

No. 24-1084

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IN THE  
**Supreme Court of the United States**

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STEVEN M. HOHN,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit**

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**AMICUS CURIAE BRIEF OF TENTH CIRCUIT  
FEDERAL PUBLIC DEFENDERS  
IN SUPPORT OF PETITIONER**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST .....	1
SUMMARY OF ARGUMENT .....	1
ARGUMENT.....	2
Our trial lawyers must often communicate with incarcerated clients by phone, and there is no way to be sure the calls are private.....	2
A. District of Colorado .....	3
B. District of New Mexico .....	5
C. District of Utah.....	5
D. District of Wyoming.....	7
E. Northern District of Oklahoma.....	8
F. Western District of Oklahoma .....	8
G. Eastern District of Oklahoma .....	9
H. District of Kansas .....	10
CONCLUSION .....	10

TABLE OF AUTHORITIES

CASES	Page(s)
<i>United States v. Kearn</i> , 90 F.4th 1301 (10th Cir. 2024).....	2
OTHER AUTHORITIES	
Admin. Off. of U.S. Courts, <i>Caseload Statistics Data Tables</i> , Table H-14 (2023).....	3
Am. Bar Ass’n, <i>Criminal Justice Standards for the Defense Function</i> § 4.3.3(b) (4th ed. 2017) .....	2

## STATEMENT OF INTEREST

The Federal Defenders for the Districts of Colorado, Wyoming, Utah, New Mexico, and Oklahoma (Northern, Western, and Eastern) represent indigent defendants charged with federal crimes throughout the Tenth Circuit. Amici have an interest in this case because it implicates the protections afforded to our communications with incarcerated clients. As explained below, we cannot always be sure that our communications with incarcerated clients are private. We therefore have an interest in whether our clients have an adequate remedy when prosecutors intentionally obtain attorney-client communications and use them against our clients.<sup>1</sup> As Mr. Hohn's petition for writ of certiorari explains, the decision below provides no remedy at all because it effectively immunizes prosecutorial misconduct that intrudes into attorney-client communications.

## SUMMARY OF ARGUMENT

Regular communication with clients is a cornerstone of effective criminal defense. Yet for us, ensuring that our attorney-client communications are confidential presents an enduring challenge. Most of our pretrial clients are incarcerated, and due to a variety of external factors—including physical distance, cumbersome jail policies, and hectic schedules—we must sometimes resort to communicating with our clients by

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<sup>1</sup> Pursuant to Supreme Court Rule 37, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief has been filed more than 10 days before it is due, and its filing thereby serves to provide the notice required by Rule 37.

phone or videoconference. While we do what we can to maintain the privacy of these communications, we cannot always be sure that they are truly confidential.

The accessibility of our communications with clients creates a vulnerability for unscrupulous prosecutors to exploit. It is therefore essential that the law provides a meaningful remedy when prosecutors intentionally obtain our attorney-client communications. But as Mr. Hohn has explained, the decision below provides no effective remedy at all. This Court should grant Mr. Hohn's petition for writ of certiorari.

### **ARGUMENT**

**Our trial lawyers must often communicate with incarcerated clients by phone, and there is no way to be sure the calls are private.**

Regular and extensive communication with clients is constitutionally essential to the work of a criminal defense attorney. *See, e.g., United States v. Kearn*, 90 F.4th 1301, 1304 (10th Cir. 2024) (holding that counsel provided ineffective assistance by inadequately explaining plea offer to client). Prevailing professional norms require that counsel "interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once." Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function* § 4-3.3(b) (4th ed. 2017). Defense counsel must "keep the client reasonably and regularly informed about the status of the case" and advise the client "concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes." *Id.* § 4-51(b). Regular communication is also integral to defense counsel's ability to build and maintain an

effective relationship of trust and confidence with the client.” § 4-3.1(f).

Most of our pretrial clients are detained during the course of district court proceedings, and a client’s incarceration poses special challenges for attorney-client communication. *See, e.g.*, Admin. Off. of U.S. Courts, *Caseload Statistics Data Tables*, Table H-14 (2023) (reporting average detention rate of 70.4% in the Tenth Circuit during the 12-month period ending Sept. 30, 2023). We strongly prefer in-person meetings, both because they facilitate a trusting relationship with the client and because we can generally be sure that our attorney-client communications are, as they should be, private. But as explained below, in-person meetings are not always feasible, and we often must speak with our clients by telephone or videoconference. In those situations, it is not always possible for us to be sure that our conversations with our clients are private. The accessibility of our attorney-client communications provides an opening for unscrupulous prosecutors to intentionally obtain them for strategic advantage. As Mr. Hohn explains in his petition for writ of certiorari, the decision below provides no effective remedy for when that happens.

#### **A. District of Colorado**

In the District of Colorado, our clients are routinely held in no fewer than sixteen different detention centers spread across four different states. While many clients are detained in the metro-Denver region, including at the Federal Detention Center (“FDC”) in Littleton, Colorado, about 30 minutes southwest of our Denver office, the U.S. Marshals Service also contracts with many local jails throughout Colorado, some of which are one to two-and-a-half hours away by car. At such distances, a single legal visit can consume our

attorneys' time; for example, between round-trip travel and meeting with clients, a visit to the Washington County Justice Center in Akron, Colorado, easily can take an entire day. Clients whose cases arise on Colorado's Western Slope are often housed in that region, in either Grand Junction, Colorado, or near Durango, Colorado, in the southwest corner of the state near the Southern Ute and Ute Mountain Ute tribal lands. Visitation with these clients involves a one- to two-day trip by air.

But not all of our clients are even housed in Colorado. Some clients are detained in Goshen County Detention Center in Torrington, Wyoming, or at Scotts Bluff Detention Center in Gering, Nebraska, which are both over three hours from Denver (in good weather). And since August 2022, still other clients have been housed at Nevada Southern Detention Center in Pahrump, Nevada, a small town on the edge of Death Valley, 810 miles away from our office, where visitation entails flying to Las Vegas, renting a car, and driving about two hours through remote desert.

These far-flung locales make communication by telephone and video calls a necessity from time to time. But our—and our clients'—ability to verify that these communications are private can vary widely across the multiple facilities with which we interact. For example, some, like FDC, have dedicated legal lines that clients can utilize to contact our office, ostensibly without being recorded or monitored. Others, like Denver County Jail, subcontract to private companies that provide video-conferencing services. Still others will schedule calls with our clients, but guards or other detainees may be present nearby given the physical setting of the facility, while at other facilities, clients may call us directly but our lawyers will not always be

able to determine whether that call was made on a private line or on a monitored/recorded line.

### **B. District of New Mexico**

In the District of New Mexico, most of the clients represented by lawyers in our Albuquerque office are housed at Cibola County Correctional Center in Milan, New Mexico, which is about 90 miles from our office. On average, it takes about two weeks to schedule an in-person visit with clients at that facility. Thus, when we need to communicate with clients quickly, a phone or Zoom call is our only feasible option. When we speak to clients in this way, we typically use prearranged calls that we are told are private. But we have no way to be sure the calls are actually private, and we cannot always be confident there is not a guard within listening range. Also, the rooms where clients are taken for prearranged phone calls have very thin walls so privacy is always a concern.

Some of the clients represented by lawyers in our Las Cruces office are housed at Hidalgo County Detention Center in Lordsburg, New Mexico, which is almost a two-hour drive from the office. Our lawyers do not usually have time to make the drive to Lordsburg so most of our communications with clients held there are by phone. We are told that the calls are private and unmonitored but have no way to verify whether that is always the case.

### **C. District of Utah**

Our attorneys in Utah communicate quite often with incarcerated clients by telephone. The primary reasons are physical distance, workload, and necessity. There are no federal detention facilities in Utah, and the U.S. Marshals Service contracts with a patchwork



of local jails. The closest to our FPD offices in Salt Lake City, Utah, is Salt Lake Metro Jail, about 6 miles from downtown, but few federal inmates are housed there. The next closest jail is Davis County, about 20 miles north of Salt Lake City, where about a quarter of our clients are housed. Another 20 miles north of there is Weber County, where about half of all federal inmates are housed. A handful of additional clients are scattered much further from Salt Lake City elsewhere in the state, and, importantly, the U.S. Marshals Service is housing an ever-growing number of pretrial detainees at Nevada Southern Detention Center in Pahrump, Nevada. Pahrump is about 480 miles from Salt Lake City and requires two days to travel back and forth.

Given these distances, and the fact that local jails outside Salt Lake City require attorneys to make appointments for in-person meetings days in advance, phone calls are vital. Unfortunately, it is not always possible to guarantee the privacy and confidentiality of attorney-client phone calls from these facilities. For example, if a client initiates a call from jail and pays for the call, they are often told the call is subject to monitoring and not confidential, but we normally don't hear that message before the call is transferred to us. Additionally, most client-initiated phone calls are from pods within jails where clients have little or no privacy. Some facilities offer tablets, and inmates can make calls from their cells or more private areas. But it is impossible to determine the level of privacy or confidentiality of any given phone call in our district, so most attorneys are hesitant to discuss sensitive matters on the telephone.

### **D. District of Wyoming**

In the District of Wyoming, our pretrial clients are principally held in one of two detention facilities, the largest of which—Scotts Bluff Detention Center—is not even in Wyoming, but rather in Gering, Nebraska, an hour-and-a-half drive from our Cheyenne office, and up to a four-hour drive from our Casper office. A significant number of our clients are detained there, while most others are housed at Platte County Detention Center, located between our offices in Cheyenne (a one-hour drive) and Casper (a one-and-a-half-hour drive). A smaller number of clients are sometimes housed in other local jails elsewhere throughout Wyoming.

Given these distances, and the fact that Wyoming's winter weather often closes roads, routine in-person visits often are not possible, and so we depend on legal calls for client communication. These calls can take one of two forms. Sometimes we schedule legal calls with the detention centers using their phone lines, and sometimes our clients reach out to us directly using phones in their units. Either way, such calls to our office are not supposed to be recorded or monitored. To the best of our knowledge, that appears to be the case, although it has not always been so, and in past years we have received privileged calls as part of a discovery production. The second way we conduct legal calls is through iPads that our office provides directly to local jails, and which are equipped with secure communication connections that we can verify. Clients can use these in private spaces to talk with our attorneys. We have had to make special accommodations with these facilities (and incur significant expenses of time and additional property costs) to make this technology

available to our clients to guarantee easier—and private—communication.

### **E. Northern District of Oklahoma**

In the Northern District of Oklahoma, our pretrial clients are generally held in one of four detention facilities, all of which are located within about an hour's drive from our office in Tulsa. The relative proximity of the facilities generally makes it easy for us to communicate with our clients in person. But in-person visits are difficult to arrange at one of those facilities, Cimarron Correctional Facility in Cushing, Oklahoma, because the facility requires visits to be scheduled at least two days in advance. Our trial lawyers' hectic and unpredictable schedules, as well as last-minute developments (such as renewed plea agreement offers on the day before court), often make planning visits in advance untenable, so many of our lawyers must use phone calls or Zoom conferences to communicate with clients housed at Cimarron Correctional Facility.

Our lawyers avoid discussing substantive matters with clients over the phone because we are not confident that our conversations are private. Indeed, we have received our own communications with clients in discovery productions in cases where the client was housed at David L. Moss Criminal Justice Center (the Tulsa County Jail). More generally, we cannot be confident when speaking with a client by phone or by Zoom that a guard is not present in the room or capable of overhearing our clients.

### **F. Western District of Oklahoma**

In the Western District of Oklahoma, many of our pretrial clients are held in jails located between 35 and

115 miles from our office in Oklahoma City. Nonetheless, we communicate by phone with clients in those facilities only in emergency situations. None of the jails in which our clients are housed has processes or equipment in place to facilitate attorney-client calls. When we must speak with a client by phone, we schedule the call with jail personnel or through the U.S. Marshals Service. Those calls may not be recorded, but the client is always physically supervised by jail staff members who are within earshot of the client.

Although not a federally contracted pretrial detention facility, Oklahoma County Detention Center houses many of our clients with co-occurring state charges. It is our understanding that recordings of every jail call in that facility are available to state prosecutors. Such recordings have been made available to the U.S. Attorney's Office, though the number of incidents is unknown. We know that, in the past, the U.S. Attorney's Office has given us discovery containing recordings of our own attorney-client communications with clients housed at that facility.

#### **G. Eastern District of Oklahoma**

In the Eastern District of Oklahoma, some of our pretrial clients are housed in distant facilities located more than a two-hour drive from our office in Muskogee. Thus, when we need to speak with a client quickly, a phone call is often the only feasible option. We are told that attorney-client calls are handled differently than other monitored calls, but we have no way to verify that. On some occasions, we have had supposedly private Zoom calls with clients only to learn later that a guard was present. At Muskogee County Jail, clients speak to us by phone from rooms

with sliding doors that allow anyone outside the room to listen in.

#### **H. District of Kansas**

The Kansas FPD represents Mr. Hohn before this Court, and is, therefore, not a signatory to this brief. That office reports, however, that in the District of Kansas, nearly all incarcerated pretrial clients are housed more than 30 miles from the FPD's offices, with some housed more than two hours away. In an attempt to maintain privacy, the office sends letters to the jails that purportedly "privatize" legal phone lines, but the FPD office knows from experience that this process does not reliably ensure that calls are private. For example, supposedly private calls often involve a guard remaining in the room with the client. In addition, the office accepts calls from clients, and they sometimes call from non-secure phones because a secure line is not available.

#### **CONCLUSION**

As this overview demonstrates, our representation of indigent defendants in criminal cases within the Tenth Circuit requires that we communicate with clients by phone (and sometimes video), and we cannot be sure that these communications are private. For this reason, it is imperative that the law provide an effective remedy when prosecutors take advantage of this vulnerability and intentionally obtain confidential attorney-client communications for their own advantage. As Mr. Hohn's petition for writ of certiorari explains, the decision below does not provide an effective remedy and in fact incentivizes prosecutorial intrusion into attorney-client communications by effectively foreclosing relief for defendants whose right to confidentially communicate with their lawyers has

been violated. This Court should grant Mr. Hohn's petition for writ of certiorari.

Respectfully submitted,

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