No. 24-1084

IN THE
# Supreme Court of the United States

STEVEN M. HOHN,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

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

## BRIEF OF DUE PROCESS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Due Process Institute is a nonprofit, bipartisan public interest organization that works to honor, preserve, and restore procedural fairness in the U.S. criminal legal system. It is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education. Due Process Institute is weighing in on this matter as part of its work to protect the fundamental integrity of the adversarial process in the criminal legal system and ensure that the American people enjoy robust protections from prosecutorial misconduct.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case offers the Court an opportunity to clarify decades of confusion on a critical Sixth Amendment question: how to assess prejudice when the government unjustifiably intercepts a defendant's confidential attorney-client communications. The Tenth Circuit's en banc decision requires defendants to show discrete, trial-specific prejudice, even where prosecutors have intentionally and unjustifiably intruded on the defense's

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[1] This amicus brief is filed with timely notice to all parties. Sup. Ct. R. 37.2. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

attorney-client confidences. That burden will be impossible for defendants to meet in most cases, which is why other Circuits have refused to adopt this rule. Only the prosecution knows how intercepted strategic information informed the government's legal strategy and case presentation, whereas defendants can only guess. The Tenth Circuit's rule creates perverse incentives for prosecutorial misconduct—victims of prosecutors who neglect their constitutional obligations and willfully interfere with the effective assistance of defense counsel will not obtain relief in the vast majority of cases.

The Court should adopt the alternative burden-shifting framework to assess prejudice advanced by Judge Bacharach's dissent. Under this approach, a defendant must first make a prima facie showing that the prosecution impermissibly and unjustifiably intruded on attorney-client communications, resulting in the interception of the defense's legal strategy. If a defendant satisfies his burden, then prejudice is presumed and the burden shifts to the prosecution to show that no actual prejudice occurred.

This approach, used by both the First and the Ninth Circuits, aligns with burden-shifting frameworks this Court has established to evaluate other potential constitutional violations in the criminal process where the prosecution has vastly superior access to information than the defense—like the use of compelled testimony, *Kastigar v. United States*, 406 U.S. 441, 460–62 (1972), or racial motivation in preemptory challenges, *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986). Burden shifting to assess prejudice here would preserve the integrity of

the adversarial process because it places the burden on the party who (a) engaged in the misconduct and (b) has the information about how the misconduct aided its case. Prosecutors should welcome the opportunity to rebut the presumption that their misconduct prejudiced the defendant. The Tenth Circuit, however, wrongly puts the burden of proof entirely on the defendant, despite the government having the best information about the advantages (or none) it gained through intentional misconduct.

Petitioner Steven M. Hohn's prosecutors created the problem here. They *intentionally* and unjustifiably listened to his confidential communications with his attorney discussing case strategy. Under these circumstances, the just result is to require the prosecutors to prove that Petitioner suffered no actual prejudice from their misconduct—Petitioner should not have to bear the burden of proving prejudice from such outrageous prosecutorial misconduct. This rule makes good sense: Only the prosecutors know what, if any, advantage they obtained from intercepting these confidential communications. The Tenth Circuit's contrary holding jeopardizes the fairness of the adversarial process. The Court should therefore grant the petition so defendants across the United States receive adequate protections from intentional prosecutorial misconduct.

## ARGUMENT

### I. This Court Should Adopt a Burden-Shifting Framework to Assess Prejudice from Prosecutors' Intentional, Unjustified Intrusions into Defendants' Attorney-Client Communications.

Lower courts have been divided for over 40 years on how to assess prejudice resulting from prosecutorial intrusions into the defense's confidential strategic information. This Court should adopt the burden-shifting framework used by the First and the Ninth Circuits to assess prejudice because it best balances the fundamental right of criminal defendants to effective assistance of counsel with society's interest in the sound administration of the criminal justice system. This framework is also consistent with burden-shifting approaches this Court uses when faced with potential constitutional violations in the criminal process where the government caused the misconduct and has vastly superior information than defendants do about the resulting harms.

#### A. Lower Courts Disagree on How to Evaluate Prejudice When Prosecutors Wrongfully Obtain Confidential Strategic Communications by the Defense.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have Assistance of Counsel for his defense." U.S. Const. amend VI. "[T]he right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann*

*v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The constitutional right to effective assistance of counsel is a critical component of the right to a fair trial and thus is essential for the adversarial criminal process to function properly. *See Herring v. New York*, 422 U.S. 853, 857–58 (1975).

For there to be effective representation, defendants and their lawyers must be able to fully and frankly discuss the case in confidence, including the weaknesses of potential defense strategies and the evidence that may be used against the defendant. The Sixth Amendment therefore guards against unjustified intrusions by prosecutors and law enforcement into the defense's confidential attorney-client communications. *See Weatherford v. Bursey*, 429 U.S. 545, 554 & n.4 (1977); Pet. 5–6, 23–27. Anything less would risk "the inhibition of free exchanges between defendant and counsel because of the fear of being overheard." *Weatherford*, 429 U.S. at 554 n.4.

Lower courts however have disagreed for more than 40 years on how to assess prejudice resulting from prosecutorial intrusions on "confidential defense strategy information" and which side bears the burden of proof of showing prejudice. *Cutillo v. Cinelli*, 485 U.S. 1037, 1037–38 (1988) (White, J., dissenting from denial of certiorari) (describing circuit split between the First, Third, and Sixth Circuits); *Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., statement respecting denial of certiorari) ("Since *Weatherford*, many federal and state courts have struggled to define what burden, if any, a defendant must meet to demonstrate prejudice from a

prosecutor's wrongful or negligent acquisition of privileged information.").

The result is an incompatible patchwork of tests across the country. *See* Pet. 16–23. On one end of the spectrum, the Third Circuit applies a per se rule for a prejudicial Sixth Amendment violation, requiring the defendant to show only that the prosecution has wrongfully intercepted the defense's confidential strategic communications. *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978). Now, on the opposite end, the Tenth Circuit requires defendants to additionally show that the intrusion caused specific prejudice to the criminal proceedings, Pet. App. 61a–64a—an all but impossible requirement in most cases. *Infra* Part II.B.

Other circuits occupy a murky middle ground, reciting a variety of so-called *Weatherford* factors to determine prejudice, including whether the governmental intrusion was intentional and whether the prosecution obtained confidential information about defense strategy, without clarifying whether such factors *suffice* to show prejudice. *E.g.*, *United States v. Kelly*, 790 F.2d 130, 136–38 (D.C. Cir. 1986); *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981). Finally, the First and the Ninth Circuits use a burden-shifting framework, assuming prejudice if the defendant shows a wrongful governmental intrusion into attorney-client communications, which the government may then rebut. *United States v. Mastroianni*, 749 F.2d 900, 907–08 (1st Cir. 1984); *United States v. Danielson*, 325 F.3d 1054, 1073–74 (9th Cir. 2003). This framework appropriately balances the competing constitutional interests for the reasons discussed below.

### B. Burden Shifting Properly Balances the Competing Constitutional Interests

A burden-shifting framework to assess prejudice would address the practical reality of informational asymmetry between the defense and the prosecution on the advantages the prosecution gained from their misconduct. It would give prosecutors an opportunity to prove the integrity of their prosecutions in the rare circumstances where this rule would be invoked. And it would disincentivize the kind of prosecutorial misconduct committed for years by the U.S. Attorney's Office in Kansas City. *See* Pet. 2; Pet. App. 5a–6a.

Under this framework, a defendant must first make a prima facie showing of (1) a prosecutorial intrusion that was intentional and unjustified into the defense's protected attorney-client communications that (2) resulted in the interception of legal strategy or other trial preparations. Pet. App. 65a–67a (Bacharach, J., dissenting in part); *Mastroianni*, 749 F.2d at 907–08. If a defendant makes this initial showing, the burden shifts to the government to show that no actual prejudice resulted to the subsequent criminal proceedings. Pet. App. 67a, 83a–85a (Bacharach, J., dissenting in part). Allowing the government to rebut this presumption balances the right to effective counsel in criminal cases with "society's interest in the administration of criminal justice." *United States v. Morrison*, 449 U.S. 361, 364 (1981). In some situations, "the revelation of confidential communications … is harmless." *Mastroianni*, 749 F.2d at 907.

What the government would need to show specifically to rebut this presumption of prejudice would

"vary from case to case." *See Danielson*, 325 F.3d at 1072. Such a showing might include, for example, proof that the confidential information was of de minimis value to the prosecution or that the prosecution did not use the information. *Mastroianni*, 749 F.2d at 907; *see* Blake R. Hills, *Unsettled Weather: The Need for Clear Rules Governing Intrusion into Attorney-Client Communications*, 50 N.M. L. Rev. 135, 160–61 (2020). If the prosecution however cannot adequately rebut the presumption, courts may then "neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Morrison*, 449 U.S. at 365.

Here Petitioner made his prima facie showing. The district court found that prosecutors, without justification, recorded a phone call between Petitioner and his lawyer and intercepted confidential communications regarding legal strategy, the evidence that Petitioner expected to face, and flaws with that evidence. Pet. App. 192a–93a. The government's invasion of the defense's confidential strategy here raises grave doubts of the fundamental fairness of the subsequent adversarial process that led to Petitioner's conviction. And Petitioner is not the only defendant affected. The U.S. Attorney's Office in Kansas City engaged in a "systematic practice of purposeful collection, retention and exploitation of calls from … detainees to their attorneys"—no less than a "purposeful and large-scale intrusion into attorney-client relationships." *United States v. Carter*, 429 F. Supp. 3d 788, 900 (D. Kan. 2019), *vacated in part by* Case No. 16-20032-02, 2020 WL 430739 (D. Kan. Jan. 28, 2020).

The government should want the opportunity to prove the soundness of its prosecutions despite pervasive abuses of prosecutorial authority. *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) ("[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." (citation omitted)). Under the Tenth Circuit's new rule, however, the taint to Petitioner's trial will go unaddressed. Petitioner has acknowledged that he cannot affirmatively prove discrete, trial-specific prejudice.[2] Pet. App. 198a. And there is no mystery why. Only prosecutors have access to their internal decision-making processes; Petitioner "can only guess" at the damage done to his case. *See Danielson*, 325 F.3d at 1070. The prosecution here intercepted key parts of Petitioner's legal strategy, including "what he believed the evidence against him to be and problems with that evidence." Pet. App. 6a–7a (quoting Pet. App. 193a). Petitioner cannot know whether the prosecution already intended to use that evidence against him or what the prosecution believed as to the weaknesses or strengths of that evidence. Pet. App. 71a (Bacharach, J., dissenting in part). The potential strategic and tactical adjustments that prosecutors could have made in response to that wrongfully acquired information are innumerable, from reframing narrative elements of the

[2] As Judge Bachrach recognized, the Tenth Circuit majority contradicted the district court's factual findings and the record when it concluded that Petitioner had "stipulated" to a complete lack of prejudice. Pet. App. 70a–71a (Bacharach, J., dissenting in part).

case, to assessing other potential evidence to present, to pursuing alternative theories of guilt.

When allocating burdens of proof for a constitutional claim, one key consideration is if "defendants typically have realistic access to the information they would need to support a federal constitutional claim or if that information is uniquely available to the government." Eve Brensike Primus, *Burdens of Proof in Criminal Procedure*, 75 Duke L.J. at 43 (rev. Apr. 16, 2025) (forthcoming).[3] If the latter is true, then "a burden-shifting regime" rightly "forces the government to produce the necessary information after the defendant makes an initial, reduced showing of a possible constitutional problem." *Id.* Here, it is appropriate—indeed necessary—to put the burden on the prosecution by requiring the government to rebut the presumption of prejudice. Prosecutors alone created this problem through their intentional misconduct, and the government alone knows the fruits of those abuses. *Danielson*, 325 F.3d at 1072. Placing the burden on the government—only after the defendant has made a prima facie showing—would also incentivize government actors to ensure that unlawful surveillance of this kind does not reoccur.

As Judge Bacharach correctly notes below, "[r]ecognition of a rebuttable presumption wouldn't violate *United States v. Morrison* or *Weatherford v. Bursey*." Pet. App. 79a (Bacharach, J., dissenting in part) (bolding omitted). Both those cases are

[3] Available at https://perma.cc/GBV3-CUKC.

distinguishable. In *Weatherford*, the government's intrusion on attorney-client communications was unintentional and had a legitimate law enforcement purpose, and the prosecution did not learn the details of the defense's trial preparations from the intrusion. 429 U.S. at 554–55. And *Morrison* did not address attorney-client communications at all, but considered whether an extreme remedy—dismissal of the indictment—was appropriate where there was no "substantial threat" of prejudice from the government's unsuccessful attempt to persuade a defendant to drop her lawyer and cooperate. 449 U.S. at 365 & n.2. Neither case prescribes rules for assessing prejudice when the prosecution intentionally and unjustifiably intercepts the defense's legal strategy.

### C. This Court Frequently Uses Burden Shifting to Balance Competing Constitutional Interests

This Court "undoubtedly has both the power and the duty to fashion 'interpretative' implementing rules to fill out the meaning of generally framed constitutional provisions." Henry Paul Monaghan, *Forward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 22–23 (1975). Burden shifting is often utilized by this Court to assess alleged violations of a defendant's constitutional criminal procedural rights where, like here, the government is at fault for the violation and has far superior information on the circumstances. Doing so balances the underlying constitutional concerns and advances "the ultimate objective" of "our adversary system of criminal justice … that the guilty be convicted and the innocent go free." *Herring*, 422 U.S. at 862.

For instance, burden shifting has long preserved a defendant's Fifth Amendment right against self-incrimination. The use immunity statute (18 U.S.C. § 6002) permits the government to prosecute the witness using evidence obtained independently of the witness's immunized testimony. Once a defendant demonstrates that they have testified, under a grant of immunity, as to matters related to a federal prosecution, the burden then shifts to the government to prove that the evidence it seeks to use is derived from a source wholly independent of the compelled testimony. *Kastigar*, 406 U.S. at 460.

Use and derivative-use immunity thus adequately balance the government's ability to carry its burden of proof against the competing interest of a witness-turned-defendant in avoiding incriminating (and unconstitutional) uses of compelled testimony. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 255 (1983) (citing *Kastigar*, 406 U.S. at 460). *Kastigar* is especially helpful here because the Court sanctioned shifting a "heavy" evidentiary burden to the prosecution when it acts "without colorable right" by intruding into a defendant's protected testimony—affording the defendant after-the-fact protection "commensurate with that resulting from invoking the privilege itself." 406 U.S. at 461–62.

Burden-shifting frameworks have also applied even where the prosecution carries stronger countervailing interests than apparent here. The approach to a *Batson* challenge is instructive: once a defendant has made a prima facie showing that a prosecutor "exercised a peremptory challenge on the basis of race," the "burden shifts to the prosecutor to present a race-neutral

explanation." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (citing *Batson*, 476 U.S. at 96–98). The Court weighed the government's "historical privilege" of peremptory challenges—which ordinarily can be exercised for any reason at all, so long as the challenge is related to the prosecutor's view of the outcome of the case, *Batson*, 476 U.S. at 89, 91—against the Equal Protection Clause and its prohibition on exclusion of persons from jury service on account of race. Based on that balancing of competing interests, *Batson* did not abolish peremptory challenges, despite concerns raised about their illegitimate use, because of their "important position" as a prosecutorial tool and trial practice. *Id.* at 98. The Court instead decided that shifting the burden of proof to the prosecution after a prima facie showing fairly balanced the competing interests inherent in the administration of criminal justice. *See id.*, at 98–99; *see also Hill v. Texas*, 316 U.S. 400, 406 (1942) ("A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for [the prosecution] may indict and try him again by the procedure which conforms to constitutional requirements.").

In establishing a burden-shifting framework, *Batson* also recognized the informational asymmetry that necessarily hinders a defendant who challenges unconstitutional prosecutorial conduct. The practical difficulties of proving a case of prejudice, especially where the violative use of confidential communications cannot be documented, render a defendant's burden "crippling" and "insurmountable." *See Flowers v. Mississippi*, 588 U.S. 284, 298 (2019) (quoting *Batson*, 476 U.S. at 92 n.17); *Batson*, 476 U.S. at 92–93, 92 n.17.

Burden shifting—specifically for a showing of prejudice—is also not new in the Sixth Amendment context. In *United States v. Wade*, 388 U.S. 218 (1967), the Court held that the conduct of a post-indictment pretrial lineup without notice to, and in the absence of, the defendant's counsel denies the defendant his Sixth Amendment right to counsel. Instead of adopting a per se exclusion rule as to in-court identifications of the defendant, the Court placed the burden of persuasion on the government to establish "by clear and convincing evidence" that in-court identifications were not based on a post-indictment lineup conducted without notice and in the absence of appointed counsel. *Id.* at 240. To serve this core constitutional commitment "motivated in part by the system's interest in ensuring reliable results," Primus, *supra*, at 70, the Court in *Wade* allocated the burden of proof to the government. The presence of counsel, in the Court's view, would "prevent[] the infiltration of taint in the prosecution's identification evidence," which "cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice." 388 U.S. at 238.

Strikingly apparent in *Wade* was the "grave potential for prejudice, intentional or not" within a process "attended with hazards of serious unfairness to the criminal accused." *Id.* at 234, 236. *Wade* did not assume that "police procedures [are] intentionally designed to prejudice an accused" but rather that the process involves inherent dangers which "the accused is helpless to subject to effective scrutiny at trial." *Id.* at 235. And when there *is* government misconduct, as is the case here, there is greater reason for presuming

prejudice and shifting the burden to the government. *See Doggett v. United States*, 505 U.S. 647, 658 (1992) (awarding the defendant relief because the government had not "persuasively rebutted" the presumption of prejudice triggered by the government's negligent denial of a speedy trial). Where the government is "at fault for the problematic [conduct], it is only fair to have the government bear the burden of proving that the [conduct] was harmless to the defendant." Primus, *supra*, at 21.

Burden shifting is clearly not a "novel approach," as asserted by the Tenth Circuit. *Contra* Pet. App. 64a. It is a framework this Court has embraced time and again to calibrate the appropriate level of constitutional scrutiny in challenges to prosecutorial misconduct. Changing the assignment of the burden of proof, moreover, has an outsized impact. "[O]n an issue where evidence … cannot be obtained," the assignment of the burden of proof becomes "outcome determinative"—"merely a way of announcing a predetermined conclusion" against the informationally disadvantaged party. Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 332–33 (1973). A thoughtful allocation of burdens is a "leverage point that offers the potential for significant improvement to the system at a relatively modest cost." Primus, *supra*, at 56. Here, burden shifting would uphold the fairness of the adversarial process for Petitioner and defendants across the United States.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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