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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OMAR FRANCISCO ORDUNO-RAMIREZ,

Defendant - Appellant.

No. 22-3019

**Appeal from the United States District Court
for the District of Kansas
(D.C. Nos. 2:19-CV-02491-JAR-JPO, 2:19-CV-02166-JAR-JPO &
2:14-CR-20096-JAR-7)**

Paige A. Nichols, Assistant Federal Public Defender (Melody Brannon, Federal Public Defender, with her on the briefs), Topeka, Kansas, for Defendant-Appellant.

Bryan C. Clark, Assistant United States Attorney (Duston J. Slinkard, United States Attorney; Carrie N. Capwell, and James A. Brown, Assistant United States Attorneys, with him on the briefs), Kansas City, Kansas, for Plaintiff-Appellee.

Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

MATHESON, Circuit Judge.

Omar Francisco Orduno-Ramirez pled guilty to a conspiracy drug offense. He received a below-Guidelines-range prison sentence of 144 months, which we affirmed on

direct appeal. After he pled guilty, but before he was sentenced, the Kansas United States Attorney's Office ("USAO") obtained soundless video recordings of five meetings between Mr. Orduno-Ramirez and his attorney.

Mr. Orduno-Ramirez sought postconviction relief under 28 U.S.C. § 2255, arguing the Government violated the Sixth Amendment by intruding on his meetings with counsel. The district court denied relief. It said that *Shillinger v. Haworth*, 70 F.3d 1132 (10th Cir. 1995)—which held that a pre-plea or pre-conviction ("pretrial") intrusion is a per se Sixth Amendment violation—does not apply to post-plea intrusions. Instead, the court determined that Mr. Orduno-Ramirez was required to show prejudice and found he had not done so.

We granted a certificate of appealability ("COA") on the following issue:

> [W]hether the district court erred in concluding that the United States' purposeful sentencing-phase intrusion into a defendant's confidential attorney-client communications is not a per se Sixth Amendment violation.

Doc. 10920619, at 2.

Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we affirm the denial of Mr. Orduno-Ramirez's § 2255 motion. We agree with the district court that the *Shillinger* per se rule does not apply. We affirm because the Government has shown the intrusion did not prejudice Mr. Orduno-Ramirez's sentencing, and Mr. Orduno-Ramirez does not argue he suffered any prejudice.

I. BACKGROUND – USAO INTRUSIONS

A. *Attorney-Client Intrusions*

CoreCivic ("CCA") is a private detention facility in Leavenworth, Kansas. *See United States v. Carter*, 429 F. Supp. 3d 788, 798 n.5 (D. Kan. 2019).[1] In 2016, the USAO suspected that certain inmates at CCA were engaged in a drug-smuggling conspiracy. *Id*. The USAO initiated an investigation. *Id*. It obtained and served a broad grand jury subpoena asking for all video and still images from all surveillance cameras at CCA, including footage from attorney visitation rooms. The subpoena also requested recordings of inmates' telephone calls, including calls with their attorneys. *Id*. at 846-48. The subpoena garnered information on "potentially hundreds of CCA detainees." *Id*. at 869. The investigation led to the indictment of Karl Carter and five others for conspiracy to distribute controlled substances in the CCA. *Id.* at 801. At a discovery conference, the government "discussed having obtained voluminous video-surveillance footage from video cameras stationed throughout the CCA facility." *Id.*

[1] Much of our discussion of the factual background derives from the district court's August 13, 2019 order in *United States v. Carter*, which includes the district court's findings about the USAO's intrusions into attorney-client communications at CCA. 429 F. Supp. 3d at 788. Both parties here use facts from *Carter*, *see* Aplt. Br. at 4; Aplee. Br. at 47, and neither argues *Carter*'s factual findings were clearly erroneous. *See United States v. Craine*, 995 F.3d 1139, 1153 (10th Cir. 2021) (we review a district court's factual findings for clear error).

B. ***The District Court's Investigation and Findings***

When the Federal Public Defender for the District of Kansas ("FPD") learned about the foregoing, it was allowed to "intervene . . . in [the *Carter*] case on behalf of its many clients detained at CCA." *Id*. at 799. The FPD "filed a motion for return of property under Fed. R. Crim. P. 41(g)" in "dozens of . . . active cases" to divest the USAO of the recordings. *Id*. at 801, 802 n.13. The district court held several evidentiary hearings to "find out from the Government the scope of its discovery efforts that potentially intruded on confidential in-person and telephonic attorney-client meetings, but the Government evaded the Court's questions, and denied that its practices implicated the Sixth Amendment." *Id*. at 799.

In October 2016, the district court appointed a special master to investigate. *Id*. at 802. It instructed the USAO to cooperate with the special master, return privileged material it had obtained unlawfully, and preserve documents relevant to the investigation. *Id*. at 808-10. But according to the court, the USAO defied these instructions by (1) deleting files from its computer system and refusing to preserve computer hard drives, *id*. at 814-18; (2) delaying implementation of a litigation hold on relevant files, *id*. at 818-23; (3) failing to make personnel available to the special master, *id*. at 827; (4) failing to produce documents the special master requested, *id*. at 828-29; and (5) misrepresenting to the court whether specific USAO attorneys reviewed certain attorney-client communications, *id*. at 831.

Based on the special master's findings, the district court found that USAO attorneys intentionally intruded on attorney-client communications because they

knew the subpoena would sweep in video footage and phone calls but took no reasonable steps to filter out privileged material. *Id*. at 835-36; 848; 864-65; 898. The court also found there was "no legitimate law-enforcement purpose" for the breadth of the USAO's collection of attorney-client communications. *Id*. at 899. And the court documented at least one occasion on which USAO attorneys used information they gained from the defendant's attorney-client communications to influence plea negotiations with that defendant. *Id*. at 853.

In sum, the district court found that the USAO intruded into a large number of defendants' communications with their attorneys, with no legitimate law-enforcement purpose, and later tried to conceal these actions. As the district court put it, the USAO committed "systemic prosecutorial misconduct" with "far reaching implications in scores of pending [] cases," and exacerbated the harm by "delay[ing] and obfuscat[ing] th[e] investigation" into its misconduct. *Id*. at 903.

By the time of the *Carter* opinion in 2019, many defendants affected by the USAO intrusions, including Mr. Orduno-Ramirez, ROA, Vol. II at 293, had filed motions for post-conviction relief under § 2255. *Carter*, 429 F. Supp. 3d at 903. The district court reassigned all of those cases to itself, *id*. at 904, and later aggregated them into one "consolidated master case." *See* ROA, Vol. I at 444; *see also In re CCA Recordings 2255 Litig.*, No. 19-2491 (D. Kan.) (the "consolidated master case").

C. ***Legal Background***

1. **The Sixth Amendment Right to Counsel**

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel "at all 'critical' stages of the criminal proceedings." *Missouri v. Frye*, 566 U.S. 134, 140 (2012) (quotations omitted). Sentencing is one of the "critical stages." *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Because the primary purpose of the right to counsel is "to secure the fundamental right to a fair trial," the "'benchmark' of a Sixth Amendment claim is 'the fairness of the adversary proceeding.'" *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). Thus, to prove a Sixth Amendment violation, a defendant must normally demonstrate "some effect of [the] challenged conduct on the reliability of the trial process"—prejudice. *Shillinger*, 70 F.3d at 1141 (quotations omitted). To establish prejudice, a defendant must normally show "that there is a realistic possibility of injury to defendants or benefit to the [government]." *Id*. at 1140 (quoting *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984) (quotations omitted)).

But "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id*. at 1141 (alterations in original) (quoting *Strickland*, 466 U.S. at 692). These include "various kinds of state interference with counsel's assistance." *Strickland*, 466 U.S. at 692. For example, the Supreme Court has found per se Sixth Amendment violations when the government prevented the defendant from "consult[ing] his attorney" before testifying, *Geders v. United States*, 425 U.S. 80, 81 (1986), or barred

direct examination of the defendant, *Ferguson v. Georgia*, 365 U.S. 570 (1961). *See also United States v. Lustyik*, 833 F.3d 1263, 1269-70 (10th Cir. 2016) (listing types of per se Sixth Amendment violations). "[P]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692.

In *United States v. Cronic*, 466 U.S. 648 (1984), when discussing ineffective-assistance-of-counsel claims, the Supreme Court identified three circumstances when a per se rule is appropriate: (1) the defendant suffers "the complete denial of counsel . . . at a critical stage" of the criminal justice process; (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id*. at 659-60. These examples illustrate that a per se Sixth Amendment rule is appropriate only for extreme situations. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004) (*Cronic* "illustrated just how infrequently the surrounding circumstances will justify a presumption of ineffectiveness" (quotation and citation omitted)).

The Court's caution about per se rules also extends to cases where the defendant alleges government interference in an attorney-client relationship. For instance, in *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Court struck down a Sixth Amendment per se rule that bypassed the prejudice question. There, an undercover officer participated in the defendant's trial strategy meetings with defense counsel. *Id*. at 547-48. The court of appeals reversed the defendant's conviction,

adopting a "per se right-to-counsel rule" under which any time an undercover officer intruded on attorney-client conversations, "a violation of the defendant's constitutional rights has occurred . . . whether or not any specific prejudice to the defendant's preparation for or conduct of the trial is demonstrated or otherwise threatened." *Id*. at 550. The Court held that this "per se rule cut[] much too broadly." *Id*. at 557. Instead, it said the defendant should be required to demonstrate some likelihood of prejudice due to the intrusion—which was lacking because "at no time did [the officer] discuss with or pass on to . . . the prosecuting attorney . . . any details or information regarding [the defendant's] trial plans." *Id*. at 548 (quotations omitted); *see also id*. at 557-58.

In *United States v. Morrison*, 449 U.S. 361 (1981), the Court again reversed a per se Sixth Amendment ruling. *Id*. at 363-64. The Third Circuit had "concluded that [the defendant's] Sixth Amendment right to counsel had been violated" by law enforcement agents who spoke to her outside her attorney's presence, "and that whether or not any tangible effect upon [the defendant's] representation had been demonstrated or alleged, the appropriate remedy was dismissal of the indictment with prejudice." *Id*. at 363. The Court disagreed, writing that finding a per se violation was inappropriate, and that any Sixth Amendment remedy must be tailored to address the prejudice the defendant suffered. *Id*. at 365 ("Our approach [to putative Sixth Amendment violations] has thus been 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 . . . . Absent such impact on the criminal proceeding, [] there is no basis for imposing a remedy in that proceeding . . . .").[2]

2. ***Shillinger v. Haworth***

In *Shillinger*, the defendant and his attorney conducted several "trial preparation sessions." 70 F.3d at 1134. Because the defendant was in custody, a sheriff's deputy was required to be present. *Id*. The defense attorney "paid the deputy overtime wages for his services," "instructed the deputy to consider himself an employee of defense counsel during the [] sessions," and said that "none of this goes out of this room." *Id*. But the deputy spoke with the prosecuting attorney, who obtained damaging information about the defense and attempted to use it at trial. *Id*. at 1134-36. After a jury convicted the defendant, he sought post-conviction relief, arguing the deputy's actions violated his Sixth Amendment right to counsel. *Id*. at 1136.

We agreed and adopted a per se rule,[3] holding that "a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the

[2] The Court has occasionally upheld per se Sixth Amendment rules in government-interference cases. But as the Court wrote in *Strickland*, most of these rules apply to situations where the government "interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense," such as a "bar on summation at [a] bench trial," a "requirement that [the] defendant be [the] first defense witness," or a "bar on direct examination of [the] defendant." 466 U.S. at 686 (collecting cases; citations omitted).

[3] When we decided *Shillinger*, there was a circuit split on whether "intentional intrusions by the prosecution [on a defendant's attorney-client relationship] constitute *per se* violations of the Sixth Amendment." 70 F.3d at 1140. Some courts held that such an intrusion automatically entitled a defendant to a new trial; others held that

Sixth Amendment rights of a defendant . . . . [A]bsent a countervailing state interest, such an intrusion must constitute a *per se* violation of the Sixth Amendment." *Id*. at 1142. Put differently, "when the [government] becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect . . . must be presumed." *Id*. This presumption is conclusive—the court must accept that the defendant suffered prejudice even if the government presents evidence to the contrary.[4]

In *Shillinger*, we provided two justifications for presuming prejudice: (1) the inherent harmful effect of such intrusions on adversarial proceedings, especially the trial; and (2) the need to deter government misconduct. *Id*.

First, we said intrusions into the attorney-client relationship are a "state-created procedure[] [to] impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him."

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the defendant needed to show prejudice; and others imposed a rebuttable presumption of prejudice on the government. *Id*. at 1140-41.

[4] Courts use the phrase "conclusive presumption" as synonymous with irrebuttable presumption. *See*, *e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268-69 (2014). A "rebuttable presumption" is one that may be disproved. *Id*. (discussing the difference between conclusive and rebuttable presumptions). Instead of using the phrase "conclusive presumption," *Shillinger* said that a pretrial intrusion is a "*per se* violation of the Sixth Amendment. In other words . . . a prejudicial effect on the reliability of the trial process must be presumed." 70 F.3d at 1142. We use "conclusive presumption" to denote the *Shillinger* rule.

Id. at 1141 (quoting *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1979)). These intrusions inherently harm "the reliability of the trial process," meaning "[p]rejudice in these circumstances is so likely that case-by-case inquiry" about prejudice is unnecessary. *Id*. at 1142 (alterations in original) (quoting *Strickland*, 466 U.S. at 692).

Second, we said "direct state interference" with attorney-client communications is "susceptible to easy correction by prophylactic rules." *Id*. at 1142 (quoting *Decoster*, 624 F.2d at 201). We concluded that "no other standard [than a per se rule] can adequately deter this sort of misconduct." *Id*. at 1142.

D. ***The District Court's Generally Applicable Orders***

After the district court discovered the USAO's intrusions into attorney-client communications, it issued a standing order appointing the FPD to represent defendants with claims that the USAO violated their Sixth Amendment rights by collecting privileged communications. The FPD filed separate motions under 28 U.S.C. § 2255 on behalf of multiple defendants, including Mr. Orduno-Ramirez, and argued that they were entitled to a conclusive presumption of prejudice under *Shillinger*. ROA, Vol. I at 638-51.

The district court aggregated these post-conviction proceedings into one consolidated master case, *In re CCA Recordings 2255 Litig.*, No. 19-2491. It then divided over 100 consolidated petitioners' alleged intentional-intrusion Sixth Amendment claims into violations that occurred (1) before the plea or conviction,

(2) after the plea or conviction but before sentencing, and (3) after sentencing. ROA, Vol. I at 641-42.

In December 2021, the district court issued a memorandum and order stating general principles it would apply to the second category of claims—alleged Sixth Amendment violations that occurred "post-plea or conviction but prior to sentencing." *Id*. at 653. For ease of reference, we refer to these situations as "post-plea intrusions." The court held that for such intrusions, *Shillinger*'s conclusive presumption does not apply, and the defendant must show actual prejudice to be entitled to relief. *Id*. at 652.[5]

The district court noted that "when the alleged intrusion occurs after the petitioner entered a guilty plea or was convicted at trial, it eliminates the possibility that the intrusion could have tainted the petitioner's plea or conviction." *Id*. Instead, "[t]he only tainted proceeding could be sentencing." *Id*. at 655. The court said the justifications for *Shillinger*'s conclusive presumption do not support extending the presumption to post-plea intrusions. *Id*. at 652. First, it found that *Shillinger*'s likelihood-of-prejudice rationale applies with less force for a post-plea intrusion

[5] The district court also held that under *Tollett v. Henderson*, 411 U.S. 258 (1973), defendants who suffered pretrial intrusions and later pled guilty waived any later challenge to those intrusions. *Tollett* held that "[w]hen a criminal defendant has [pled guilty], he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea," except to the extent the deprivation rendered his plea involuntary. 411 U.S. at 267. The *Tollett* rule applies only to pre-plea constitutional violations. It does not foreclose relief for Mr. Orduno-Ramirez because his alleged Sixth Amendment violation occurred after he pled guilty.

violation because it does not "pervade the entire criminal proceeding . . . the way it does at trial," and "does not implicate the same potential for prejudice." *Id*. at 655. Second, as to *Shillinger*'s deterrence rationale, the district court said the USAO's misconduct was serious, but "[d]eterrence of such misconduct alone is not enough to justify presumptive relief" absent "the fairness or reliability concerns identified" in *Shillinger*. *Id*. at 657.

II. BACKGROUND – MR. ORDUNO-RAMIREZ'S CASE

Mr. Orduno-Ramirez's case became enmeshed in the USAO intrusions outlined above.

A. *Indictment and Guilty Plea*

In October 2014, Mr. Orduno-Ramirez was indicted in the District of Kansas for conspiracy to distribute and possess with intent to distribute more than 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(viii). The district court appointed Kevin Babbitt to represent him. Mr. Orduno-Ramirez was incarcerated at CCA pending trial. On April 13, 2016, he pled guilty under a plea agreement.

B. *Government Intrusion*

Between March 11 and April 11, 2016—before Mr. Orduno-Ramirez pled guilty—he met four times with Mr. Babbitt in an attorney visitation room at CCA. ROA, Vol. I at 258-59. On May 6—after he pled guilty—Mr. Orduno-Ramirez and Mr. Babbitt met to discuss his case in advance of sentencing. *Id*. at 259-60. The visitation room surveillance camera captured video footage, but not sound, from

these meetings. *Id*. at 258-59. On May 17, the USAO obtained copies of these five soundless video recordings. *Id*. at 603.

Mr. Orduno-Ramirez does not argue that CCA's choice to keep a video camera in the attorney meeting room was itself an intrusion. Rather, he asserts that the intrusion occurred when the USAO obtained the footage on May 17. *See* Aplt. Br. at 3. The parties thus agree that the USAO intruded on Mr. Orduno-Ramirez's communications with his attorney only after he pled guilty. *See also* Aplee. Br. at 65.[6]

The recordings reveal little about Mr. Orduno-Ramirez's interactions with Mr. Babbitt because they contain no sound. In each recording, Mr. Babbitt and Mr. Orduno-Ramirez appear to speak, make gestures, and examine documents and legal materials. *See* ROA, Vol. I at 258-60.[7]

C. ***Sentencing and Direct Appeal***

In November 2017, the district court sentenced Mr. Orduno-Ramirez to 144 months in prison, a below-Guidelines-range sentence reflecting a 44-month

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[6] Even though some of the video footage depicted pre-plea meetings between Mr. Orduno-Ramirez and Mr. Babbitt, the intrusion here was post-plea because the Government acquired the footage after Mr. Orduno-Ramirez pled guilty. *See* Aplt. Br. at 19 (describing the issue in this case as "whether a prosecutor who intentionally intrudes upon the defendant's attorney-client communications after a trial or guilty plea, but before sentencing, commits a per se Sixth Amendment violation"); Aplee. Br. at 5.

[7] This description of the videos derives from a summary of their contents by Mr. Orduno-Ramirez's counsel, prepared at the direction of the district court. *See* ROA, Vol. I at 257-60.

downward variance. Mr. Orduno-Ramirez appealed his sentence, arguing it should have been lower because he was a minor participant in the conspiracy. We affirmed. *United States v. Orduno-Ramirez*, 719 F. App'x 830, 830-31 (10th Cir. 2017) (unpublished).

D. ***Post-Conviction § 2255 Proceedings***

In March 2019, the FPD moved on behalf of Mr. Orduno-Ramirez for postconviction relief under 28 U.S.C. § 2255, alleging that the Government violated his Sixth Amendment right to counsel by intruding on his attorney-client communications. ROA, Vol. II at 293-328. Mr. Orduno-Ramirez argued that *Shillinger*'s presumption should extend to post-plea intrusions, and he therefore did not need show prejudice to succeed on his Sixth Amendment claim. *Id*. at 314-15.

The Government opposed the motion, arguing that *Shillinger*'s conclusive presumption should not extend to the sentencing phase. And it contended that Mr. Orduno-Ramirez had not shown any actual prejudice. ROA, Vol. II 360-63. To support this contention, the Government submitted an affidavit from the lead prosecutor in Mr. Orduno-Ramirez's case stating that "[a]t no time during my involvement in this case did I view or was privy to any video recordings of the defendant at CCA" and "[a]t no time prior to the defendant's sentencing . . . was I aware that video recordings existed of the defendant's meetings at CCA with his defense counsel." *See* ROA, Vol. II at 385-86. At one point, another prosecutor entered an appearance in Mr. Orduno-Ramirez's case, but she withdrew from the case in 2016—well before Mr. Orduno-Ramirez's sentencing. *Id*. at 385. Thus, the only

prosecutor involved in Mr. Orduno-Ramirez's sentencing did not view the soundless video recordings.[8]

The Government also pointed out that Mr. Orduno-Ramirez had not identified "any snippet on any video in his case where the substance of discussions relating to legal advice or strategy is discernible or ascertainable by any viewer of the video." *Id*. at 360. The Government further observed that prejudice was unlikely because Mr. Orduno-Ramirez received a favorable sentence. *Id*. at 362.

Mr. Orduno-Ramirez's § 2255 motion became part of the consolidated master case, *In re CCA Recordings 2255 Litig.*, No. 19-2491, along with the other post-conviction proceedings. As noted, the district court's December 2021 order in the consolidated case held that the *Shillinger* conclusive presumption does not apply to post-plea intrusions. The court then applied this holding to Mr. Orduno-Ramirez's § 2255 motion. ROA, Vol. II at 539-53. It rejected his claim that the Government's intrusion into his communications with his attorney constituted a per se Sixth Amendment violation. The court also found there was no "realistic possibility that [Mr. Orduno-Ramirez] was prejudiced as a result of the government's alleged intrusion" because (1) the Government received the video recordings after he pled

[8] At oral argument, the FPD noted that the other prosecutor did not withdraw from Mr. Orduno-Ramirez's case until after the USAO obtained the video recordings, suggesting that she could have communicated the content of those recordings to the lead prosecutor before Mr. Orduno-Ramirez's sentencing. Oral Arg. at 30:00-30:45. But this suggestion is speculative and does not warrant disregarding the lead prosecutor's sworn statement that he was not aware of the videos at the time of sentencing.

guilty, so the intrusion did not affect the plea negotiations; and (2) his "sentencing bears no indicia of a tainted proceeding." *Id*. at 551-52. The court thus denied Mr. Orduno-Ramirez's § 2255 motion and declined to grant a COA. We granted a COA, and this appeal followed.

III. **DISCUSSION**

In evaluating the denial of Mr. Orduno-Ramirez's § 2255 motion, "we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011).

On appeal, 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. *See* Aplee. Br. at 28, 47. Mr. Orduno-Ramirez does not contend that he suffered any actual prejudice from the intrusion. Aplt. Br. at 12. The only disputed question is whether *Shillinger*'s conclusive presumption should extend to post-plea government intrusions.

A. ***No Conclusive Presumption of Prejudice***

Mr. Orduno-Ramirez urges us to reverse the district court and hold that *Shillinger*'s conclusive presumption categorically extends to sentencing. We are not persuaded this is the proper course.

A Sixth Amendment per se rule of prejudice is a blunt legal instrument. *Lustyik*, 833 F.3d at 1268 ("[A] rigid, *per se* rule is, by its nature, too blunt an instrument to account for the legitimate demands of the adversarial system.") (citation and

quotations omitted). The Supreme Court has cautioned against sweeping Sixth Amendment rules that "cut[] much too broadly." *Weatherford*, 429 U.S. at 557; *see* 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 2.9(g) (4th ed.) (explaining that in the Sixth Amendment context, a "*per se* standard is either overinclusive or underinclusive as compared to the application of that function to all relevant circumstances on a case-by-case basis").

The case to create a Sixth Amendment conclusive presumption must therefore be especially strong. The record must demonstrate a high likelihood of prejudice. *See Strickland*, 466 U.S. at 692. In deciding whether there should be a per se prejudice rule for post-plea intrusions, we consider the rationales underlying the *Shillinger* conclusive presumption for pretrial intrusions.

1. **Likelihood of Prejudice**

In *Shillinger*, we concluded that a pretrial government intrusion into attorney-defendant communications is so likely to cause prejudice at trial that "case-by-case inquiry into prejudice is not worth the cost." 70 F.3d at 1142 (quoting *Strickland*, 466 U.S. at 692). We repeatedly referred to the high risk that such an intrusion will prejudice the trial process. *Id*.[9] In *Cronic*, the Supreme Court said that the "Sixth Amendment guarantee is generally not implicated" without "some effect . . . on the

[9] We concluded that "a prejudicial effect on the reliability of the trial process must be presumed" in cases of intentional intrusion, and observed that "groundless prosecutorial intrusions are never harmless because they necessarily render a trial fundamentally unfair." *Shillinger*, 70 F.3d at 1142.

reliability of the trial process." 466 U.S. at 658. Neither *Shillinger* nor *Cronic* said anything about the likelihood of prejudice extending to sentencing.

A post-plea intrusion is less likely to cause prejudice than a pretrial intrusion because the latter can taint any part of a criminal prosecution—trial, sentencing, or both—and greatly expand the task of ascertaining prejudice as compared to a post-plea intrusion.[10] As the district court said in its December 2021 order, "when the alleged intrusion occurs after the petitioner entered a guilty plea or was convicted at trial, it eliminates the possibility that the intrusion could have tainted the petitioner's plea or conviction," ROA, Vol. I at 652, and thus "does not implicate the same potential for prejudice," *id*. at 655. In short, *Shillinger*'s primary concern—that a pretrial intrusion will prejudice the trial—is absent when the intrusion is post-plea.

Another way to assess the likelihood of prejudice is to compare the risk at trial and sentencing. Commonly understood features of sentencing suggest the risk of prejudice is lower at sentencing because the opportunity for a prosecutor to use information from attorney-defendant communications is narrower.[11] Judges and

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[10] A district court evaluating a pretrial intrusion "face[s] the virtually impossible task of reexamining the entire proceeding to determine whether the disclosed information influenced the government's investigation or presentation of its case or harmed the defense in any other way." *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978).

[11] The following general observations briefly touch on only a few aspects of sentencing and are made with appreciation for the variety of trials and sentencings. They are, of course, subject to exceptions and debate. But, along with the other points made here about likelihood of prejudice, they support the norm of needing to establish prejudice for a Sixth Amendment violation.

prosecutors can and do play significant roles in both proceedings. But at sentencing, the judge finds facts[12] and imposes punishment,[13] largely in reliance on the Probation Office's presentence investigation report.[14] If the defendant pled guilty—which occurs in nearly 90 percent of federal cases[15]—the court may also rely on factual stipulations in the plea agreement.[16] As a result, the prosecutor plays a lesser role relative to the judge at sentencing than at trial, especially when a plea agreement limits prosecutorial discretion.[17] The prosecutor thus has less opportunity to influence sentencing than at trial with information gleaned from a post-plea

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[12] The district judge "may accept any undisputed portion of the presentence report as a finding of fact" and "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary . . . ." Fed. R. Crim. P. 32(i)(3)(A), (B). *See United States v. Lozano*, 921 F.3d 942, 946 (10th Cir. 2019) (district court is factfinder at sentencing).

[13] "The court shall determine the kinds of sentence and the guideline range . . . ." United States Sentencing Guideline § 1B1.1(a). *See United States v. Smart*, 518 F.3d 800 (10th Cir. 2008) (district court makes ultimate determination of a defendant's sentence).

[14] A "probation officer shall make a presentence investigation of [the] defendant . . . and shall . . . report the results of the investigation to the court." 18 U.S.C. § 3552(a). *See United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014) (explaining how the district court can use the facts in the presentence report to inform its sentencing).

[15] "Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement." U.S. Sent'g Guidelines Manual at 8 (U.S. Sent'g Comm'n 2021).

[16] *See United States v. Richardson*, 901 F.2d 867, 869 (10th Cir. 1990) (district court can, but is not required to, rely on stipulated facts in plea agreement).

[17] *See United States v. Scott*, 469 F.3d 1335, 1340 (10th Cir. 2006) (the government cannot argue for a higher sentence than agreed to in plea agreement).

intrusion.[18] Further, judges can protect against the risk of prejudice to defendants at sentencing because they are often better situated than juries to screen improperly gained information.[19]

One further consideration cuts against creating a per se prejudice rule here based on likelihood of prejudice—a comparison between the facts underlying *Shillinger* and this case. In *Shillinger*, a law enforcement official disclosed confidential attorney-client trial-preparation communications to the prosecution. 70 F.3d at 1137-38. Here, the USAO obtained, after the guilty plea and before sentencing, soundless video footage of Mr. Orduno-Ramirez meeting with counsel. We viewed the likelihood of prejudice to be so great in *Shillinger* that we not only found a per se violation but also announced a broad per se rule for all pretrial intrusions. The facts in this case present no comparable likelihood.

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[18] Much of a prosecutor's influence over sentencing occurs before a plea or conviction through the charging decision, plea negotiations, and plea agreements—which occur before a post-plea intrusion. *See* Arthur W. Campbell, Law of Sentencing § 12.1 (Sept. 2022 update).

[19] *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 55 (2006) (In contrast to juries, "[j]udges . . . are repeat players with more information about criminal justice purposes and practicalities. Thus, they necessarily have broader insights about punishment options and how to sentence effectively . . . . In short, judges are more flexible, expert, can better apply complex rules, and can try to equalize outcomes across a range of cases."); *see also Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 896 (10th Cir. 2000) ("[I]n bench trials, questions raised relative to the admission or exclusion of evidence become relatively unimportant, because the rules of evidence are intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the verdict," whereas judges can "consider[] only competent evidence and disregard[] any incompetent evidence." (quotations and alterations omitted)).

Mr. Orduno-Ramirez advances various arguments about how the prosecutors can use "ill-gotten attorney-client communications" to prejudice a defendant at sentencing. Aplt. Reply Br. at 7-8; *see also* Aplt. Br. at 33-40. We agree that this is possible. For example, he contends that prosecutors could advocate for fact-intensive upward adjustments at sentencing, possibly based on improperly obtained information. Aplt. Reply Br. at 7-8. But the possibility of prejudice is not enough to warrant a per se rule. Instead, *Strickland* and *Cronic* admonish that "prejudice is presumed" only when "[p]rejudice . . . is *so likely* that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (emphasis added). And for the reasons discussed above, post-plea intrusions do not meet that standard.

Mr. Orduno-Ramirez thus has not made the strong case needed for a conclusive presumption of prejudice based on a post-plea intrusion. He has given us no reason to expect a risk of prejudice at sentencing from a post-plea intrusion that rises to the level of what the *Shillinger* panel feared would occur at trial from a pretrial intrusion.[20] And he has not shown why we should disregard the Supreme Court's caution against Sixth Amendment per se prejudice rules.

[20] Indeed, the district court said in its December 2021 order that all § 2255 movants in the consolidated cases, including Mr. Orduno-Ramirez, who were seeking relief based on post-plea/pre-sentencing intrusions, "acknowledge that they cannot demonstrate the possibility of prejudice on their Sixth Amendment claims, but instead allege presumptive prejudice under the rule in *Shillinger*." ROA, Vol. I at 652. This alone shows that creating a per se prejudice rule would be "overinclusive . . . compared to" determining prejudice "on a case-by-case basis." 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 2.9(g) (4th ed.).

We intend none of the foregoing to suggest that post-plea government intrusions into attorney-defendant communications pose no significant risk to sentencing proceedings. They may do so, and should be taken seriously, but not through an overinclusive per se prejudice rule.

2. **Deterrence**

In *Shillinger*, this court also relied on deterrence to create a per se prejudice rule. We said "no other standard can adequately deter this sort of misconduct." 70 F.3d at 1142. Despite the district court's deep concern about the USAO's systemic intrusions into many attorney-defendant communications at the CCA, a concern that we share, it determined that deterrence was not sufficient to extend a conclusive presumption of prejudice to post-plea intrusions without "the fairness or reliability concerns identified" in *Shillinger*. ROA, Vol. I at 657.

Like the district court, we read *Shillinger* as weighing the likelihood of prejudice and the need for deterrence together as complementary factors. Although the USAO's systemic conduct may point to the need for a "prophylactic rule[]," *Shillinger*, 70 F.3d at 1142 (quotations and citations omitted), we are mindful of the Supreme Court's caution against per se or sweeping Sixth Amendment rules that obviate consideration of prejudice in every instance. We find insufficient reason here to adopt a per se rule.

* * * *

The "'benchmark' of a Sixth Amendment claim is 'the fairness of the adversary proceeding.'" *Shillinger*, 70 F.3d at 1141 (quoting *Nix*, 475 U.S. at 175).

At sentencing, a government intrusion into attorney-client communications does not render prejudice "so likely that case-by-case inquiry into prejudice is not worth the cost." *Id*. at 1142 (quoting *Strickland*, 466 U.S. at 692). Nor does the need to deter government misconduct warrant a conclusive presumption of prejudice. We therefore affirm the district court's determination that *Shillinger*'s conclusive presumption does not extend to post-plea intrusions.

B. ***Actual Prejudice***

Without a conclusive presumption, a defendant must suffer prejudice from a post-plea intrusion into attorney-client communications to obtain relief under the Sixth Amendment. The district court said the defendant must show prejudice, but we need not decide which party bears the burden because the Government has shown that Mr. Orduno-Ramirez has not been prejudiced, and he does not contend otherwise. We therefore leave open whether the defendant must show prejudice or the government must show lack of prejudice.[21] Because Mr. Orduno-Ramirez has not

[21] As the district court pointed out in its January 2021 and December 2021 orders, the Supreme Court has not resolved "the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information." ROA, Vol. I at 451; 645; 653 (quotations and citations omitted); *see Cutillo v. Cinelli*, 485 U.S. 1037, 1037-38 (1988) (White, J., dissenting from denial of cert.) (noting circuit split on who bears the burden to prove prejudice).

In most cases, a defendant alleging a Sixth Amendment violation must show prejudice. *See Strickland*, 466 U.S. at 658. But courts may shift the burden on an issue "when the true facts relating to a disputed issue lie peculiarly within the knowledge of" the party opposing relief, making it difficult for the party seeking relief to bear the burden of proof. *Hennessey v. Univ. of Kansas Hosp. Auth.*, 53 F.4th 516, 530 (10th Cir. 2022) (quotations and citation omitted); *see also Lima v. United States*, 708 F.2d 502, 509

been prejudiced, there is no Sixth Amendment violation and no ground for § 2255 relief.

In the district court, the judge and the Government assumed that Mr. Orduno-Ramirez bore the burden to show prejudice. Nonetheless, the Government introduced affirmative evidence and arguments demonstrating that Mr. Orduno-Ramirez suffered no prejudice. The Government showed:

(1) The lead prosecutor did not view the videos, and the other prosecutor withdrew from the case before Mr. Orduno-Ramirez's sentencing. ROA, Vol. II at 385-86. Thus, no prosecutor involved in the sentencing was aware of the contents of the recordings.

(2) The soundless video recordings provided no strategic value to the prosecution. Aplee. Br. at 52-53; ROA, Vol. II at 359-60.[22]

(10th Cir. 1983) (noting the merit of "redistribut[ing] the burden [of proof] to those who have superior knowledge of the truth and better access to evidence").

In fact, the First Circuit uses a burden-shifting approach for government intrusions on attorney-client communications. *United States v. DelCologero*, 530 F.3d 36, 64 (1st Cir. 2008) ("[W]e only require defendants to make a prima facie showing of prejudice by proving that confidential communications were conveyed as a result of the government intrusion into the attorney-client relationship. The burden then shifts to the government to show that the defendant was not prejudiced; that burden is a demanding one." (quotations, citations, and alterations omitted)).

[22] The recordings depict only Mr. Orduno-Ramirez and his attorney talking without revealing their conversation. ROA, Vol. I at 258-60. Mr. Orduno-Ramirez says a viewer could "observe non-verbal communications" like "body language," or "use [] viewing software to zoom in, for instance, on a document." Aplt. Br. at 4 (quotations omitted). While this may be true in some cases, nothing in the record suggests that the Government could gain usable information from the videos in this case.

(3) The record reveals no irregularity in Mr. Orduno-Ramirez's sentencing.[23]

The Government therefore showed the intrusion did not cause prejudice, and Mr. Orduno-Ramirez does not contend he was prejudiced. We agree with the district court that Mr. Orduno-Ramirez's "sentencing bears no indicia of a tainted proceeding." ROA, Vol. II at 552.

IV. **CONCLUSION**

We affirm the district court's denial of Mr. Orduno-Ramirez's § 2255 motion.[24]

[23] Mr. Orduno-Ramirez objected to a number of factual findings in his presentence investigation report. In response, the Government cited extensive evidence from the investigation into Mr. Orduno-Ramirez, including statements by his alleged co-conspirators. None of the information the Government relied on for sentencing could have come from the soundless video recordings. Mr. Orduno-Ramirez's 144-months prison sentence fell below the Guidelines range.

[24] On February 14, 2023, Mr. Orduno-Ramirez filed a motion asking us to order supplemental briefing on whether we should adopt a rebuttable presumption of prejudice when, between a plea and sentencing, the prosecution intrudes on defense attorney/client communications. We denied the motion because we do not decide that issue here. Mr. Orduno-Ramirez, nonetheless, submitted his arguments in a letter filed under Federal Rule of Appellate Procedure 28(j), and the Government filed a response.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re CCA Recordings 2255 Litigation, **Petitioners,**	**Case No. 19-cv-2491** **(This Document Relates to Case Nos. 15-cr-20043-JAR-2, United States v. Aguilera, 20-cv-02027-JAR, Aguilera v. United States; 14-cr-20096-JAR-5, United States v. Alvarez, 19-cv-2227-JAR, Alvarez v. United States; 15-cr-20045-JAR-1, United States v. Birdsong, 19-cv-02406-JAR, Birdsong v. United States; 15-cr-20086-DDC-1, United States v. Blakney, 18-cv-02454-JAR, Blakney v. United States; 14-cr-20096-JAR-3, United States v. Chinchilla, 19-cv-02392-JAR, Chinchilla v. United States; 14-cr-20130-JAR-2, United States v. Clark, 19-cv-02410-JAR, Clark v. United States; 14-cr-20096-JAR-6, United States v. Faulkner, 18-cv-02452-JAR, Faulkner v. United States; 15-cr-20042-JAR-2, United States v. Felix-Gamez, 18-cv-02487-JAR, Felix-Gamez v. United States; 14-cr-20068-DDC-2, United States v. Galvan-Campos, 19-cv-02055-JAR, Galvan-Campos v. United States; 14-cr-20134-JAR-1, United States v. Harssfell, 19-cv-02722-JAR, Harssfell v. United States; 15-cr-20019-JAR-1, United States v. Haupt, 18-cv-02423-JAR, Haupt v. United States; 15-cr-20100-JAR-1, United States v. Hollins, 18-cv-02465-JAR, Hollins v. United States; 15-cr-20032-DDC-2, United States v. Hurtado; 18-cv-2463-JAR-JPO, Hurtado v. United States; 15-cr-40064-DDC-1, United States v. Johnson, 18-cv-04099-JAR, Johnson v. United States; 14-cr-20138-DDC-1, United States v. Jones; 18-cv-2554-JAR-JPO, Jones v. United States; 16-cr-**

20022-JAR-2, United States v. Gary Jordan, 19-cv-2015-JAR-JPO, Gary Jordan v. United States; 15-cr-40078-DDC-1, United States v. Krites, 18-cv-04096-JAR, Krites v. United States; 14-cr-20068-DDC-5, United States v. Lougee, 19-cv-02226-JAR, Lougee v. United States; 15-cr-20098-JAR-1, United States v. Love; 19-cv-2732-JAR-JPO, Love v. United States; 16-20003-DDC-1, United States v. McCambry; 19-2394-JAR-JPO, McCambry v. United States; 15-cr-20050-JAR-1, United States v. McDaniel, 19-cv-02145-JAR, McDaniel v. United States; 14-cr-20035-JAR-1, United States v. Meinert, 18-cv-02455-JAR, Meinert v. United States; 14-cr-20068-JAR-9, United States v. Murphy, 19-cv-02365-JAR, Murphy v. United States; 14-cr-20096-JAR-1, United States v. Olea-Monarez; 20-cv-2051-JAR-JPO, Olea-Monarez v. United States; 14-cr-20096-JAR-7, United States v. Orduno-Ramirez, 19-cv-02166-JAR, Orduno-Ramirez v. United States; 15-cr-20019-JAR-2, United States v. Pavone; 20-cv-02400-JAR, Pavone v. United States; 14-cr-20014-JWL-13, 15-cr-20006-JAR-1, 15-cr-20020-JAR-5, United States v. Phommaseng, 18-cv-02477-JAR, 18-cv-02478-JAR, 18-cv-02479, Phommaseng v. United States; 15-cr-40059-DDC-2, United States v. Ramirez, 19-cv-04059-JAR, Ramirez v. United States; 14-cr-20067-JAR-1, United States v. Rapp, 18-cv-02117-JAR, Rapp v. United States; 12-cr-20003-JAR-10, United States v. Redifer, 19-cv-02594-JAR, Redifer v. United States; 15-cr-20042-JAR-1, United States v. Roark, 19-cv-02405-JAR, Roark v. United States; 15-cr-20099-DDC-1, United States v. Shevlin; 18-cv-2501-JAR-JPO, Shevlin v. United States; 13-cr-40123-JAR-1, United States v. Sneed, 19-cv-04008-

JAR, Sneed v. United States; 13-cr-20070-JAR-4, United States v. Tillman, 19-cv-02083-JAR, Tillman v. United States; 14-cr-20096-JAR-8, United States v. Valdez, 19-cv-02254-JAR, Valdez v. United States; 13-cr-20081-JAR-1, United States v. Warren, 19-cv-02220-JAR-1, Warren v. United States; 15-cr-20081-DDC-2, United States v. Wilson, 18-cv-02499-JAR, Wilson v. United States)

v.

United States of America,

Respondent.

MEMORANDUM AND ORDER

This matter comes before the Court on the above-captioned consolidated petitioners' Motions to Vacate and Discharge with Prejudice under 28 U.S.C. § 2255. These petitioners allege that the government violated the Sixth Amendment by intentionally and unjustifiably intruding into their attorney-client relationships by becoming privy to their attorney-client communications after their guilty pleas or convictions, but before they were sentenced. Petitioners ask the Court to reject the government's request to dismiss their motions on procedural grounds and find that they have made a sufficient showing to warrant an evidentiary hearing. As a remedy, petitioners ask the Court to vacate their judgments with prejudice to refiling or alternatively, to reduce their custodial sentence by 50% and vacate any term of supervised release.

Most of these petitioners recently requested the Court to set a status conference to determine whether and when their respective habeas motions should be set for evidentiary

hearing.[1] This Court declined to set the matter for a status conference, explaining that it intended to issue orders on the majority of these pending motions after review of and in conjunction with the post-evidentiary briefing in *Hohn v. United States*, No. 19-2082, where the petitioner alleged a pretrial Sixth Amendment violation.[2] The Court has now ruled in *Hohn*, clarifying that a pretrial violation alleged under the Tenth Circuit's decision in *Shillinger v. Haworth* is a per se Sixth Amendment violation that is not subject to harmless-error analysis.[3] In this Order, the Court addresses whether the *Shillinger* per se rule *categorically* applies when the alleged Sixth Amendment violation occurs post-plea or conviction but prior to sentencing.

I. Background

The Court assumes the reader is familiar with its January 18, 2021 Order in the consolidated master case that frames the issue now before the Court ("January 18 Order").[4] That Order addressed the governing standard for Sixth Amendment intentional-intrusion claims under *Shillinger*, which held that a per se violation occurs when the government becomes privy to protected attorney-client communications because of its purposeful, unjustified intrusion into the attorney-client relationship.[5]

The January 18 Order generally divides over 100 consolidated petitioners' alleged intentional-intrusion Sixth Amendment claims into three temporal categories: (1) violations that occurred before the plea or conviction; (2) violations that occurred after the plea or conviction

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[1] Doc. 1023. Unless otherwise specified, citations prefaced with "Doc." refer to filings and docket entries in this consolidated case, *In re CCA Rec. 2255 Lit.*, Case No. 19-2491-JAR-JPO. With the exception of *United States v. Carter*, Case No. 16-20032-JAR, Doc. 758 (D. Kan. Aug. 13, 2019) ("*Black* Order"), citations to filings in Case No. 16-20032-JAR are prefaced with "*Black*, Doc."

[2] Doc. 1026.

[3] Doc. 1033 (citing 70 F.3d 1132 (10th Cir. 1995)).

[4] Doc. 730.

[5] 70 F.3d at 1142.

but before sentencing; and (3) violations that occurred after sentencing.[6] This temporal categorization was driven in part by the parties' divergent approaches to applying Tenth Circuit precedent in *Shillinger*. Petitioners seek to apply *Shillinger*'s per se rule to all alleged violations, regardless of timing and circumstance; the government effectively ignores the per se rule or attempts to discount that extant decision as simply bad law.

Given the number of cases affected, the Court endeavored to establish legal standards common to these categories of petitioners, with individualized application to follow for each petitioner. The Court determined that the rule in *Tollett v. Henderson*[7] procedurally barred petitioners who alleged pre-plea Sixth Amendment violations from advancing those claims.[8] The Court dismissed one petitioner's § 2255 motion on these grounds and certified the issue for appeal; thirty-nine petitioners have successfully moved the Court to stay dismissal of their claims pending the appeal of that case.[9] The Court also determined that approximately twenty petitioners lacked standing to advance their Sixth Amendment claims for various reasons, including: claims that alleged post-sentencing violations; claims where petitioners who had been deported challenged only their sentence; claims where petitioners challenging their sentence had been sentenced to the mandatory-minimum sentence; and claims involving binding pleas that were accepted by the court at the change-of-plea hearing.[10]

The Court contemporaneously ruled that three petitioners who proceeded to trial in their underlying criminal proceedings are entitled to evidentiary hearings on their Sixth Amendment

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[6] *See* Docs. 730, 784.

[7] 411 U.S. 258 (1973).

[8] Doc. 730 at 29–41.

[9] Docs. 874, 922.

[10] Docs. 730, 784.

claims involving audio recordings.[11] These petitioners, including Hohn, are in the first temporal category of claims asserting pretrial Sixth Amendment violations. Two of those petitioners' motions were resolved by the parties; Hohn's evidentiary hearing was held August 9 and 10, 2021.[12] The Court ultimately denied Hohn's § 2255 motion on the merits after determining that he did not satisfy the protected-communication element under *Shillinger*.[13]

From the outset, the government has argued that each and every petitioner's Sixth Amendment claim in these consolidated proceedings is subject to harmless-error review, under which constitutional error may be disregarded on habeas review unless found to have had "substantial and injurious effect or influence" on the outcome of the underlying proceeding.[14] The Court addressed the government's harmless-error argument prior to the evidentiary hearing in *Hohn*.[15] The Court rejected the government's claim that it needed to review the protected attorney-client communications prior to the evidentiary hearings in order to determine whether any alleged Sixth Amendment violation amounts to harmless error.

The above-captioned petitioners assert or have moved for leave to amend to assert claims in the second temporal category of motions alleging post-plea or conviction, pre-sentencing Sixth Amendment violations. As in *Hohn*, the government argues that these petitioners' claims are subject to harmless-error analysis.

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[11] Docs. 731 (Vernon Brown); 732 (William Mitchell); 758 (Steven Hohn).

[12] The Court is still reviewing one remaining § 2255 motion for a petitioner who proceeded to trial and who alleges a video recording claim. *See United States v. Cortez-Gomez*, No. 16-40091-01-DDC.

[13] Doc. 1033.

[14] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[15] Doc. 940. The Court's order also applied to consolidated petitioner William Mitchell; the parties subsequently resolved his § 2255 motion by agreement.

II. Sixth Amendment Standard

The January 18 Order sought to reaffirm the Court's analysis and legal determinations regarding what is required in the Tenth Circuit to establish a violation of the Sixth Amendment based on the government's alleged intentional intrusion into petitioners' protected attorney-client communications and is incorporated by reference herein.[16] The Court will provide excerpts from the January 18 Order as needed to frame and inform its discussion of the issues presently before it.

A. Overview

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence."[17] Claims of government intrusion into the attorney-client relationship like those at issue here are included in the category of cases to be considered when deciding if a defendant has been denied the right to effective assistance of counsel. The Supreme Court has explained that this right has been accorded "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[18]

In general, to prevail on an ineffective assistance of counsel claim under the Sixth Amendment, a petitioner has the burden of showing a reasonable probability of prejudice.[19] In *Strickland v. Washington*, the Supreme Court set forth the familiar two-prong standard for evaluating ineffective assistance of counsel: that counsel's performance was deficient and that deficiency prejudiced the defense.[20] The prejudice requirement, which is at issue in this case,

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[16] Doc. 730 at 5–20.

[17] U.S. Const. amend. 6.

[18] *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

[19] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[20] *Id.*

"arises from the very nature of the right to effective representation."[21] In other words, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."[22]

Relevant here, the Sixth Amendment right to effective assistance of counsel includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference.[23] The Supreme Court has held that the government violates the Sixth Amendment when it intentionally interferes with the confidential relationship between defendant and defense counsel and that interference prejudices the defendant.[24] The Court did not, and still has not, resolved "the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information."[25] As discussed in detail in the January 18 Order, federal appellate courts are divided on the issue in cases where the prosecution intentionally obtained, without any legitimate justification, confidential attorney-client information.[26] As discussed below, the Tenth Circuit has found a per se violation of the Sixth Amendment once the defendant demonstrates that the prosecution improperly intruded into the attorney-client relationship.[27]

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[21] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006).

[22] *Id.* (citing *Strickland*, 466 U.S. at 685).

[23] *See Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1979) ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard.").

[24] *See United States v. Morrison*, 449 U.S. 361, 365 (1981); *Weatherford*, 429 U.S. at 554 n.4.

[25] *Cutillo v. Cinelli*, 485 U.S. 1037 (1988) (White, J., dissenting from denial of certiorari); *see Kaur v. Maryland*, 141 S. Ct. 5 (2020) (Sotomayor, J., statement respecting denial of certiorari).

[26] *See Cutillo*, 485 U.S. at 1037–38 (White, J., dissenting) (noting conflicting approaches between the Circuits in cases where the Sixth Amendment violation involves the transmission of confidential defense strategy information); Doc. 730 at 9–10 (discussing split among the circuit courts of appeal and collecting cases).

[27] *Shillinger v. Haworth*, 70 F.3d 1132, 1141–42 (10th Cir. 1995).

B. *Shillinger v. Haworth*

In *Shillinger*, the prosecutor solicited information about the defendant's pre-trial preparation sessions from a sheriff's deputy who was present in the courtroom and used that information at trial to impeach the defendant and again in closing argument.[28] The Tenth Circuit held that the 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 constitutes a per se violation of the Sixth Amendment.[29] In other words, when the government becomes privy to confidential communications because of its unjustified, purposeful intrusion into the attorney-client relationship, "a prejudicial effect on the reliability of the trial process must be presumed."[30] The Tenth Circuit clarified, however, that this per se rule "in no way affects the analysis to be undertaken in cases in which the state has a legitimate law enforcement purpose for its intrusion."[31] Such cases would require proof of prejudice, or "'a realistic possibility of injury to [the defendant] or benefit to the [government]' in order to constitute a violation of a defendant's Sixth Amendment rights."[32]

The court further recognized that even where there has been an unjustified intrusion resulting in a per se Sixth Amendment violation, the court must fashion a remedy "tailored to the injury suffered."[33] After affirming the lower court's grant of habeas relief, the *Shillinger* court remanded for an evidentiary hearing to determine if the remedy imposed—a new trial—was tailored to cure the taint of the intentional-intrusion violation or whether the government's

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[28] *Id.* at 1134–36.

[29] *Id.* at 1142.

[30] *Id.*

[31] *Id.* (citing *Weatherford v. Bursey*, 429 U.S. 545, 557 (1977)).

[32] *Id.* (alteration in original) (quoting *Weatherford*, 429 U.S. at 558).

[33] *Id.* (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

conduct justified a different remedy, such as recusal of the original prosecution team or even dismissal of the indictment.[34]

In the January 18 Order, this Court rejected the government's broad arguments that the consolidated petitioners are not entitled to rely upon *Shillinger*'s per se rule for several reasons. First, the Court found that the ruling was not dicta. Because the *Shillinger* court expressly concluded that this per se rule provides "the relevant standard" for assessing intentional-intrusion claims, it is binding Tenth Circuit precedent.[35]

Second, the Court rejected the government's argument that under the Supreme Court's decision in *United States v. Gonzalez-Lopez*,[36] petitioners must nonetheless establish actual prejudice to succeed on their Sixth Amendment claims.[37] Because the *Shillinger* court expressly acknowledged both *Strickland*'s general rule and its direct state-interference exception, this Court explained that *Gonzalez-Lopez* does not alter that exception that a defendant need not always show prejudice to prove an ineffective-assistance Sixth Amendment claim.[38] And because the Tenth Circuit reached the same conclusion in *Shillinger*, the decision is consistent with the Supreme Court's decision in *Gonzalez-Lopez*.[39]

Third, the Court addressed the government's position questioning whether *Shillinger* is good law in light of the Supreme Court's view in *Weatherford v. Bursey* and *United States v. Morrison* that at least "a realistic possibility" of prejudice must be demonstrated to substantiate a Sixth Amendment violation of the kind alleged here, and a presumption falls short of this

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[34] *Id.* at 1142–43.

[35] Doc. 730 at 13 (quoting *Shillinger*, 70 F.3d at 1139).

[36] 548 U.S. 140 (2006).

[37] Doc. 730 at 13.

[38] *Id.* at 15–16.

[39] *Id.*

demonstration.[40] This Court explained that the Tenth Circuit analyzed and distinguished *Weatherford*, noting that the Supreme Court "emphasized both the absence of purposefulness in the prosecutor's intrusion and the legitimate law enforcement interests at stake."[41] The *Shillinger* court concluded that, unlike in *Weatherford*, "the intrusion here was not only intentional, but also lacked a legitimate law enforcement purpose."[42] The court also explained that *Morrison* "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."[43] As previously discussed, *Morrison* never reached the prejudice question, "holding only that even if the defendant's Sixth Amendment rights were violated, dismissal of the indictment was an inappropriate remedy in that case."[44] Under *Shillinger*, once petitioners demonstrate the prosecution team intentionally and unjustifiably became privy to their protected attorney-client communications, prejudice is presumed.[45] In the Tenth Circuit, this presumption results in a per se Sixth Amendment violation.[46]

III. Discussion

A. Harmless-Error Analysis and *Shillinger*

This Court first had occasion to address the government's harmless-error argument prior to the evidentiary hearing in *Hohn*, where the government argued that it needed to review the call

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[40] *Id.* at 16–17.

[41] *Shillinger v. Haworth*, 70 F.3d 1132, 1138–39 (10th Cir. 1995).

[42] *Id.* at 1139.

[43] *Id.* at 1140.

[44] *Id.*

[45] *See id.* at 1142; Doc. 730 at 10.

[46] *See Shillinger*, 70 F.3d at 1140, 1142 (distinguishing between the First Circuit's burden-shifting approach, which treats the presumption of prejudice as rebuttable, and the Third Circuit's per se rule, and ultimately adopting the latter approach (first citing *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984); and then citing *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978))).

on which Hohn based his Sixth Amendment claim for evidence that might prove the alleged violation was harmless. The Court agreed with Hohn that under *Shillinger*, intentional-intrusion violations are a type of structural error that are not subject to harmless-error analysis.[47] The Court subsequently clarified this ruling in its post hearing Memorandum and Order in *Hohn*, which is incorporated by reference herein.[48]

As this Court explained, the Supreme Court has recognized that certain denials of the Sixth Amendment right to effective assistance of counsel "make the adversary process itself presumptively unreliable."[49] These per se Sixth Amendment violations are not subject to harmless-error analysis—prejudice is presumed.[50] The Supreme Court has relieved defendants of the obligation in *Strickland* to make an affirmative showing of prejudice, and presumed such effect in a very narrow set of cases, including: the actual or constructive denial of counsel at a critical stage of trial, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest.[51] In these cases, prejudice is presumed because the circumstances are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.[52] These types of presumptively prejudicial Sixth Amendment violations are part of the so-called *Cronic*-error variety of Supreme Court jurisprudence.[53] When this type of error

[47] Doc. 940 at 13–15.

[48] Doc. 1033 at 11–17.

[49] *Id.* at 14 (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984))

[50] *Id.*

[51] *Id.* (citing *Cronic*, 466 U.S. at 658–660); *Strickland v. Washington*, 466 U.S 668, 692 (1984).

[52] *Id.* (quoting *Cronic*, 466 U.S. at 658); *see Strickland*, 466 U.S. at 692; *Mickens v. Taylor*, 535 U.S. 162, 175 (2002).

[53] *Cronic*, 466 U.S. at 658. To be clear, neither Hohn nor consolidated petitioners allege that they were actually or constructively denied the right to counsel at a critical stage of trial. Instead, they allege state interference with counsel's assistance.

happens, the issue is not whether the error is harmless; instead, the court irrebutably presumes that it was prejudicial.[54]

This Court explained that the Tenth Circuit adopted this reasoning in *Shillinger* in holding that prejudice is presumed for the government's intentional and unjustified intrusion into the defendant's attorney-client relationship.[55] In fashioning a rule that "best accounts for the competing interests at stake," the Tenth Circuit recognized and drew upon this category of cases where Sixth Amendment prejudice is presumed,[56] specifically cases where direct state interference with the right to effective counsel has been held to violate the defendant's Sixth Amendment right per se.[57] The court cited the rationale behind the use of a per se rule in such cases: "[t]hese state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him."[58] The quoted passage goes on to state, "[b]ecause these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate."[59] The court proceeded to hold that a prosecutor's intrusion into the attorney-client relationship likewise constitutes a "direct interference" with the fundamental Sixth Amendment rights of a defendant to a fair adversary

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[54] *Id.* at 659 & n.25; *see also Bell v. Cone*, 535 U.S. 685, 695–96 (2002).

[55] Doc. 1033 at 14–16.

[56] *Shillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995) (citing *Strickland*, 466 U.S. at 692; then citing *Perry v. Leeke*, 488 U.S. 272, 279–80 (1989); and then citing *Cronic*, 466 U.S. at 658 & n.24).

[57] *Id.* (first citing *Ferguson v. Georgia*, 365 U.S. 579 (1961) (prohibiting direct examination of the defendant by his counsel); then citing *Brooks v. Tennessee*, 406 U.S. 605 (1972) (requiring those defendants who choose to testify to do so before any other defense witnesses); then citing *Herring v. New York*, 422 U.S. 853 (1975) (refusing to allow defense counsel closing argument in a bench trial); and then citing *Geders v. United States*, 425 U.S. 80 (1976) (prohibiting any consultation between a defendant and his attorney during an overnight recess separating the direct-examination and the cross-examination of the defendant)).

[58] *Id.* (quoting *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1979)).

[59] *Id.* (quoting *Decoster*, 624 F.2d at 201).

proceeding.[60] Absent a countervailing government interest, such an intentional intrusion constitutes a per se violation of the Sixth Amendment, where "a prejudicial effect on the reliability of the trial process must be presumed."[61] In adopting this per se rule, the court stressed that "no other standard can adequately deter this sort of misconduct," and that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."[62]

The Tenth Circuit further held that this per se rule subsumes the harmless-error analysis; it recognizes that such violations are never harmless "because they 'necessarily render a trial fundamentally unfair.'"[63] Accordingly, *Shillinger* instructs that the circumstances of these intrusions categorically justify a presumption of prejudice that precludes application of the harmless-error standard and requires automatic relief.[64] In other words, the Tenth Circuit has recognized that a *Shillinger* violation constitutes a narrow variety of presumptively prejudicial constitutional error identified by *Strickland* and its progeny.[65]

With this analytical framework in mind, the Court turns to the application of its harmless-error ruling to the remaining category of pending § 2255 cases where the alleged Sixth Amendment violation occurred after a guilty plea or conviction at trial but before sentencing.

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[60] *Id.* at 1142.

[61] *Id.*

[62] *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

[63] *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)).

[64] *Id*.

[65] Doc. 1033 at 15–16.

B. Application to Remaining Temporal Category of Claims

The January 18 Order explained that the *Shillinger* per se rule was not necessarily limited to violations that occurred at trial.[66] But relative to the category of claims at issue here, the Court found that when the alleged intrusion occurs after the petitioner entered a guilty plea or was convicted at trial, it eliminates the possibility that the intrusion could have tainted the petitioner's plea or conviction.[67] Thus, absent the possibility of any related unfairness or injury at the conviction stage, petitioners whose claims fall under this category do not have standing to challenge their guilty plea or conviction under § 2255.[68] The Court further found, however, that the government failed to establish any basis for finding that these petitioners lack standing to challenge their sentence, as it did not identify any reason that the Court could not grant relief, only that it should not.[69] Notably, the government did not acknowledge or address the categorical presumptive prejudice that applies to a *Shillinger* per se violation in arguing certain petitioners lacked standing, focusing instead on the lack of prejudice in individual cases.[70]

Petitioners in this category acknowledge that they cannot demonstrate the possibility of prejudice on their Sixth Amendment claims, but instead allege presumptive prejudice under the rule in *Shillinger*. Like Hohn, these petitioners argue that once they prove the elements under *Shillinger*, prejudice is presumed and granting their § 2255 motions should be automatic, requiring either dismissal of the case or a significant reduction of sentence and/or vacation of any term of supervised release. The government responds that petitioners' wholesale reliance on

[66] Doc. 730 at 17–19 (explaining scope of the Sixth Amendment was not so narrow and describing scenario where the government had intentionally intruded upon defendant Michelle Reulet's attorney-client relationship prior to entering a written plea agreement). As noted, the issue of whether petitioners are barred from raising claims that allege pre-plea violations is currently pending before the Tenth Circuit Court of Appeals.

[67] *Id.* at 54.

[68] *Id.*

[69] *Id.;* Doc. 784 at 24.

[70] *See, e.g.,* Doc. 722 (filed under seal).

Shillinger to avoid the obligation to prove prejudice is misplaced. As explained in detail below, the Court concludes that the *Shillinger* per se rule does not extend to alleged violations that occurred post-plea or conviction but prior to sentencing, and thus these petitioners cannot rely on a presumption of prejudice to establish a Sixth Amendment claim. To the extent the Court's prior order on standing with respect to this category of claims held or suggested otherwise, the Court reconsiders and clarifies that ruling at this time.[71]

As previously discussed, *Shillinger* includes unjustified governmental-intrusion claims as part of a limited class of ineffective-assistance cases where the defendant is relieved of the obligation to show prejudice. The Tenth Circuit explained, "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost."[72] Faced with an egregious situation before and during trial, the *Shillinger* court did not have to evaluate the potential for prejudice that intentional-intrusion claims can have on sentencing. Although it is clear that *Shillinger*'s per se rule applies when a petitioner's Sixth Amendment rights are violated at trial, the ruling did not extend—and has not been extended—to govern alleged intentional-intrusion violations at sentencing.

As discussed at length by *Shillinger* and this Court, the Supreme Court has not resolved "the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information," and federal appellate courts are divided on the issue.[73] Because the *Shillinger* per se rule is a variety of presumptively prejudicial constitutional error that has yet to be recognized

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[71] *See* Doc. 730 at 54; *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1224–25 (10th Cir. 2007) (explaining "law of the case" doctrine is discretionary, and that district courts remain free to reconsider their earlier interlocutory rulings made before the entry of judgment).

[72] 70 F.3d 1132, 1142 (10th Cir. 1995) (quoting *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984)).

[73] *See supra* notes 25–26.

by the Supreme Court, such an extension warrants careful analysis and consideration of Supreme Court precedent.[74] These cases are instructive and caution against the categorical extension of the *Shillinger* per se rule to violations that occurred post-plea or conviction but prior to sentencing.

The Supreme Court instructs that presumptively prejudicial constitutional error occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[75] Presumptively prejudicial constitutional error is one that is highly likely to have "some effect . . . on the reliability of the trial process."[76] In other words, it is one that is highly likely to "affect[ ] the framework within which the trial proceeds."[77]

The issue here requires the Court to evaluate whether an unjustified governmental intrusion into a defendant's attorney-client relationship that occurs post-plea or conviction but before sentencing always triggers a presumption of prejudice without regard to whether the defendant was actually prejudiced in a given case. This analysis turns on the potential for prejudice. In making this determination, the Court is mindful of the Supreme Court's instruction that because such presumptively prejudicial violations are categorical, it should not look to the effect of the error or lack of prejudice in an individual petitioner's case to determine whether the presumption is justified.[78]

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[74] *See United States v. Kaid*, 502 F.3d 43, 46 (2d Cir. 2007) (expressing "reluctance to extend a rule of per se prejudice in any new direction").

[75] *United States v. Cronic*, 466 U.S. 648, 658 (1984); *see Mickens v. Taylor*, 535 U.S. 162, 175 (2002).

[76] *Cronic*, 466 U.S. at 658.

[77] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

[78] *Cronic*, 466 U.S. at 659; *Bell v. Cone*, 535 U.S. 685, 695 (2002); *see* Doc. 730 at 54 (denying government's motion to dismiss post-plea/pre-sentence claims on standing grounds, explaining that while the actual sentence imposed may be relevant to whether an injury was actually incurred, it has no bearing on the *Shillinger* presumption of prejudice test and related fairness concerns).

Here, any Sixth Amendment violation occurred after a guilty plea or trial, so the integrity of the petitioner's conviction and trial process is not in question. The only tainted proceeding could be sentencing. An intentional-intrusion violation at sentencing is not intrinsically harmful to the entire trial process, nor does it pervade the entire criminal proceeding at sentencing the way it does at trial. Such a violation post-plea or conviction but before sentencing simply does not implicate the same potential for prejudice as a violation at the conviction stage, especially where the guilty plea or conviction is untainted by any alleged Sixth Amendment violation.

For one, the balance of power at sentencing is different, given the checks and balances inherent to the sentencing process and the discretion of the court to impose a reasonable sentence that is informed by the facts established at trial, the plea or sentencing agreement, the Presentence Investigation Report prepared by the United States Probation Office, or the mandate when resentencing on remand. Moreover, in cases resolved by a guilty plea or sentencing agreement, the government's discretion or capacity to prejudice the defendant is eliminated or curtailed before the sentencing hearing takes place. While the Court can imagine a scenario where an intentional-intrusion violation could render a sentencing proceeding unfair, "it does not *necessarily* or *fundamentally* do so."[79] Thus, the certain prejudice at trial described in *Shillinger* is not evident at sentencing.

An additional consideration here is that, unlike the context of trial, it is possible to "quantitatively assess" the effect of the government's alleged intrusion at sentencing.[80] "A defining feature of structural error is that the resulting unfairness or prejudice is necessarily unquantifiable and indeterminate, such that any inquiry into its effect on the outcome of the case

[79] *United States v. Trujillo*, 960 F.3d 1196, 1207 (10th Cir. 2020).

[80] *See Fulminante*, 499 U.S. at 308.

would be purely speculative."[81] As the *Shillinger* court recognized, prejudice from these type of Sixth Amendment violations at trial is difficult to prove.[82] The information needed to prove prejudice often rests within the exclusive control of the prosecution and is not necessarily apparent to the defendant or reviewing court.[83] The prosecution team "makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions."[84]

At sentencing, however, the effect of the government's misconduct can be measured by both its action and inaction, such as whether it honored the terms of the plea agreement or whether it made any objections or argument inconsistent with the terms of the plea agreement. The effect can also be measured by the sentencing court's rulings on any government objections or motions and the court's statement of reasons for the sentence it imposed. Accordingly, rather than engaging in impermissible speculation, the reviewing court can make "an intelligent judgment about" the effect the alleged error might have on sentencing, as opposed to the nebulous or pervasive errors at trial contemplated by *Shillinger*.

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[81] *United States v. Solon*, 596 F.3d 1206, 1211 (10th Cir. 2010) (alteration omitted) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005)); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) ("[A]s we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.").

[82] 70 F.3d 1132, 1141–42 (10th Cir. 1995).

[83] *United States v. Danielson*, 325 F.3d 1054, 1070 (9th Cir. 2003) (adopting burden-shifting analysis for Sixth Amendment claims alleging governmental interference with attorney-client relationship; defendant must make prima facie showing of prejudice that government affirmatively intruded to obtain privileged information about trial strategy; burden then shifts to government to show there has been no prejudice to defendant as a result of these communications).

[84] *Id.* at 1071 (quoting *Briggs v. Goodwin*, 698 F.2d 486, 494–95 (D.C. Cir. 1983), *vacated on other grounds*, 712 F.2d 1144 (D.C. Cir. 1983)).

As both sides acknowledge, *Shillinger* rightly places great importance on the actual fairness and reliability of the trial process.[85] But the categorical extension of *Shillinger*'s per se rule to include violations that occurred post-plea or conviction but before sentencing would amount to an overapplication of that ruling beyond the underlying rationale contemplated and described by the Tenth Circuit.[86] Because such intentional-intrusion violations neither implicate the possibility of certain prejudice nor raise an allegation of unfairness that is "necessarily unquantifiable or indeterminate," none of the fairness or reliability concerns identified by the Supreme Court or the Tenth Circuit are present at sentencing.[87] Deterrence of such misconduct alone is not enough to justify presumptive relief. Without any analogous case in which the Supreme Court presumed prejudice under similar circumstances, the Court declines to do so here in the first instance. Accordingly, the Court declines to extend *Shillinger*'s per se rule to post-plea or conviction, pre-sentence violations, and prejudice for this category of claims is not to be presumed.

Having determined that this temporal category of claims does not justify a *Shillinger* presumption of prejudice, the Court must apply the default standard of review for petitioners' individual claims. Under *Shillinger*, the prejudice necessary to prove a Sixth Amendment intentional-intrusion violation is "a realistic possibility of injury to [the defendant] or benefit to

[85] 70 F.3d at 1142 (per se rule recognizes that intentional and groundless prosecutorial intrusions are never harmless because they "necessarily render a trial fundamentally unfair").

[86] *See Weatherford v. Bursey*, 429 U.S. 545, 557–58 (1977) (rejecting application of per se rule that "cuts too broadly" because in certain scenarios, where "there would have been no constitutional violation.").

[87] *United States v. Solon*, 596 F.3d 1206, 1211 (10th Cir. 2010) (quoting *United States v. Gonzalez-Huerta*, 403 F.3d 727, 733 (10th Cir. 2005); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). Likewise, none of the "egregious case" implications of *Brecht* footnote nine appear to be present in this category of cases, which requires a showing that "the integrity of the proceeding was so infected that the entire trial was unfair." *Duckett v. Mullin*, 306 F.3d 982, 994–95 (10th Cir. 1992).

the [government]."[88] Thus, petitioners must show a realistic probability of prejudice in order to establish a violation of their Sixth Amendment rights.

The Court will issue orders in individual cases for this category consistent with this Order. To avoid any confusion regarding the applicability of this Order and eliminate the need for any subsequent motions for reconsideration or clarification, the following is a list of petitioners who assert post-plea or conviction, presentence claims subject to this ruling. As noted, six of these petitioners have pending motions for leave to amend to assert post-plea claims; three have asserted additional unrelated claims. The government has moved to dismiss on procedural grounds in all but two cases. Eight petitioners also allege pre-plea claims that are precluded by *Tollett*; the Court will defer ruling on these petitioners' § 2255 motions until the Tenth Circuit has entered a decision in the pending appeal of that issue.

- Aguilera, Oscar, 15-20043, 20-2027
- Alvarez, Juan Carlos, 14-20096, 19-2227
- Birdsong, Jerome, 15-20045, 19-2406
- Blakney, Martez, 15-20086, 18-2454
- Chinchilla, Rosalio, 14-20096, 19-2392
- Clark, Enoch, 14-20130, 19-2401 [pre-and post-plea violations]
- Faulkner, Lee, 14-20096, 18-2452
- Felix-Gamez, Ricardo, 15-20042, 18-2487 [pre-and post-plea violations]
- Galvan-Campos, Jesus, 14-20068, 19-2055
- Harsfell, Tyrssverd, 14-20134, 19-2722
- Haupt, Charles, 15-20019, 18-2423
- Hollins, Tarone, 15-20110, 18-2465
- Hurtado, Nicholas 15-20032, 18-2463 [motion to amend]
- Johnson, Booker, 15-40064, 18-4099 [pre-and post-plea violations]
- Jones, Calvin, 14-20138, 18-2554 [motion to amend]
- Jordan, Gary, 16-20022, 19-2015 [motion to amend]
- Krites, Phillip, 15-40078, 18-4096
- Lougee, David, 14-20068, 19-2226 [sentencing agreement]
- Love, Gerren, 15-20098, 19-2732
- McCambry, Ashawntus, 16-20003, 19-2394 [motion to amend]
- McDaniel, Joshua, 15-20050, 19-2145 [resentenced on remand]

[88] 70 F.3d at 1142 (quoting *Weatherford*, 429 U.S. at 558).

- Meinert, Scott, 14-20035, 18-2455
- Murphy, Michael, 14-20068, 19-2365
- Olea-Monarez, Vicencio, 14-20096, 20-2051 [additional claims]
- Orduno-Ramirez, Omar, 14-20096, 19-2166
- Pavone, Shawn, 15-20019, 20-2400
- Phommaseng, Petsamai, 15-20020, 18-2477 [pre-and post-plea violations]
- Ramirez, Miguel, 15-40059, 19-4059
- Rapp, Gregory, 14-20067, 18-2117 [pre-and post-plea violations; motion to amend; sentencing agreement; additional claims]
- Redifer, Michael, 12-20003, 19-2594
- Roark, Jeffrey. 15-20042, 19-2405 [pre-and post-plea violations]
- Shevlin, David, 15-20099, 18-2501 [motion to amend]
- Sneed, Shawn, 13-40123, 19-4008 [pre-and post-plea violations]
- Tillman, Terry, 13-20070, 19-2083
- Valdez, Hector, 14-20096, 19-2254
- Warren, Arrick. 13-20081, 19-2220 [pre- and post-plea violations; additional claims]
- Wilson, Timothy, 15-20081, 18-2449

Finally, motions to reconsider the Court's decision are highly discouraged, as the Court intends to proceed forthwith to issue orders applying its ruling to individual petitioners; any such motions and responses shall be limited to five pages, with no reply.

IV. Conclusion

At a July 2016 discovery conference in *Black*, this Court asked the prosecutor whether there were video recordings of the attorney visitation rooms at CCA. This simple inquiry launched an investigation, appointment of a Special Master, a mandamus petition, multiple evidentiary hearings, an appeal, and over 100 § 2255 motions alleging improper governmental intrusion into scores of petitioners' attorney-client relationships. It bears repeating that evidence of systemic government abuse that came to light in the *Black* investigation has not gone without consequences. The *Black* investigation and evidentiary hearing were able to shine light on the practices and environment of the USAO, which in turn led to important reforms within the entire District of Kansas. Moreover, in January 2020, this Court approved the settlement of a civil

class action brought on behalf of detainees who had their attorney-client telephone calls recorded by CCA and Securus Technologies, Inc.[89] This civil action was not meant to be a substitute for habeas relief, and the plaintiffs did not waive or forfeit any right to file a § 2255 motion in return for participation in the class action; in fact, many plaintiffs are petitioners in this consolidated action.[90]

Since then, the Court has endeavored to give the consolidated § 2255 litigants an opportunity to seek efficient, fair, and consistent relief. After careful consideration, the Court concludes that petitioners alleging claims in this final temporal category cannot rely on *Shillinger*'s per se rule. As this Order makes clear, because this category of petitioners relies exclusively on the presumption of prejudice, it will more than likely result in a finding that petitioners have not demonstrated the required realistic possibility of prejudice needed to prove their Sixth Amendment claims, and their § 2255 motions will be subject to denial. Given the amount of time these § 2255 motions have been pending, and that many petitioners in this category have been released from their custodial sentence, the Court is mindful of the need for finality these petitioners deserve and request. The Court will soon issue orders in individual cases as noted above, all consistent with the required particularized approach recently stressed and reaffirmed by the Tenth Circuit when it dismissed the appeal in *United States v. Carter*.[91]

IT IS THEREFORE ORDERED BY THE COURT that the Court declines to extend the *Shillinger* per se rule to alleged Sixth Amendment intentional-intrusion violations that occurred after a plea or conviction but before sentencing; the above-captioned petitioners cannot rely on the *Shillinger* presumption of prejudice to establish their Sixth Amendment claims, but

[89] *Huff v. CoreCivic*, D. Kan. No. 17-cv-2320-JAR-JPO, Doc. 177 (Jan. 28, 2020).

[90] *See id.*, Doc. 177-1 (list of settlement class members).

[91] 995 F.3d 1222, 1227–28 (10th Cir. 2021).

instead must demonstrate a realistic possibility of prejudice as discussed in this Order. The Court will proceed to analyze individual petitioners' claims consistent with this Order.

IT IS FURTHER ORDERED that motions to reconsider or clarify the Court's decision are discouraged; any such motions and responses shall be limited to **five pages**, with no reply.

IT IS SO ORDERED.

Dated: December 10, 2021

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In re: CCA Recordings 2255 Litigation,
Petitioners,

v.

Case No. 19-cv-2491-JAR-JPO

(This Document Relates to Case No. 14-cr-20096-JAR-7, *United States v. Omar Orduno-Ramirez*, and Case No. 19-2166-JAR-JPO, *Omar Orduno-Ramirez v. United States*)

United States of America.
Respondent.

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner Omar Orduno-Ramirez's Motion to Vacate and Discharge with Prejudice under 28 U.S.C. § 2255 (Doc. 596).[1] Petitioner alleges the government violated the Sixth Amendment by intentionally and unjustifiably becoming privy to his attorney-client communications, and asks the Court to find that he has made a sufficient showing to warrant an evidentiary hearing. As a remedy, he asks the Court to vacate his judgment with prejudice to refiling or alternatively, to reduce his custodial sentence by 50% and vacate his term of supervised release. The government has responded, opposing the motion and seeking dismissal on several grounds, including on threshold jurisdictional grounds.[2] The Court

[1] Unless otherwise specified, citations prefaced with "Doc." refer to filings and docket entries in the underlying criminal case, No. 14-20096-JAR-7. Citations prefaced with "*CCA Rec. Lit.* Doc." Refer to filings and entries in this consolidated case, No. 19-cv-2491-JAR-JPO. With the exception of *United States v. Carter*, Case No. 16-20032-JAR, Doc. 758 (D. Kan. Aug. 13, 2019) ("*Black* Order"), citations to filings in Case No. 16-20032-JAR are prefaced with "*Black*, Doc."

[2] *Orduno-Ramirez v. United States*, No. 19-2166-JAR-JPO, Docs. 3, 5, 6.

held that because the alleged Sixth Amendment violation occurred after Petitioner entered his guilty plea but before he was sentenced, he lacked standing to challenge his conviction, but not his sentence.[3] The Court has reviewed the parties' submissions and the record and is prepared to rule. For the reasons explained in detail below, Petitioner's challenge to his sentence, including any term of supervised release, is denied without an evidentiary hearing. Petitioner is also denied a certificate of appealability.

I. Background

A. Procedural History

Petitioner was charged in a Superseding Indictment with conspiracy and possession with intent to distribute more than 50 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii) and 846.[4] This count carried a statutory mandatory-minimum term of 10 years and a maximum term of life imprisonment.[5]

On April 13, 2016, Petitioner pleaded guilty to the offense with no plea agreement.[6] Based on a total offense level of 36 and a criminal history category of I, the Presentence Investigation Report ("PSR") calculated Petitioner's advisory Guidelines range at 188 to 235 months.[7] Subsequently, he filed *pro se* objections to the PSR, contending that the total offense level, attributed drug quantity, and narrative in the PSR overstated his criminal culpability and that he was eligible for Safety Valve relief under U.S.S.G. § 5C1.2.[8] Applying the Safety Valve, he argued that his base offense level should have been 17, not 38, the result of a significant

[3] *CCA Rec. Lit.*, Docs. 730, 784.

[4] Doc. 47.

[5] *Id.* at 16; *see also* 21 U.S.C. §§ 841(a), 841(b)(1)(A), and 846.

[6] Doc. 276.

[7] Doc. 429 ¶ 72.

[8] Doc. 346 at 2–5.

downward variance. Defendant also filed a counseled sentencing memorandum, framed around letters from his wife and children and arguing for leniency under the 18 U.S.C. § 3553(a) factors.[9] He also objected to an offense level enhancement for importation and the absence of a minor-role adjustment.

The government did not file any objections to the PSR but it did respond to Petitioner's sentencing memorandum.[10] It agreed he was eligible for Safety Valve relief, but contended that he had more than a minor role in the drug conspiracy.[11] It also argued he was likely eligible for a role enhancement, but opted not to pursue one, and that a variance would not be appropriate in consideration of the sentences received by codefendants.[12]

On January 12, 2017, the Court overruled Petitioner's objections, adopted the PSR's sentencing calculations, and found that the Guidelines range was 188 to 235 months' imprisonment.[13] The Court denied Petitioner's request for a downward departure, but did grant a variance below the advisory Guidelines range, imposing a sentence of 144 months' imprisonment, followed by five years' supervised release.[14] Petitioner appealed his sentence, contending the Court erred in failing to apply a minor role adjustment.[15] The Tenth Circuit affirmed Petitioner's sentence, upholding the Court's findings as to his role in the conspiracy.[16] He has not filed a prior habeas motion under 28 U.S.C. § 2255.

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[9] Doc. 430.

[10] Doc. 464.

[11] *Id.* at 2–6.

[12] *Id.* at 6–9.

[13] Doc. 468; Sent. Tr., Doc. 500 at 181–82.

[14] Doc. 500 at 180–83.

[15] Docs. 151, 531.

[16] *United States v. Orduno-Ramirez*, 719 F. App'x 830, 833–34 (10th Cir. 2017).

Petitioner was represented by Kevin Babbit in the underlying criminal proceedings. The Court appointed the Federal Public Defender ("FPD") to represent Petitioner in his § 2255 proceedings on July 17, 2018.[17] On March 28, 2019, the FPD filed this § 2255 motion on Petitioner's behalf, setting forth a single ground for relief: the government violated the Sixth Amendment by intentionally and unjustifiably intruding into his attorney-client relationship. Petitioner's scheduled release date is January 13, 2025.[18]

B. The *Black* Investigation and Order

The Court assumes the reader is familiar with its ruling in *United States v. Carter* ("*Black* Order") that precipitates the § 2255 motion before the Court.[19] That comprehensive opinion was intended to provide a record for future consideration of the many anticipated motions filed pursuant to § 2255 and is incorporated by reference herein. The Court does not restate the underlying facts and conclusions of law in detail but will provide excerpts from the record as needed to frame its discussion of the issues presently before it.

Petitioner seeks relief based on events documented in the *Black* case and investigation, which involved audio recordings of telephone conversations and soundless video recordings of meetings between attorneys and their clients who were detained at CCA. The government admits that it obtained videos from CCA in connection with the *Black* case, which focused on drug and contraband trafficking inside CCA. The government's possession of these recordings came to light in August 2016, when then-Special Assistant United States Attorney ("SAUSA")

[17] Standing Order 18-3.

[18] Federal Bureau of Prisons, *Inmate Locator*, https://www.bop.gov/inmateloc/ (last visited Dec. 22, 2021).

[19] Case No. 16-20032-JAR, Doc. 758 (D. Kan. Aug. 13, 2019). As discussed in that Order, the Sixth Amendment claims stem from recordings of conversations and meetings with counsel while they were detained at Corrections Corporation of America ("CCA"). That facility has since been renamed CoreCivic. For convenience, the Court refers to it as CCA in this Order.

Erin Tomasic and Assistant United States Attorney ("AUSA") Kim Flannigan accused defense attorney Jacquelyn Rokusek of "jeopardiz[ing] their investigation" in *Black* based on information they claimed to have gleaned from the video recordings.[20] The defense also discovered that the United States Attorney's Office for the District of Kansas ("USAO") had a practice of routinely obtaining CCA recorded attorney-client phone calls from CCA, and that it did so without notice to attorneys, clients, or courts.[21]

Once notified of the video and audio recordings, this Court ordered (1) all local federal detention facilities to cease recording attorney-client meetings and phone calls;[22] (2) the video and audio recordings in USAO custody to be impounded;[23] and (3) the government to preserve its computer hard drives.[24] By October 11, 2016, the Court had appointed a Special Master to assist in what the Court termed "Phase I and Phase II" of the Court's investigation, that is, to determine the number of recordings possessed by the government, to index and segregate them, and to identify privileged or confidential information within those recordings.[25]

On January 31, 2017, the Special Master issued the "First Report Regarding Video Recordings."[26] The Special Master determined that the government had obtained from CCA video recordings of the attorney-meeting rooms made between February 20, 2016, and May 16,

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[20] *Id.* at 70–80.

[21] *Id.* at 29–30.

[22] *Black*, Doc. 253 at 3.

[23] *Id.* at 3, 12 ("The Court subsequently issued a clawback order directing the government to gather and surrender to the Court all audio recordings in its possession, in the possession of investigative agencies, and in the possession of other defendants who had received them in discovery.").

[24] *Id.* at 40. At the September 7, 2016 hearing in *Black*, "[t]he Court ordered the government to retain and preserve all of the hard drives as well as all of the hardware necessary to access the information on the hard drives." *Id.*

[25] *Black*, Doc. 146 (Appointment Order).

[26] *Black*, Doc. 193.

2016—a period of 86 days, or approximately 14,000 hours—documenting approximately 700 attorney visits.[27] This Court in *Black* found that the USAO did not come into possession of the CCA videos until June 1, 2016.[28] The Court has since clarified that the government's possession of the video recordings began when the United States Secret Service picked up DVR 6 from CCA on May 17, 2016.[29] There is no dispute that the USAO disgorged the video recordings to the Court on August 9, 2016. Nor is there evidence that the government maintained copies of the video recordings on a computer (the "AVPC") or on Special Agent Jeff Stokes's laptop after that time.[30]

The government did not cooperate with the Special Master's investigation, however, which ultimately resulted in a lengthy delay in this Court's ability to rule on these issues. Finally, despite the delay associated with the government's failure to cooperate and its litigation efforts challenging the propriety of the Special Master's investigation, the Court conducted a full evidentiary hearing on all pending matters in *Black* in October and November 2018.

On August 13, 2019, the Court issued the *Black* Order, which detailed, among other things, the government's view that soundless video recordings are not protected communications and rejected the government's argument that the communication in the videos is too rudimentary to discern whether it involves legal advice or strategy or to disclose the content of any accompanying verbal communication.[31] The Order also addressed the governing standard for an

[27] *Id.* at 3, 5 (specifically, CCA Attorney Meeting Rooms 3 and 6 through 9).

[28] *Black* Order at 66.

[29] *CCA Rec. Lit.*, Doc. 784 at 13.

[30] *CCA Rec. Lit.*, Doc. 546 (Petitioners' Notice of Errata withdrawing any such allegations individually or collectively advanced).

[31] *Black* Order at 164–65.

intentional-intrusion Sixth Amendment claim in the Tenth Circuit.[32] The Order discussed the elements required to prove a per se violation of the Sixth Amendment under the Tenth Circuit's decision in *Shillinger v. Haworth*,[33] which held that a per se Sixth Amendment violation occurs when: (1) there is a protected attorney-client communication; (2) the government purposefully intruded into the attorney-client relationship; (3) the government becomes "privy to" the attorney-client communication because of its intrusion; and (4) the intrusion was not justified by any legitimate law enforcement interest.[34] Once those elements are established, prejudice is presumed.[35]

The Court further held that a finding of purposeful intrusion into the attorney-client relationship necessarily requires a threshold showing that the recordings were protected attorney-client communications.[36] While recognizing that the attorney-client privilege is not a right guaranteed by the Sixth Amendment, the Court applied principles relating to the privilege as a framework for this showing that the recordings between petitioners and counsel were protected communications under the Sixth Amendment. With respect to the video recordings, the Court determined that the following threshold showings must be made after review and verification by the FPD in each individual case: (1) the video of the attorney-client meeting exists; and (2) the quality of the non-verbal communication in the video is sufficient to confirm communication between the detainee and counsel.[37] This threshold showing requires an affidavit from defense counsel confirming that the nature and purpose of the meeting(s) were within the ambit of

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[32] *Id.* at 145–62.

[33] 70 F.3d 1132 (10th Cir. 1995).

[34] *Black* Order at 162 (citing *Shillinger*, 70 F.3d at 1142).

[35] *Id.*

[36] *Id.* at 163.

[37] *Id.* at 166.

protected communication, including but not limited to defense preparation, plea negotiations, or review of discovery.[38]

C. Proceedings in Consolidated Master Case

The *Black* Order reassigned all *Black*-related § 2255 motions pending before other judges in the District to the undersigned for determination of the merits of petitioners' Sixth Amendment claims and for consolidated discovery.[39] It was this Court's intent that by reassigning the habeas actions to the undersigned and consolidating the cases for discovery, the process for seeing over 100 cases to completion would be streamlined for all parties.

Like the *Black* Order, the Court assumes the reader is familiar with the proceedings in the consolidated master case that precipitates the matter before the Court, and does not restate the underlying facts in detail but will provide excerpts from the record as needed to frame its discussion of the issues presently before it. In addition to the two threshold showings recited above, this Court stated during a September 2019 status conference that the privilege logs for video recordings would need to describe the specific topic of any confidential attorney-client communication, for example, plea negotiations, as well as an indication that "some nonverbal communication going on about that [topic] that . . . is observable."[40] The government raised blanket objections to the privilege logs, arguing that many fail to meet the threshold showings because (1) they do not describe the topic of any communication or describe the communicative value of any observable nonverbal gestures; (2) boilerplate statements that a video reveals attorney communications or that communication was about legal advice and strategy are too vague; and (3) physical gestures such as pointing to documents or a laptop alone are not

[38] *Id.*

[39] *CCA Rec. Lit.*, Doc. 1.

[40] *CCA Rec. Lit.*, Doc. 21 at 50.

sufficient to establish privileged attorney-client communications are depicted on a soundless video.

As detailed in the Court's October 15, 2020 Orders, the parties' initial efforts at cooperation culminated in the government's notice that it refuses to comply with discovery orders and demands that the Court rule immediately on both the procedural and merits defenses raised in its responses to the § 2255 motions.[41] Highly summarized, the Court: (1) reaffirmed its previous ruling on the government's implied waiver argument and, in light of the government's blanket objections to petitioners' privilege logs, established a procedure for *in camera* review of the recordings; (2) reaffirmed the finding that soundless video recordings may be protected communications and found that petitioners did not waive any protection because the attorney meeting rooms were monitored; (3) ordered the parties to supplement their responses and replies to address jurisdictional defenses and the collateral-attack waiver by plea agreement issue; and (4) found the government's refusal to comply with discovery orders issued by the Court sanctionable under Fed. R. Civ. P. 37(b)(2) and notified the government of its intent to take as conclusively established certain facts petitioners might have proved regarding the "privy to" element of their Sixth Amendment claims for any petitioner who establishes that he or she is entitled to an evidentiary hearing.[42]

On January 18, 2021, the Court issued an order: (1) reaffirming and expanding its holding regarding the applicable Sixth Amendment standard; (2) addressing the collateral-waiver by plea issue; and (3) addressing jurisdictional defenses raised by the government, including certification

[41] *CCA Rec. Lit.*, Docs. 587, 588.

[42] *Id.* The Court subsequently denied petitioners' related Motion for Spoliation Sanctions under Fed. R. Civ. P. 37(e)(2) alleging that the government destroyed or lost ESI relative to the video recordings. *CCA Rec. Lit.*, Doc. 926.

requirements under Rule 2(b) of the Rules Governing Section 2255 Proceedings.[43] Specifically, the Court ruled that three petitioners in this consolidated litigation who proceeded to trial in their underlying criminal proceedings are entitled to evidentiary hearings on their audio recording Sixth Amendment claims. Second, the Court determined that the rule in *Tollett v. Henderson* procedurally barred petitioners who alleged pre-plea Sixth Amendment violations from advancing those claims.[44] The Court dismissed one petitioner's § 2255 motion on these grounds and certified the issue for appeal; thirty-nine petitioners have successfully moved the Court to stay dismissal of their claims pending the appeal of that case.[45] Third, the Court determined that approximately twenty petitioners lacked standing to advance their Sixth Amendment claims for various reasons, including: claims that alleged post-sentencing violations; claims where petitioners who had been deported challenged only their sentence; claims where petitioners challenging their sentence had been sentenced to the mandatory-minimum sentence; and claims involving binding pleas that were accepted by the court at the change-of-plea-hearing.[46]

Petitioner timely filed his Rule 2(b) certification on February 25, 2021.[47]

On December 10, 2021, the Court issued an order that concluded petitioners in the temporal category of claims who alleged Sixth Amendment violations that occurred post-plea or conviction but before sentencing could not rely on *Shillinger*'s per se rule.[48]

D. Recordings in this Case

On August 13, 2019, this Court released the video recordings to the FPD as a result of

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[43] *CCA Rec. Lit.*, Doc. 730 (clarified and reconsidered in part on other grounds, *id.*, Doc. 784).

[44] *Id.* (citing 411 U.S. 258 (1973)).

[45] *CCA Rec. Lit.*, Docs. 874, 922.

[46] *CCA Rec. Lit.*, Docs. 730, 784.

[47] CCA Rec. Lit., Doc. 775-1.

[48] *CCA Rec. Lit.*, Doc. 1034.

the *Black* investigation.[49] The FPD, along with defense counsel, reviewed five video recordings of Petitioner meeting with Babbit in person at CCA on March 11 and 14, April 5 and 11, and May 6, 2016.[50]

Pursuant to the Court's Order, Petitioner provided a privilege log detailing the claimed protected communications, verifying that during these meetings, Petitioner discussed matters "relat[ing] to legal advice or strategy" with Babbit.[51] Petitioner also provided a sworn declaration from Babbit, stating that he reviewed the video recordings listed on the privilege log, and confirmed, with respect to the recorded meetings and each other meeting with Petitioner at CCA: (1) the only reason he met with Petitioner "was to discuss matters related to legal advice or strategy"; and (2) he had no knowledge nor did he believe that the meetings were recorded as they were attorney-client protected, that he did not consent to such, and that he was not aware such recordings would be dispensed to prosecutors.[52]

Petitioner was prosecuted by former SAUSA Erin Tomasic and AUSA David Zabel, the latter of whom denies that he viewed the recording during the pending underlying case.[53]

The Court reviewed the video recordings *in camera*. As set out in the privilege log, the Court confirms that the first video recording shows Petitioner meeting with Babbit and, as with each subsequent visit, someone Babbit identifies as an interpreter on March 11, 2016 for approximately forty-seven minutes, where they reviewed the Sentencing Guidelines. The second recording, dated March 14, 2016, shows Petitioner meeting with Babbit for one hour and twenty-

[49] *Black* Order at 165.

[50] *CCA Rec. Lit.*, Doc. 205-2 at 134–37.

[51] *Id.*

[52] *Orduno-Ramirez*, 19-2166-JAR-JPO, Doc. 4-1.

[53] *Id.*, Doc. 3-1.

one minutes, during which time they reviewed documents. The third recording shows Petitioner and Babbit talking on April 5, 2016 for almost an hour while Babbit's laptop is open. The fourth recording shows a nearly two-hour conversation between Petitioner and Babbit on April 11, 2016, during which time they review documents, the Sentencing Guidelines, and Babbit's laptop. The final recording reveals a forty-five minute conversation between Petitioner and Babbit on May 6, 2016, with a three-ring binder and legal pad before Babbit. In light of the analysis below, however, further details of the meetings visible in the videos are not pertinent and will not be discussed in this order.

II. Discussion.

A. Procedural Defenses

The government does not raise any procedural defenses in this case.[54]

B. Decision in Consolidated Proceedings

The Court entered a Memorandum and Order on December 10, 2021, that concluded petitioners in the temporal category of claims who alleged Sixth Amendment violations that occurred post-plea or conviction but before sentencing could not rely on *Shillinger*'s per se rule, which is incorporated by reference herein.[55]

As discussed in detail in that Order, the Tenth Circuit has recognized that a per se *Shillinger* violation constitutes a narrow variety of presumptively prejudicial constitutional error where the government's unjustified purposeful intrusion into a defendant's attorney-client relationship precludes application of the harmless-error standard and requires automatic relief.[56]

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[54] The government concedes that the ruling in *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), does not foreclose petitioners' claims where the alleged constitutional violation took place after a petitioner entered a guilty plea. *See CCA Rec. Lit.*, Doc. 730 at 41.

[55] *CCA Rec. Lit.*, Doc. 1034.

[56] *Id.* at 14.

The Court went on to conclude, however, that the categorical extension of *Shillinger*'s per se rule to violations that occurred post-plea or conviction but prior to sentencing would amount to an overapplication of that ruling beyond the rationale contemplated and described by the Tenth Circuit.[57] Accordingly, the Court declined to extend *Shillinger*'s per se rule to an alleged pre-sentence Sixth Amendment violation and prejudice is not to be presumed in this category of claims.[58] Instead, petitioners must demonstrate prejudice, that is, "a realistic possibility of injury to [the defendant] or benefit to the [government]."[59]

C. Application

Petitioner's claim is in the temporal category of motions alleging post-plea/pre-sentencing Sixth Amendment violations. Petitioner's motion falls in a sub-category of these claims where the petitioner pleaded guilty without a plea agreement. The recorded meetings between Petitioner and Babbit took place from March 11 to May 6, 2016. Four of the recordings predate Petitioner's April 13, 2016 guilty plea. The other meeting took place after Petitioner entered his plea but before his January 12, 2017 sentencing. As noted above, however, the USAO did not have possession of and access to the video recordings until May 17, 2016, and it gave up possession when it disgorged the videos to the Court on August 9, 2016. Thus, any alleged Sixth Amendment violation could not have occurred until after Petitioner's plea but before he was sentenced.

As this Court discussed in its January 18, 2021 Order, when the alleged intrusion occurs after the petitioner enters a guilty plea, it eliminates the possibility that the intrusion could have

[57] *Id*. at 20–21.

[58] *Id.* at 21.

[59] *Shillinger v. Haworth,* 70 F.3d 1132, 1142 (10th Cir. 1995) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977)).

tainted the petitioner's conviction.[60] Thus, Petitioner does not have standing to challenge his guilty plea under § 2255.[61] The only tainted proceeding could be sentencing. Having determined that this category of governmental-intrusion claims may not rely on the *Shillinger* presumption of prejudice, the Court turns to whether Petitioner has demonstrated a realistic possibility of injury or benefit to the government. Even assuming Petitioner has satisfied the other elements of his Sixth Amendment claim, he cannot show any realistic possibility that he was prejudiced as a result of the government's alleged intrusion.

Petitioner's sentencing bears no indicia of a tainted proceeding. While the government opposed Petitioner's sentencing objections and request for a downward departure, it also opted not to pursue a role enhancement that it contended was supported by the evidence. This Court reached the same conclusion about the possible role enhancement in denying Petitioner's request for a sentence reduction as a minor participant, as affirmed by the Tenth Circuit. Petitioner further benefitted from a downward variance of 44 months, and the government did not cross-appeal that downward variance. The prosecution bore all the hallmarks of a reasoned advocate for the government and not an antagonist leveraging inside information. Petitioner has not demonstrated, nor can the Court imagine, any realistic possibility of prejudice under these circumstances.

Because Petitioner has not shown and cannot show a realistic possibility of prejudice as a result of the government's alleged intrusion into his attorney-client relationship, and nothing in the record suggests any threat to the reliability or fairness of Petitioner's sentencing proceedings,

[60] Doc. 730 at 54.

[61] *Id.*

he cannot succeed on his Sixth Amendment claim. Petitioner's § 2255 motion is therefore denied.

III. Certificate of Appealability

Rule 11 of the Rules Governing Section 2255 Proceedings states that the Court must issue or deny a certificate of appealability ["COA"] when it enters a final order adverse to the applicant. "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right."[62] To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[63] For the reasons stated above, the Court finds that Petitioner has not made this showing and, therefore, denies a certificate of appealability as to its ruling on his § 2255 motion.

IT IS THEREFORE ORDERED BY THE COURT that Petitioner Omar Orduno-Ramirez's Motion to Vacate and Discharge with Prejudice under 28 U.S.C. 2255 (Doc. 596) is **denied** without an evidentiary hearing. Petitioner is also denied a certificate of appealability.

IT IS SO ORDERED.

Dated: January 3, 2022

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

[62] 28 U.S.C. § 2253(c)(2).

[63] *Saiz v. Ortiz,* 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke,* 542 U.S. 274, 282 (2004)).

FILED
United States Court of Appeals
Tenth Circuit

April 3, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OMAR FRANCISCO ORDUNO-RAMIREZ,

Defendant - Appellant.

No. 22-3019
(D.C. No. 2:19-CV-02491-JAR-JPO)
(D. Kan.)

ORDER

Before **MATHESON**, **KELLY**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk