structural errors).

One criminal-procedure treatise attributes this struggle to the fact that even this Court's own members "continue to disagree about the appropriate analysis for distinguishing between those errors that may be harmless and those that may not be harmless." Wayne R. LaFave, et al., 7 CRIM. PROC. § 27.6(d) (4th ed. Nov. 2022). Another commentator, in contrast, finds this Court's cases "both conservative and cohesive," while "the 'structural' errors identified by the circuit courts are anything but—exposing the need for a clearer and more accurate prescriptive definition of structural error." Henderson, *A Comprehensive Consideration of the Structural-Error Doctrine*, 85 Mo. L. Rev. at 982.

Either way, how to identify structural constitutional error is a question of exceptional importance to both federal and state courts. It is a question that frequently reflects tension between concerns about the outcome in a particular case (courts are loath to grant what they view as a "windfall" to criminal defendants) and concerns about systemic interests beyond the case at hand. *Compare, e.g., State v. Paumier*, 288 P.3d 1126, 1130 (Wash. 2012) (en banc) (finding violation of public-trial-right procedural rule structural error justifying reversal regardless of prejudice, in

part because of right's unique importance to the public), *with id*. at 1133 (Madsen, C.J., dissenting on grounds that treating violation as structural error resulted in "defendant automatically obtaining the windfall of reversal of his conviction and a new trial").

This Court has sometimes resolved this tension by prioritizing core constitutional rights over individual case outcomes when those rights are not just derived from our general interest in fair judicial proceedings, but are, rather, part of the essential framework in which those proceedings are constitutionally required to take place. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006) (denial of right to counsel of choice is "structural defect" affecting "the framework within which the trial proceeds," rather than "simply an error in the trial process itself"). And thus considerations of prejudice in an individual case are off the table when it comes to enforcing the constitutional framework for a **discrimination-free judicial system**, *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Ballard v. United States*, 329 U.S. 187 (1946); **unbiased judges and juries**, *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Gray v. Mississippi*, 481 U.S. 648 (1987); *Tumy v. Ohio*, 273 U.S. 510 (1927); **public trials**, *Waller v. Georgia*, 467 U.S. 39 (1984); **counsel in criminal cases**, *Gonzalez-Lopez*, 548 U.S. 140; *Gideon v. Wainwright*, 372 U.S. 335 (1963); **defendant autonomy**, *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018); *Faretta v. California*, 422 U.S. 806 (1975); and **jury verdicts**, *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

Despite these many examples, it remains difficult to identify which rights are structural ("framework"-related) and which rights are not. This Court has relied on

one or more of three "broad" but "not rigid" rationales when deeming rights structural: (1) when the "right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; and (3) "if the error always results in fundamental unfairness." *Weaver v. Massachusetts*, 582 U.S. 286, 294-96 (2017).

This Court illustrated the "other interest" rationale in *Williams* when it held that "an unconstitutional failure to recuse constitutes structural error" justifying a remedy regardless of prejudice and "even if the judge in question did not cast a deciding vote." 579 U.S. at 14. As this Court explained, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Id.* at 16. Framework-related interests are so much stronger than individual outcomes in the defendant-autonomy context that this Court enforces autonomy rights without regard to prejudice even while recognizing that doing so "usually increases the likelihood of a trial outcome *unfavorable* to the defendant." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (emphasis added). In sum, "[t]he very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right." *Neder v. United States*, 527 U.S. 1, 34 (1999) (Scalia, J., dissenting in part). This means that sometimes individual defendants will get a second crack at things (a trial, a sentencing, an appeal), not because their personal interests were harmed

the first time around, but because a court or prosecutor has blundered in a way that disrupts the very framework of our constitutional system.[4]

When an entire United States Attorney's Office has not merely blundered, but has intentionally, secretly, and repeatedly disrupted that framework in countless cases, it seems like an easy case for declaring structural error. But then again, this Court has adopted a "strong presumption" that constitutional errors are subject to harmless-error analysis, *Rose v. Clark*, 478 U.S. 570 (1986), and described structural errors as "a very limited class of errors," *United States v. Marcus*, 560 U.S. 258, 263 (2010) (citation omitted) that are "highly exceptional," *United States v. Davila*, 569 U.S. 597, 611 (2013). These cautionary flags are understandable, and yet they leave courts erring on the side of *right results* over *basic rights*. Here, for instance, the Tenth Circuit recognized that "the USAO's systemic conduct may point to the need for a 'prophylactic rule[ ],'" but the Tenth Circuit was sufficiently worried about this Court's "caution against per se or sweeping Sixth Amendment rules that obviate consideration of prejudice in every instance" that it found "insufficient reason here to adopt a per se rule." Pet. App. 18a, 23a. Which raises the question: if not here, where?

This Court has previously granted certiorari to review and correct erroneous *adoptions* of structural-error rules. *See, e.g., Greer v. United States*, 141 S.Ct. 2090, 2099-2100 (2021) (reversing Fourth Circuit decision vacating conviction without

[4] It is usually *not* the case that recognizing error to be structural *frees* the defendants who benefit from that recognition. Structural error justifies a remedy regardless of prejudice, but *what* remedy is a separate question (a question that is not presented here). *See Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (discussing distinction between recognizing error and choosing a remedy "appropriate to the violation"); *United States v. Morrison*, 449 U.S. 361, 364-66 & n.2 (1981) (assuming Sixth Amendment error and discussing how remedies "should be tailored to the injury").

regard to prejudice due to error in plea colloquy); *Davila*, 569 U.S. at 608-13 (reversing Eleventh Circuit decision vacating conviction without regard to prejudice where magistrate judge improperly participated in plea discussions); *Marcus*, 560 U.S. at 262-67 (reversing Second Circuit decision vacating conviction on ex post facto grounds without regard to prejudice); *Weatherford*, 429 U.S. at 557-58 (reversing Fourth Circuit decision vacating conviction without regard to prejudice where undercover agent attended defendant's attorney-client meetings but did not convey details of conversation to the prosecution).

This Court should grant certiorari to review and correct the Tenth Circuit's erroneous *rejection* of a structural-error rule here.

**3. The Tenth Circuit's decision undervalues a core Sixth Amendment right; the critical nature of sentencing proceedings; and the role of legitimacy and deterrence interests in structural-error analyses.**

The Tenth Circuit's decision here undervalues the Sixth Amendment's core requirement of confidentiality; the critical nature of sentencing proceedings; and the role of legitimacy and deterrence interests in structural-error analyses.

a. State and federal courts have long recognized that the right to *private* communications with counsel is at the core of the right to counsel. *Coplon v. United States*, 191 F.2d 749, 758 (D.C. Cir. 1951) ("The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts."); *In re Rider*, 195 P. 965, 966 (Cal. App. 1920) ("it is the absolute right of parties charged with crime to consult privately with their attorneys"); *State v. Davis*, 130 P. 962, 964 (Okla. Ct. Crim. App. 1913) (same; "if parties in prison and charged with crime are compelled to consult their attorneys

in the presence of an officer or officers of the law, the very object and purpose of the Constitution and of the statute would be defeated . . . [t]his alone would render such consultations a miserable and contemptible farce").

This core value of confidentiality plays a critical role in the adversarial process. The defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 61 (1932). To benefit from that guiding hand, "[a] criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014). Indeed, "those necessary conferences between counsel and accused" are nearly sacrosanct, "sometimes partak[ing] of the inviolable character of the confessional." *Powell*, 287 U.S. at 69; *accord Nordstrom*, 762 F.3d at 910 ("In American criminal law, the right to privately confer with counsel is nearly sacrosanct."). Given the value and sensitivity of information exchanged during attorney-client conferences, that information "must be insulated from the government" "[i]n order for the adversary system to function properly." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978).

The Sixth Amendment thus necessarily "protect[s] the attorney-client relationship from intrusion in the criminal setting." *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974). In other words, the right to confidentiality of communications with counsel is—like the right to counsel of choice—part of the Sixth Amendment framework in which criminal proceedings are constitutionally required to take place. *See Gonzalez-Lopez*, 548 U.S. at 148-49. The Tenth Circuit undervalued the core value of this right when it refused to enforce it here absent prejudice.

b. Courts and commentators alike have recognized that "[t]he sentencing phase of a criminal stage is one of the most critical stages of the judicial process." Nancy Fox Kaden, *Sentencing*, 73 GEO. L. J. 671, 671 (Dec. 1984). Indeed, given the fact that "[t]he vast majority of [criminal] cases not dismissed ultimately result in conviction, either after a trial or as a result of a negotiated plea," sentencing is usually not just "one of," but "*the* most critical stage of a criminal prosecution, and the proceeding having the greatest personal impact on the defendant." 3 CRIM. PRAC. MANUAL § 102:2 (March 2023) (emphasis added); *accord United States v. Ruiz-Rodriguez*, 277 F.3d 1281, 1291 (11th Cir. 2002) (initial sentencing in a felony case is "often the most critical stage when a defendant pleads guilty"); *United States v. Jackson*, 32 F.3d 1101, 1109 (7th Cir. 1994) ("sentencing is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant" (marks and citations omitted)).

Federal sentencing proceedings in particular are dizzyingly complex proceedings during which the district court is required to "subject[ ] the defendant's sentence to the thorough adversarial testing contemplated by the federal sentencing procedure." *Rita v. United States*, 551 U.S. 338, 351 (2007). And prosecutors play an "*indispensable* role" in these proceedings. Department of Justice Manual (JM) 9-27.710 cmt. (emphasis added).[5] For instance, prosecutors provide the Probation Office with detailed facts to include in the PSR, some of which are "obtainable only from prosecutorial or investigative files to which probation officers do not have access." JM

[5] Available at https://www.justice.gov/jm/justice-manual.

9-27.720(1) & cmt.; *see, e.g.,* R3.17-18 (PSR allegations derived from FBI reports). And prosecutors routinely recruit and rely on cooperating witnesses for material aspects of those facts. *See, e.g.,* R3.18-19 (PSR allegations derived from proffer statements). If a defendant objects to a fact that will affect sentencing, the prosecutor then bears the burden of proving that fact at the sentencing hearing by a preponderance of the evidence. *United States v. McDonald*, 43 F.4th 1090, 1095 (10th Cir. 2022); Fed. R. Crim. P. 32(i)(3)(B); JM 9-27.720(5) cmt. ("the government should be prepared to substantiate significant factual allegations disputed by the defense").

Prosecutors also advocate for fact-sensitive adjustments that "can have a profound effect on the defendant's sentence." JM 9-27.720(2) cmt. They gather and present victim-impact statements at sentencing. Manual 9-27.720(6) cmt. (prosecutors should "notify victims" of their statutory right to allocution and "notify the court of any victims wishing to make a statement"). They advocate for upward variances, respond to defense requests for leniency, and decide when to recommend sentence reductions for substantial assistance. JM 9-27.730. With so many factual and legal issues in play, prosecutors have many opportunities at sentencing to take strategic advantage of the content of a defendant's confidential communications with counsel.

The Tenth Circuit has previously recognized the unacceptable risk that intentional, unjustified pre-*trial* intrusions pose, and has adopted a structural-error rule regarding those intrusions. *See Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995) (prosecutor per se violated Sixth Amendment where prosecutor intentionally and unjustifiably became privy to attorney-client communications before trial;

harmless-error rule did not apply). But here the Tenth Circuit found "no reason to expect a risk of prejudice at sentencing from a post-plea intrusion" that rises to the level of what might occur at trial from a pre-trial intrusion. Pet. App. 19a-21a. In finding that post-plea, pre-sentencing intrusions do not violate the Sixth Amendment, the Tenth Circuit undervalued and understated the critical nature of sentencing proceedings.

c. Perhaps more importantly, the Tenth Circuit's focus on the likelihood of prejudice at sentencing distracted it from any genuine inquiry into legitimacy and deterrence interests as valid reasons to adopt a structural-error rule here. The Tenth Circuit touched on these latter concerns only long enough to reject them on grounds that such rules are "blunt legal instrument[s]" that this Court has "caution[ed] against." Pet. App. 7a, 17a-18a.

By defaulting to this presumption against structural-error rules without giving legitimacy and deterrence interests their due, the Tenth Circuit liberated prosecutors to carry on collecting and exploiting attorney-client communications "with a fair assurance of impunity." Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 FORDHAM L. REV. at 1432-36 (2021). Harm to the system matters to the courts, the bar, and the public as a whole. But as long as courts like the Tenth Circuit continue to believe "that outcome-determinative prejudice is the only kind of harm that truly matters, deep reform will elude our grasp." *Id.* at 1441. The Kansas USAO broke the rules for years, concealed its misconduct, and then lied about it. The Tenth Circuit erred when it held that the USAO's intentional, secret, systemic, and

unjustified post-plea, pre-sentencing intrusions neither violated the Sixth Amendment nor justified a remedy absent prejudice. Review is necessary.

**4. No vehicle problems stand in the way of this Court's review.**

Finally, this case presents no procedural impediments to reviewing the question presented. Mr. Orduno-Ramirez timely sought appellate review of the district court's order denying his § 2255 motion. The question presented was fully litigated in the appellate briefs and at oral argument in the Tenth Circuit, and that court decided the issue in a published decision. If this Court were to hold that post-plea, pre-sentencing intrusions of the egregious type that occurred are structural Sixth Amendment violations justifying a remedy regardless of prejudice, then Mr. Orduno-Ramirez and several others whose appeals remain abated in the Tenth Circuit would be entitled to return to the district court and pursue their § 2255 claims. No vehicle problems stand in the way of this Court's review.

## CONCLUSION

For the above reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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