No. 23-5034

IN THE

Supreme Court of the United States

OMAR FRANCISCO ORDUNO-RAMIREZ
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

Petitioner's Reply Brief

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REPLY

Is the US Department of Justice in the least bit bothered by the Kansas USAO's misconduct? Or even just a little uncomfortable with its response to getting caught? Not according to the government's brief in opposition, which at no point admits wrongdoing or hints at repentance. Instead, the government blithely tells this Court that there's *nothing to see here* and asks this Court to *trust us, we're the government*. The government's refusal to take this petition more seriously is reason alone to grant certiorari. As we show below, the government misrepresents our position, misinterprets structural error, downplays its own misconduct, and insists that this Court can safely leave Sixth Amendment protections in the hands of prosecutors. But this Court—and not the government—is the final arbiter of Sixth Amendment rights. Regardless of how this Court ultimately rules, review is necessary.

1. The rule we ask this Court to consider is exacting but easy for prosecutors to follow.

We have asked this Court to grant certiorari to decide a vital question about the Sixth Amendment right to confidential attorney-client communications. And we have proposed an exacting rule that will apply only in the most egregious circumstances: When prosecutors intentionally and without any legitimate law-enforcement justification access confidential attorney-client communications before sentencing, those prosecutors commit structural Sixth Amendment error, justifying a remedy regardless of prejudice. Since it is entirely within a prosecutor's power to refrain from this sort of intentional intrusion, violations of this rule should be "easy for the government to prevent." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("In

certain Sixth Amendment contexts, prejudice is presumed," including "various kinds of state interference with counsel's assistance" that, "because the prosecution is directly responsible," are "easy for the government to prevent").

The government tries to make our position seem less palatable. According to the government, we contend 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." BIO 8-9. The government further describes our proposed rule as one "that would grant automatic relief whenever the government has any recording of post-plea or post-trial attorney-client communications." BIO 13. These are gross misstatements. Under the rule that we have proposed, a prosecutor will violate the Sixth Amendment *not* whenever the government happens to come into possession of attorney-client communications, but *only if* the prosecutor learns the content of the communications, and does so both intentionally and without a legitimate law-enforcement justification. These predicate elements were absent in *Weatherford v. Bursey*, 429 U.S. 545 (1977). Had they been present, Mr. Bursey "would have [had] a much stronger case." *Id.* at 554. This is that "much stronger" case.

One additional note about the government's concern with "automatic relief." BIO 13. As we noted in our original petition, Pet. 10 n.4, our proposed rule would not require prejudice to prove a Sixth Amendment violation and to justify *some* remedy, but *what* remedy might be justified is a separate question not presented here. *See Waller v. Georgia*, 467 U.S. 39, 49-50 (1984) (discussing distinction between

recognizing error and choosing a remedy "appropriate to the violation"); *United States v. Morrison*, 449 U.S. 361, 364-66 & n.2 (1981) (assuming Sixth Amendment error and discussing how remedies "should be tailored to the injury"). All we seek here is a rule defining Sixth Amendment error in this context, and a remand for further proceedings consistent with that rule.

2. Structural error by definition does not require a showing of actual prejudice in individual cases; rather, structural-error rules protect interests and recognize harms beyond individual case outcomes.

The government argues that a per se prejudice (structural-error) rule is unwarranted because nobody in Mr. Orduno-Ramirez's position attempted to show actual prejudice. BIO 12, 13.[1] But we wouldn't be here if we could show prejudice, and neither will any future litigant. This Court would never have any reason to adopt a structural-error rule in the presence of identifiable prejudice. Requiring a showing of actual case-specific prejudice in order to invoke structural error would defeat the purpose of a structural-error rule. Such rules by definition do not require litigants to

[1] The government ignores the fact that this evidence will typically lie in the hands of prosecutors, thus making it difficult for defendants to access and "highly unlikely" that a court can conclude with certainty "how the government's knowledge of any part of the defense strategy might benefit the government." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (noting that "not all government attorneys can be counted on to act with . . . punctilio"). And the government does not mention the Kansas USAO's efforts to block any prejudice showing here, from engaging in collection practices that often left "no paper trail"; to destroying the hard drive containing the video-viewing software; to outright refusing to honor the district court's preservation and discovery orders. *See United States v. Carter*, 429 F. Supp. 3d 788, 847, 870-74 (D. Kan. 2019); R1.365, 377. The government relies on the affidavit of AUSA David Zabel claiming ignorance about the videos. BIO 5. But the government does not mention that the district court found Zabel's credibility "lacking" when he swore ignorance about a colleague's intrusion in another case. 429 F. Supp. 3d at 852. n.355. The government treats the district court's description of the video contents as if they completely describe the contents, BIO 12, without acknowledging that the district court made only limited findings, holding that any further description was "not pertinent" given its denial of relief on other grounds. R2.549-50. The government also ignores the district court's findings that despite being soundless, the videos generally "visually captured meaningful communication between attorneys and clients," and that a viewer could both "easily observe non-verbal communications" and zoom in on documents. 429 F. Supp. 3d at 833-34.

show harm in individual cases, because they recognize both the difficulty of showing case-specific harm and the need to guard against other, systemic harms. Pet. 17-20.

In the Sixth Amendment context, systemic harm occurs with the intentional intrusion into the sacrosanct attorney-client relationship itself, regardless of whether or how the intruding prosecutor makes use of that intrusion. *Hoffa v. United States*, 385 U.S. 293, 306 (1966) (calling deliberate prosecutorial intrusions into attorney-client communications "intrusion[s] of the grossest kind"). This Court recognized as much in *Weatherford* when it opined that harm from an intrusion might result not only from the prosecution's use of attorney-client communications at trial, but also from any other use of the communications "to the substantial detriment" of the defendant, or even from the prosecution's mere access to the details of the communications. 429 U.S. at 554 ("or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case"). As this Court cautioned in *Weatherford*, "[o]ne 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." *Id*. at 554 n.4. That threat justifies a structural-error rule.

By focusing on the existence or absence of a particular kind of case-outcome prejudice, the government's no-harm no-foul argument misses the point, yet again signaling a need for this Court's review.

3. The government's *nothing-to-see-here* approach illustrates the need for this Court's review.

The government's breezy factual account whitewashes the meticulously documented history of the Kansas USAO's misconduct, further illustrating the need for this Court's review. For instance, the government states that the Kansas USAO collected videos of attorney-client meetings but then claims that "[t]he U.S. Attorney's Office *promptly and voluntarily* turned over the soundless videos for the court to review." BIO 4 (emphasis added). This claim is false twice over.

First, the government cites the district court's decision denying Mr. Orduno-Ramirez's § 2255 motion in support of this claim. *Id.* (citing Pet. App. 63a). But the district court stated only that the government "gave up possession when it disgorged the videos to the Court on August 9, 2016." Pet. App. 63a. The district court did not describe the disgorgement as either prompt or voluntary.

Second, the government's disgorgement of videos was in fact neither prompt nor voluntary. Rather, the district court found that the USAO knew it was in possession of the videos as early as June 10, 2016; kept the videos for over two months; misled the court about their existence; distributed them to law enforcement agencies; used them to gain a strategic advantage over a defendant; incorrectly advised the FPD and others that they did not exist; and only came clean and coughed them up when the FPD brought its concerns to the district court. 429 F. Supp. 3d at 835-42.

The government further downplays the events in Kansas as "one-off" and "unique" and says that we have identified "no widespread problem." BIO 12, 16. But the district court here described the Kansas USAO's misconduct—both its intrusions and its

coverup—as exactly that: "widespread," 429 F. Supp. 3d at 880, 898, "systemic," *id*. at 903, and "repeated," *id*. at 808, 864. If not now, in this case, when else would this Court's review be justified?

That said, it is not hard to find intrusions in other jurisdictions that further justify this Court's review and clarification of Sixth Amendment standards. Just a few recent examples include *State v. Newberry*, 2023 WL 6475159 (Ohio App. 8 Dist. Oct. 5, 2023) (finding law enforcement's recording of attorney-client communications an "unconscionable violation of Newberry's constitutional rights" but denying any remedy under *Weatherford*); *Booth v. Jackson*, 2023 WL 2783674 (W.D. Wash April 5, 2023) (finding that state court unreasonably applied *Weatherford* in rejecting claim that state violated Sixth Amendment by eavesdropping on attorney-client conversations; setting hearing to address actual prejudice); *United States v. Lazzaro*, 2022 WL 17417970 (D. Minn. Oct. 12, 2022) (finding that intrusion into attorney-client calls was neither knowing nor prejudicial under *Weatherford*); *United States v. Sawatzky*, 994 F.3d 919, 923-24 (8th Cir. 2021) (placing burden on defendant to prove prejudice from government's seizure of attorney-client correspondence from jail cell five days before sentencing); *United States v. Anand*, 2022 WL 3357484 at *12 (E.D. Penn. Aug. 15, 2022) (finding "no harm, no foul" in government's viewing of attorney-client documents seized during execution of search warrant); *Smith v. Commonwealth*, 2022 WL 1547787 (Va. App. May 17, 2022) (holding no right to Sixth Amendment remedy where prosecutors obtained but did not listen to attorney-client jail calls); *Butler v. Pickell*, 2022 WL 3337170 at **3-4 (E.D. Mich. May 11, 2022)

(finding that prisoner stated plausible Sixth Amendment violation based on jail's monitoring and recording of attorney-client visits); *Strode v. Park*, 2021 WL 6072700 at **11-12 (M.D. Penn. Dec. 23, 2021) (citing *Weatherford* among other authorities to deny qualified immunity to jail staff in action alleging Sixth Amendment violation based on staff's presence during attorney-client calls).

The government does not argue that Mr. Orduno-Ramirez's case is not an appropriate vehicle for the question presented; it merely argues that the question itself is not important enough to review. BIO 15. The government rewrites the question in an over-specified manner in an attempt to minimize the answer's applicability to other intrusions. BIO 15 ("when the government obtains a soundless recording of a post-plea, pre-sentencing attorney-client communication"). But of course every Sixth Amendment intrusion will have its own particular facts, just as every First Amendment, Second Amendment, or Fourth Amendment violation has its particular facts. Every case can be described as a one-off. If this were reason to deny certiorari, then this Court would have little to do.

We have explained that this Court should grant certiorari for institutional reasons and to protect the rule of law. Pet. 12-15. The government's resistance to this Court's review is standard practice, but its unrepentant approach here is not. The district court described the Kansas USAO as "an echo chamber of sorts" in which prosecutors self-perpetuated the notion that they could collect attorney-client calls with impunity. *Id*. at 860. The DOJ's brief proves that these echoes reverberate all the way to the top. Review is necessary.

4. The government has proven that it cannot be trusted to guard defendants' Sixth Amendment rights.

The government argues that this Court's intervention is unnecessary because there is now a "largely curative" policy in place at the Kansas USAO. BIO 13-14, 16. This policy (which the government neither attaches nor describes) provides little comfort to the 100-plus defendants whose attorney-client communications the government collected before the policy was in place. And it should provide little comfort to this Court. We've attached the policy to this reply. It is a "Revision" of an undisclosed prior policy. Attach. 1. It may itself be revised again or wholly rescinded at the whim of the USAO. It states that it has been established "[i]n recognition of the well-established attorney-client privilege" and is "consistent with" a 2014 DOJ memorandum regarding electronic surveillance procedures within the federal prison system. Attach. 1. It does not mention the Sixth Amendment. Attach. 1-5.

The policy does not create any new rules or enforcement mechanisms—it simply establishes procedures for obtaining and filtering recordings in compliance with existing constitutional, evidentiary, and DOJ rules. *Id*. But those pre-existing rules did not deter federal prosecutors from secretly collecting, retaining, and exploiting attorney-client communications for years. 429 F. Supp. 3d at 900. And they did not deter the Kansas USAO from engaging in a "wholesale strategy to delay, diffuse, and deflect" the district court's inquiry into the USAO's systemic misconduct. *Id*. at 800. The government offers no reason to believe that this policy statement will have the deterrent effect that existing constitutional, evidentiary, and DOJ rules did not.

As the Kansas experience makes plain, prosecutors cannot be trusted to guard our clients' rights to confidential attorney-client communications. That responsibility belongs to the Sixth Amendment as interpreted by this Court. Review is necessary.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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PROCEDURE FOR REQUESTING AND USING RECORDED INMATE PHONE CALLS, VIDEOS AND EMAILS IN CRIMINAL AND CIVIL CASES[1]

I. Purpose

In recognition of the well-established attorney-client privilege, the United States Attorney's Office for the District of Kansas (USAO) hereby establishes policy, procedure, and responsibilities regarding requests for the receipt, handling, and use of recorded inmate phone calls, videos and emails[2] obtained from jails, prisons, and/or detention facilities in criminal or civil cases handled by the United States Attorneys' Office for the District of Kansas (USAO).

Inmate calls, videos or emails used by the USAO in any investigation or case may only be obtained through grand jury subpoenas, trial subpoena, administrative subpoena, or specific form described below. The USAO will no longer handle investigations and/or prosecutions with recorded inmate phone calls, videos or emails obtained from facilities without following this policy.[3]

This policy and approval process is consistent with the Department's December 1, 2014, Memorandum regarding Electronic Surveillance Procedures within the Federal Prison System.

A "filter team" will be utilized to shield the prosecution team from being exposed to material that it should not receive under the rules of professional conduct or other laws. Exposure to such material could result in disqualification of members of the prosecution team or suppression of evidence. The use of a filter team may demonstrate that the investigative/prosecution team was not exposed to information to which it was not entitled.

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[1] This policy does not confer any rights on any person investigated or prosecuted in any federal investigation in the District of Kansas.

[2] For purposes of this policy, any reference to recorded inmate phone calls will include facility videos (of inmates) and inmate emails.

[3] This policy does not address whether audio or video recordings of inmate calls or meetings with their counsel are privileged or confidential in nature. This is not an opinion on the law of privilege and/or when potentially privileged or confidential materials lose their protection, as those are questions of substantive law not considered or addressed in this policy.

II. Procedure

A. Approval to Request Recorded Phone Calls or Videos

Any Assistant United States Attorney[4] (AUSA) and/or law enforcement officer working with an AUSA who seeks, in furtherance of an investigation or case, to obtain recorded inmate phone calls, videos or emails from any facility must first complete an internal form entitled "Request for Authorization to Obtain Recorded Inmate Phone Calls" (referred to as Request"). In criminal cases, the branch Criminal Coordinator and Criminal Chief will review and approve the completed form. In civil cases, the branch Civil Coordinator and the Civil Chief will review and approve the completed form.

If the requested information includes an inmate or calls that are the subject of another known investigation or case, the request must be coordinated with the AUSA(s) and law enforcement officers(s) assigned to the other investigation or case. The USAO will not engage in crossover investigations or submit duplicate requests for information from facilities absent this coordination, so pursuit of an effective and efficient manner for proceeding is accomplished. The AUSAs will communicate the coordinated plan to the involved Criminal or Civil Coordinator(s).

When communicating approval of a Request, the branch Criminal or Civil Coordinator will also identify the assigned Filter AUSA. In criminal cases, the Criminal Chief selects Filter AUSAs after consultation with appropriate Civil and/or Criminal Coordinators. In civil cases, the Civil Chief selects Filter AUSAs after consultation with appropriate Civil and/or Criminal Coordinators.

B. Request to the Facility or United States Marshal

Upon approval, the prosecution team will complete a subpoena or internal form titled "Request to United States Marshal for Recorded Inmate Phone Calls or Videos" (referred to as "USMS Request"), which shall be provided to the facility or the United States Marshals Service (USMS) Office. A copy of each Request, USMS Request and/or subpoena shall be maintained in the case file and central location to be established and maintained by each branch Criminal or Civil Coordinator.

Due to the relationship that the USMS has with facilities holding pre-trial detainees, a USMS Request may be used (rather than a subpoena) to request recorded inmate phone calls or videos. The USMS Request must be completed by an AUSA and provided to Deputy XXX, the USMS Point of Contact in Wichita/Topeka/Kansas City.

Alternatively, if the USAO uses a grand jury subpoena, trial subpoena, or administrative subpoena to obtain the calls or videos, the subpoena should be directed to the custodian of record for the facility. The subpoena must specify each of the following – the inmate's calls requested, the time period covered and request that all calls involving the telephone numbers of all known attorney(s) for the inmate (including office telephone numbers/extensions and cellular phone numbers) be excluded from production. In addition, the period covered by the subpoena should be limited to what is relevant and does not overlap other investigations or cases.

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[4] Any reference in this policy to an AUSA applies to a Special Assistant United States Attorney (SAUSA).

C. Filter Team

When receiving recorded inmate phone calls, videos or emails from an institution, there is a reasonable possibility that communications between an inmate and his/her attorney may be provided. These circumstances warrant the use of filter teams.

The subpoena or USMS Request shall direct production to the filter AUSA or filter team (the team, in addition to an AUSA, may include a law enforcement officer not assigned to the investigation or case). No one involved in the filter team shall be assigned/designated as involved in the specific case at the time the initial request is approved by the Criminal Coordinator and Criminal Chief in criminal cases, or by the Civil Coordinator and Civil Coordinator. The filter AUSA or filter team shall not participate in the investigation or prosecution or civil case that is the subject of the requested information, except to the extent needed to prosecute issues related to the filter process. Supervisory AUSAs and filter AUSAs must take steps to ensure the filter AUSA does not have any investigations or cases connected in any manner to the investigation or prosecution for which the AUSA serves as the filter AUSA. To protect the integrity of the filter, it may be necessary to assign filter AUSAs who are not in the same branch office or division as the prosecuting AUSA(s). Law enforcement officers assigned to the filter team must also take steps to ensure the filter officer has no investigations or cases connected to the filter investigation or prosecution.

D. Filter Team Process

The filter team will review the written instructions provided by the Criminal Chief, Civil Chief, or branch Criminal or Civil Coordinator, which will rely on the information provided by the prosecution team.

The filter team must keep all potentially privileged material in a secure manner. This includes sealed, labelled as "potentially privileged or confidential" material, locked, and/or secured in a location not accessible to the prosecution team.

The filter team must use suitable safeguards and conduct all actions in a manner to rebut the presumption that the potentially privileged or confidential material was shared with the prosecution team before the filtering process concluded.

The entirety of recorded phone calls and the index of such calls provided by the institution must be maintained for subsequent review with defense counsel. The filter team will create a duplicate of the recorded phone calls for their review, which will lead to the elimination of any calls between an inmate and their counsel. The duplication will also include a copy for the inmate's counsel.

The filter team will use the index of phone numbers that accompanied the recorded phone calls to initially remove any recorded phone calls with known attorneys for the inmate. The filter team will use a log to document this preliminary elimination process. Unless the investigation is of ongoing criminal activity of the inmate, this log and duplicate of all recorded phone calls should be provided to inmate's counsel with an explanation of the filter process to date. Defense counsel will be given a specified period of time to review the remaining phone calls to assert privilege and communicate such to the filter team, with defense counsel's own privilege log. If the filter team disputes defense counsel's privilege claim then the filter team will evaluate the merits of the privilege claim with the First

Assistant United States Attorney and Criminal Chief to evaluate seeking judicial review, which would be handled by the filter AUSA.

Depending upon whether defense counsel is reviewing the recorded phone calls to assert privilege, the filter team will review all remaining recorded phone calls involving phone numbers not known to be associated with the inmate's counsel, to include contractors known to be associated with inmate's counsel, such as defense investigators and forensic experts, etc. If potentially privileged recordings are identified, the filter team will promptly inform the First Assistant United States Attorney and the Criminal Chief in criminal cases or the Civil Chief in civil cases without revealing any content. The potentially privileged recordings must be segregated from the non-privileged recordings. Unless the filter team is awaiting defense counsel to complete a review of the phone recordings to make any privilege assertion, then non-privileged recordings may be provided to the prosecution team. Before providing any materials to the prosecution team, the filter team should fully document the review process and how the prosecution team was excluded from the entire process, especially if any attorney calls were excluded. Additionally, before the filter team relinquishes any recorded phone calls to the prosecution team, it may be useful for the filter AUSA to be instructed by PRAO for guidance in that process.

If the filter team believes the crime fraud exception applies to any of the recorded phone calls, then it will inform the First Assistant United States Attorney and Criminal Chief without revealing any content. If approved by the First Assistant United States Attorney or Criminal Chief, judicial determination of the application of the crime fraud exception will be sought. Any such litigation will be handled by the filter AUSA, unless the First Assistant United States Attorney, Criminal or Civil Chief, and Civil or Criminal Coordinator determine that it is appropriate for the AUSA assigned to the case to do so.

E. Handling Recorded Calls, Videos or Emails Obtained from Facilities

When an inmate's recorded calls, videos or emails are received from a detention facility the materials will be provided to a filter team immediately for safekeeping and review. The filter team will follow the procedures described in paragraph D, above, before providing any of the evidence to the prosecution team or the civil AUSA assigned to the case.

F. Exception and Process for Current Recorded Phone Calls

On the effective date of this policy, recorded inmate calls, facility videos or emails may already be in the possession of some prosecution teams or civil AUSAs. To the extent possible, these prosecution teams or civil AUSAs shall apply this policy to their investigations/cases. For example, if any calls have not been reviewed, the prosecution team should immediately inform the Criminal Coordinator and Criminal Chief to request the assistance of a filter team.

If the prosecution team or civil AUSA has completed the review of any recorded inmate phone calls or videos prior to this policy's effective date, the AUSA should inform the Criminal Coordinator and Criminal Chief, or in civil cases, the Civil Coordinator or Civil Chief, and provide the following:

- Identify defendant(s) charged;
- Case Number (USAO, agency number and court number);
- Case agent and agency;
- Names of inmates whose calls were obtained;
- Time period covered for the phone calls received;
- Process by which the calls were obtained, such as subpoena, USMS request, or other;
- Name of facility that provided the calls;
- Steps taken to ensure there were no attorney inmate phone calls requested or reviewed;
- Whether any calls between an inmate and attorney, were obtained; and
- If any inmate-attorney phone calls were obtained, the steps taken to isolate such calls.