No. 23-5034

IN THE SUPREME COURT OF THE UNITED STATES

OMAR FRANCISCO ORDUNO-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a conclusive presumption of prejudice and a Sixth Amendment violation in his sentencing, based on the government's acquisition of soundless videos of attorney-client meetings following his guilty plea, where no prosecutor involved in the sentencing was aware of the contents of the recordings, they provided no strategic value to the prosecution, and the record reveals no irregularity in the sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 61 F.4th 1263. The order of the district court (Pet. App. 51a-65a) is unreported but is available at 2022 WL 23792. A prior order of the district court (Pet. App. 27a-50a) is unreported but is available at 2021 WL 5868517.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2023. A petition for rehearing was denied on April 3, 2023 (Pet. App. 66a). The petition for a writ of certiorari was filed on

June 30, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of conspiring 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 (b)(1)(A)(viii). Pet. App. 13a. He was sentenced to 144 months of imprisonment, to be followed by five years of supervised release. Id. at 53a. The court of appeals affirmed. 719 Fed. Appx. 830 (10th Cir. 2017). Petitioner later moved for postconviction relief under 28 U.S.C. 2255. Pet. App. 14a-15a. The district court denied the motion. Id. at 51a-65a. The court of appeals affirmed. Id. at 1a-26a.

1. Petitioner was a participant in a drug-trafficking operation that transported and distributed methamphetamine across state lines. See 719 Fed. Appx. at 830; 2 C.A. App. 84-86. Petitioner served as a drug courier, "recruit[ed] a new courier," "aided and managed that courier," smuggled noncitizen workers, and "enjoyed the trust of, and interacted with, the top drug organizers." 719 Fed. Appx. at 834; see 2 C.A. App. 102, 107, 263-265.

In 2014, petitioner was indicted for conspiring 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). Pet. App. 13a. Petitioner was detained at Corrections Corporation of America (CCA), a detention facility in Leavenworth, Kansas. Id. at 3a, 13a.

In 2016, petitioner pleaded guilty to the charged offenses. Pet. App. 13a. The district court sentenced him to 144 months of imprisonment, a 44-month downward variance from the bottom of the applicable Sentencing Guidelines range. Id. at 14a-15a. The court of appeals affirmed petitioner's sentence. 719 Fed. Appx. at 830.

2. While petitioner was detained at CCA, the U.S. Attorney's Office for the District of Kansas was investigating certain other inmates' involvement in a drug-smuggling conspiracy at that facility, in a case that became known as United States v. Carter, 429 F. Supp. 3d 788 (D. Kan. 2019). Pet. App. 3a. The investigation ultimately culminated in an indictment charging certain inmates, not including petitioner, with conspiring to distribute controlled substances in the prison. Ibid.

Through a grand jury subpoena in the Carter investigation, the government obtained soundless video footage from all CCA surveillance cameras, which included footage capturing attorney-visitation rooms. Pet. App. 3a. The footage depicted many CCA detainees who were not directly implicated in the Carter case. See ibid. The Federal Public Defender for the District of Kansas was permitted to intervene in the Carter case on behalf of its

clients detained at CCA, seeking to divest the government of the attorney-client communications that it had obtained. Id. at 4a.

The U.S. Attorney's Office promptly and voluntarily turned over the soundless videos for the court to review. See Pet. App. 63a. After appointing a special master, ibid., "the district court found that the [U.S. Attorney's Office] intruded into a large number of defendants' communications with their attorneys, with no legitimate law-enforcement purpose, and later tried to conceal these actions," id. at 5a. The Carter litigation has "led to important reforms within the entire District of Kansas," designed to better protect attorney-client communications. Id. at 48a; see id. at 55a.

3. In 2019, petitioner (like more than 100 other CCA inmates) moved for postconviction relief under 28 U.S.C. 2255, contending that the government had violated the Sixth Amendment by intruding on his attorney-client communications. Pet. App. 15a; see id. at 58a. According to evidence from the Carter litigation, after petitioner had pleaded guilty but before his sentencing, the government obtained soundless video footage of five meetings between petitioner and his attorney. Id. at 13a-14a. "In each recording, [petitioner and his lawyer] appear to speak, make gestures, and examine documents and legal materials." Id. at 14a.

The video "recordings reveal little about [petitioner's] interactions with [his lawyer] because they contain no sound."

Pet. App. 14a. And the government submitted an affidavit from the prosecutor who handled petitioner's sentencing stating that "[a]t no time during my involvement in this case did I view or was [I] privy to any video recordings of [petitioner] at CCA" and "[a]t no time prior to [petitioner's] sentencing . . . was I aware that video recordings existed of [petitioner's] meetings at CCA with his defense counsel." Id. at 15a (citation omitted; first and second set of backets in original). "Thus, the only prosecutor involved in [petitioner's] sentencing did not view the soundless recordings." Id. at 15a-16a.

The district court denied petitioner's Section 2255 motion. Pet. App. 51a-65a; see id. at 29a-50a. The court noted that under the Tenth Circuit's previous decision in Shillinger v. Haworth, 70 F.3d 1132 (1995), when "pretrial" the "government becomes privy to protected attorney-client communications because of its purposeful, unjustified intrusion into the attorney-client relationship," that court deems a "per se Sixth Amendment violation that is not subject to harmless-error analysis" to have occurred. Pet. App. 30a; see Shillinger, 70 F.3d at 1142. The district court reasoned, however, that the per se rule "d[id] not extend to alleged violations" -- like the one in petitioner's case -- "that occurred post-plea or conviction but prior to sentencing." Pet. App. 42a. The court observed that in such cases, "the integrity of the petitioner's conviction and trial process is not in

question," so "[t]he only tainted proceeding could be sentencing." Id. at 44a. And it explained that "at sentencing," the "potential for prejudice" is mitigated by "the checks and balances inherent to the sentencing process and the discretion of the court to impose a reasonable sentence." Ibid.

Having rejected a per se rule, the district court determined that petitioner "cannot show any realistic probability that he was prejudiced as a result of the government's alleged intrusion" into his attorney-client communications. Pet. App. 64a. The court observed that the government "did not have possession of and access to the video recordings" of those communications until after "[p]etitioner [had] entered his [guilty] plea." Id. at 63a. The court further found that "[p]etitioner's sentencing bears no indicia of a tainted proceeding," particularly given that he "benefitted from a downward variance of 44 months." Id. at 64a. And, finding "nothing in the record suggests any threat to the reliability or fairness of [p]etitioner's sentencing proceedings," the court reasoned that "he cannot succeed on his Sixth Amendment claim." Id. at 64a-65a.

4. The court of appeals granted a certificate of appealability and affirmed. Pet. App. 1a-26a. The court explained that "to prove a Sixth Amendment violation, a defendant must normally demonstrate 'some effect of [the] challenged conduct on the reliability of the trial process.'" Id. at 6a (citation

omitted; brackets in original). The court emphasized that this "Court's caution about per se [prejudice] rules" includes "cases where the defendant alleges government interference in an attorney-client relationship." Id. at 7a (citing Weatherford v. Bursey, 429 U.S. 545 (1977)). And, like the district court, the court of appeals declined to extend a "per se prejudice rule" for "pretrial government intrusion[s] into attorney-defendant communications" to also encompass "post-plea intrusions." Id. at 18a.

The court of appeals explained that "[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," whereas the former could only potentially affect "sentencing." Pet. App. 19a. The court also observed that "the opportunity for a prosecutor to use information from attorney-defendant communications is narrower" at sentencing, where "the judge finds facts and imposes punishment, largely in reliance on the Probation Office's presentence investigation report" and "factual stipulations in the plea agreement." Id. at 19a-20a (footnote omitted).

The court of appeals also found that "[t]he facts in this case" -- which involved only "soundless video recordings" from which no "usable information" could be derived -- provided a "further consideration cut[ting] against creating a per se

prejudice rule." Pet. App. 21a, 25a & n.22. "Indeed," the court observed, "all" of the many defendants seeking post-Carter "relief based on post-plea/pre-sentencing intrusions[] 'acknowledge that they cannot demonstrate the possibility of prejudice on their Sixth Amendment claims,'" which "shows that creating a per se prejudice rule would be 'overinclusive.'" Id. at 22a n.20 (citation omitted). Accordingly, the court determined that petitioner "ha[d] not shown why [it] should disregard [this] Court's caution against Sixth Amendment per se prejudice rules." Id. at 22a.

Finally, the court of appeals explained that "[w]ithout a conclusive presumption," petitioner could obtain relief only if he suffered "[a]ctual [p]rejudice." Pet. App. 24a (emphasis omitted). The court observed that petitioner did not "contend he was prejudiced." Id. at 26a. And it found that "no prosecutor involved in the sentencing was aware of the contents of the recordings," id. at 25a; "nothing in the record suggests that the Government could gain usable information from the videos in this case," id. at 25a n.22; and "[t]he record reveals no irregularity in [petitioner's] sentencing," id. at 26a.

ARGUMENT

Petitioner renews his contention (Pet. 12-15) that a Sixth Amendment violation automatically occurs when the government obtains soundless videos of a defendant's meetings with his attorney following the defendant's guilty plea but before his

sentencing. The court of appeals correctly declined "to create" a "conclusive presumption" of prejudice in that context, Pet. App. 18a, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. As petitioner acknowledges, "most constitutional errors * * * will not justify a remedy unless they prejudiced the defendant." Pet. 15. (citing Chapman v. California, 386 U.S. 18 (1967)). That is equally true of alleged violations of the Sixth Amendment. "Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." United States v. Cronic, 466 U.S. 648, 658 (1984). Although "[i]n certain Sixth Amendment contexts, prejudice is presumed," Strickland v. Washington, 466 U.S. 668, 692 (1984), those contexts are limited, see, e.g., Florida v. Nixon, 543 U.S. 175, 190 (2004), and do not include circumstances like petitioner's.

a. In Weatherford v. Bursey, 429 U.S. 545 (1977), for example, this Court rejected a "per se" rule that a Sixth Amendment violation occurs "'whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship.'" Id. at 549-550 (citation and emphasis omitted). The Court explained that a "per se rule [would] cut[] much too broadly" and require invalidating a conviction even where prejudice was clearly absent -- for instance, where the agent had merely participated in

attorney-client conversations about "the weather or other harmless subjects." Id. at 557-558 (emphasis omitted). The Court accordingly held that an undercover agent's presence at confidential attorney-client meetings did not violate the Sixth Amendment unless the agent "communicated the substance of the [attorney-client] conversations and thereby created at least a realistic possibility of injury to [the defendant] or benefit to the State." Id. at 558.

Similarly, in United States v. Morrison, 449 U.S. 361 (1981), the Court rejected a per se rule requiring automatic dismissal of an indictment where law-enforcement agents met with a criminal defendant "without the knowledge or permission of her counsel," "disparaged" that counsel, and sought to coerce the defendant into cooperating in a related investigation. Id. at 362. The Court explained that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." Id. at 365. And because the defendant in Morrison had "demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation," the Court found that the government's conduct "provide[d] no justification for interfering with the criminal proceedings." Id. at 366.

b. The court of appeals correctly applied the foregoing principles and determined that no "conclusive presumption" of prejudice was triggered here. Pet. App. 18a. This Court has never recognized a presumption of prejudice where, after conviction but before sentencing, the government obtains soundless (or even audible) recordings of attorney-client communications. Petitioner thus asked the court of appeals "to create" a new "presumption." Ibid. But such a new presumption could be justified only if there were "a high likelihood of prejudice" across the relevant category of cases, ibid., thus rendering a "case-by-case inquiry into prejudice" not "worth the cost," Strickland, 466 U.S. at 692. And no such likelihood of prejudice exists in this context.

As the court of appeals recognized, when "the alleged intrusion" into attorney-client communications "occurs after the [defendant] entered a guilty plea or was convicted at trial," any risk of prejudice could relate exclusively to sentencing. Pet. App. 19a. At sentencing, however, a prosecutor has only "narrow[]" opportunities "to use information from attorney-defendant communications." Ibid. That is because the sentencing court will generally base its factfinding not on the prosecutor's representations, but "on the Probation Office's presentence investigation report" and "factual stipulations in the plea agreement." Id. at 20a; see Fed. R. Crim. P. 32(c)(1)(A). And it

is well equipped to "screen" any "improperly gained information" that the prosecution seeks to rely upon. Pet. App. 21a.

This case, like other post-Carter cases involving claims of Sixth Amendment violations at sentencing, is a prime illustration of why a per se prejudice rule is unwarranted in this context. "The soundless video recordings" at issue "provided no strategic value to the prosecution." Pet. App. 25a. They simply showed petitioner and his lawyer "speak[ing], mak[ing] gestures, and examin[ing] documents and legal materials." Id. at 14a. And petitioner received a favorable sentence that was 44 months below the bottom of his Guidelines range. Id. at 14a-15a. Indeed, not a single person who sought relief based on a post-plea intrusion following the Carter litigation asserted that he could "demonstrate the possibility of prejudice on [his] Sixth Amendment claim[]." Id. at 22a n.20. The fact that nobody in petitioner's position has even attempted to show actual prejudice confirms that a per se prejudice rule would "cut[] much too broadly." Weatherford, 429 U.S. at 557.

c. Petitioner's contrary arguments (Pet. 12-25) lack merit. Petitioner contends (Pet. 12) that a per se prejudice rule is necessary to address what he calls "particularly egregious" and "repeated" prosecutorial "misconduct." To the extent that he is seeking a one-off rule based on the unique backdrop of the Carter litigation, such a rule is unwarranted. Even assuming that it

would be appropriate to focus on that small set of cases, neither petitioner nor any of the more than 100 other claimants from CCA have alleged that they could demonstrate prejudice. Pet. App. 22a & n.20. In petitioner's particular case, for example, "the only prosecutor involved in [petitioner's] sentencing did not view the soundless video recordings," id. at 15a-16a, and "bore all the hallmarks of a reasoned advocate for the government and not an antagonist leveraging inside information," id. at 64a. The district court's findings about other governmental conduct in different cases does not justify blanket relief for a group of claimants whose own proceedings were unaffected.

To the extent that petitioner seeks a broader rule that would grant automatic relief whenever the government has any recording of post-plea or post-trial attorney-client communications, such a broad rule is unsupported. He does not suggest that, notwithstanding the absence of any asserted prejudice for him or inmates with similar claims, prejudice in this circumstance is common, let alone so common that it should be presumed. Nor can he show that any such rule is necessary for deterrence. The U.S. Attorney's Office here, for example, has implemented new policies designed to safeguard the privacy of attorney-client communications going forward. See 1 C.A. App. 500-501 (stating that the U.S. Attorney's Office's "mandatory comprehensive policy" issued in May 2017 was "largely curative of many of the issues

that [had come] to light"); Pet. App. 48a (noting the "important reforms within the entire District of Kansas"). Although it did so following both sentencing-related claims and other claims, petitioner provides no reason to conclude that the government will take corrective measures only if unaffected claimants receive relief.

Petitioner's cited authorities (Pet. 12) do not support a per se prejudice rule here. In Morrison, the Court noted in dicta that "a pattern of recurring violations by investigative officers * * * might warrant the imposition of a more extreme remedy." 449 U.S. at 365 n.2. But the Court found no such pattern and imposed no such remedy there; petitioner identifies no case in which the Court has done so; and neither lower court here found that the circumstances of the Carter case warranted such a remedy. Petitioner's remaining cited cases did not even involve Sixth Amendment violations -- much less establish per se prejudice rules for such violations.*

Petitioner also asserts (Pet. 20) that the court of appeals "undervalue[d]" the "critical nature of sentencing proceedings." But in fact, the court emphasized that "post-plea government intrusions into attorney-defendant communications * * * should

* See Brecht v. Abrahamson, 507 U.S. 619, 638 n.9 (1993) (alleged due process violation); Bank of Nova Scotia v. United States, 487 U.S. 250, 259 (1988) (alleged prosecutorial misconduct before grand jury); United States v. Russell, 411 U.S. 423, 432-33 (1973) (alleged due process violation).

be taken seriously." Pet. App. 23a. It simply determined that a "per se prejudice rule" would be "overinclusive." Ibid. Even if "prosecutors have many opportunities at sentencing to take strategic advantage of the content of a defendant's confidential communications with counsel," Pet. 23, the circumstances here illustrate that such prejudice is rare.

2. Petitioner identifies no other factor that would justify this Court's review. Petitioner asserts (Pet. 15) that courts generally "have struggled to identify which errors" should be exempt from "harmless-error analysis." But he cites no circuit conflict on that issue, let alone a conflict over whether the type of error here is subject to harmless-error analysis. And it is far from clear that consideration of the particularized issue of presumptions of error when the government obtains a soundless recording of a post-plea, pre-sentencing attorney-client communication would provide meaningful guidance for the variety of other situations in which defendants seek presumptions of prejudice.

Petitioner also emphasizes (Pet. 19) that the Court "has previously granted certiorari to review and correct erroneous adoptions of structural-error rules." But that trend presumably stems from the Court's recognition that structural errors are "'highly exceptional'" and arise "[o]nly in a 'very limited class of cases.'" Greer v. United States, 141 S. Ct. 2090, 2099-2100

(2021) (citations omitted). When a lower court seeks to expand that limited category, this Court may understandably intervene to ensure that the expansion is warranted. That practice does not counsel in favor review where, as here, the court of appeals applies the "general rule" rather than the exception. Id. at 2099 (citation omitted).

Finally, petitioner suggests (Pet. 24-25) that a presumption of prejudice is necessary to deter future instances of misconduct. But petitioner identifies no widespread problem of post-plea government intrusions into attorney-defendant communications. Instead, he focuses solely on the U.S. Attorney's Office's conduct here -- but as noted above, the district court found that the Office's 2017 "mandatory comprehensive policy" was "largely curative of many of the issues that came to light in the [Carter] case." 1 C.A. App. 500. There is accordingly no sound basis for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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