

IN THE
Supreme Court of the United States

STEVEN M. HOHN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

**BRIEF OF *AMICI CURIAE*
CRIMINAL LAW AND ETHICS PROFESSORS
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are academics who focus on criminal law, the substantive and procedural barriers to criminal defendants' access to justice, and the ethical obligations of lawyers.² Their primary interest in this case is the preservation of ethical principles that govern prosecutors, whose adherence to ethical rules is especially important given their special role and unique responsibilities in the criminal legal system. *Amici* file this brief out of concern that the Tenth Circuit's requirement that criminal defendants identify specific trial prejudice flowing from a federal prosecutor's intentional interception of privileged and confidential attorney-client communications erects an insurmountable burden that will only undermine the ethical principles that govern the legal profession. *Amici*'s subject-matter expertise and perspective, which is informed in part by *amici*'s role in educating and training students who will one day join the profession, will aid this Court's consideration of the petition for a writ of certiorari. *Amici*'s names are:

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SUMMARY OF ARGUMENT

The legal system is built on foundational presumptions of good faith and fair dealing by government officials. Litigants accusing government officials of malfeasance must set forth clear, affirmative proof of the official's impropriety to overcome the presumption courts accord government actors. Petitioner successfully overcame that presumption in this case: he exposed a months-long scheme by federal prosecutors in Kansas to surreptitiously intercept phone calls between criminal defendants and their legal counsel, including in petitioner's own case.

The court below held that robust showing was not enough to warrant relief for petitioner. According to the Tenth Circuit, to receive relief under 28 U.S.C. § 2255, petitioner must do more than prove the government engaged in blatant and persistent wrongdoing; he must also prove he was prejudiced by the government's misconduct. *United States v. Hohn*, 123 F.4th 1084 (10th Cir. 2024). The Tenth Circuit held that petitioner must show how the government used information it gleaned from petitioner's private phone calls with his lawyer in its trial strategy—a task that, in practice, is virtually impossible for litigants to meet. Because the court determined that petitioner could not meet this burden, it denied his Section 2255 petition.

The Tenth Circuit's rule is wrong and requires review because it clashes with the holdings of several other circuit courts and undermines ethical principles that govern the legal profession. First among those ethical principles is the attorney-client relationship and the concomitant duties that protect it. Those principles and duties are undermined when a prosecutor intentionally and without

meaningful justification intercepts attorney-client phone calls, thus destroying the bedrock tenets (a) that clients are entitled to speak to their counsel in order to receive proper advice, and (b) that counsel need information from their clients to provide adequate representation. Such conduct threatens systemic consequences: it can subvert the adversarial system by chilling a defendant's willingness to freely communicate with his counsel, and it can undermine a defendant's Sixth Amendment right to counsel by diluting the quality and force of defense counsel's advocacy.

At a broader level, the Tenth Circuit's rule flouts principles of fundamental fairness. It erects a nearly insurmountable burden on criminal defendants, who have already unveiled egregious acts of misconduct and wrongdoing by government officials, and who are uniquely ill-equipped to identify how prosecutors changed their trial strategy in response to information intercepted during the defendant's private calls with their lawyer. It places the burden on the victims of the government's misconduct, rather than where the burden would more naturally lie and, as a normative matter, should lie: with the wrongdoer. And it asks defendants to name the unknowable, that is, how the government might have changed its trial strategy, a fact often elusive to the prosecutor who improperly intercepted calls, let alone to the defendant who has minimal, if any, access to the prosecution's thought process.

Likewise, the Tenth Circuit's rule dilutes the prosecutor's unique ethical obligations as a minister of justice. The prosecutor's role goes beyond mere advocacy—she is charged with seeking justice, ensuring fairness, and protecting the innocent, and she is duty

bound to protect the rights of all persons, including those accused of crimes. By requiring defendants to demonstrate specific prejudice in the face of a prosecutor's intentional, unjustified intrusion on attorney-client communications, the Tenth Circuit's framework flouts these critical principles.

Finally, the Tenth Circuit's rule undermines specific ethical duties that bind criminal defense lawyers. Those include the duty of confidentiality, which encourages full and frank communication between defendants and their lawyers; the duty of competence, which ensures that defense counsel adequately investigates and prepares for a case; and the duty of diligence, which ensures reasonable promptness and thoroughness in representing a client's interests. Each of these duties is undermined—and the defense attorney's obligation to advocate is weakened—by the specter that our criminal legal system inadequately deters prosecutors from intentionally intercepting client communications.

For these reasons, in addition to those set forth in the petition for a writ of certiorari, the Tenth Circuit's rule requires reversal. This Court should grant the petition.

ARGUMENT

Unlike criminal defense attorneys, who enjoy a singular duty to advocate zealously for their clients, prosecutors have a dual obligation. Prosecutors must advocate for the government's position in a particular case while simultaneously serving as "ministers of justice." A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to

govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). When a litigant unmask a robust scheme by prosecutors to invade the attorney-client relationship, they should not have to make an additional showing of specific prejudice. A prosecutor’s betrayal of the duty to assure “that justice [is] done” must be enough. *Id.*

I. The Attorney-Client Relationship and its Ethical Protections Are Indispensable to the Fair Administration of Justice

The attorney-client relationship has long been indispensable to the adversarial system, and integral to the realization of the constitutional right to effective counsel in the Sixth Amendment. In *Gideon v. Wainwright*, this Court examined the long history of the Sixth Amendment and its consistent recognition of the fundamental right to the assistance of competent counsel. 372 U.S. 335 (1963). Two decades after *Gideon*, this Court held that the right to assistance of counsel necessarily and specifically means *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The import of the right to effective counsel is irrefutable: the Constitution guarantees the right because, as the court below recognized, “the guidance of an attorney helps ensure that the defendant receives a fair trial.” *Hohn*, 123 F.4th at 1092. Indeed, attorneys play a “critical” role in “the ability of the adversarial system to produce just results.” *Strickland*, 466 U.S. at 685.

Part of the right to effective assistance of counsel is the right to communicate confidentially with an attorney.

Indeed, “[b]y assuring confidentiality, the [attorney-client] privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009). The attorney-client relationship and client confidentiality thus enable “free exchanges between defendant and counsel” and promote an attorney’s ability to effectively represent a defendant. *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977).

A bundle of other ethical duties flesh out the attorney-client relationship and defense attorneys’ obligations to their clients. Attorney conduct is governed by certain core ethical duties, including the duties of confidentiality, loyalty, competence, diligence, and—for prosecuting and defense attorneys alike—the duty to administer and protect justice. These duties find their locus in principles intrinsically tied to the nature of being an attorney. And they are just as essential to the attorney-client relationship and the adversarial system as the duty of confidentiality.

Each of these principles is undermined where a government prosecutor intentionally and without justification eavesdrops on private communications between a defendant and her counsel. Such untoward conduct seriously undermines the adversarial system by discouraging defendants from engaging in full and frank conversation with their attorneys. It further inhibits defense counsel’s ability to discharge her own duties of competence and diligence by impairing her ability to fully and faithfully investigate her client’s case and to advocate on behalf of her client.

Thus, in addition to the clear constitutional implications of the Tenth Circuit's opinion, the Tenth Circuit's prejudice framework both directly and indirectly impacts the ethical principles that bind both criminal defense lawyers and prosecutors.

II. The Tenth Circuit's Rule is Incompatible with Principles of Fairness

The Tenth Circuit's rule is also incompatible with basic principles of fairness. For one thing, the Tenth Circuit's framework requires the defendant to discover and prove not only the fact of an egregious and surreptitious violation of his attorney-client relationship, but also *how* that breach affected their case. A defendant is rarely privy to (and therefore is unlikely to have any clue about) the government's trial strategy *before* the prosecutor intercepted the defendant's legal calls. There is no reason to expect the defendant can articulate at all (let alone with specificity) how information divulged during the defendant's legal call might have changed that strategy. Indeed, how the government might have used information obtained in its case is a fact often unknowable even to the offending prosecutor. *Hohn*, 123 F.4th at 1164 (Rossman, J., dissenting). As Judge Rossman explained, "[b]ecause of the virtually infinite ways each criminal proceeding can progress, 'it is impossible to know what different choices the prosecutor would have made' were she not intruding, 'and then to quantify the impact of those different choices on the outcome of the proceedings.'" *Id.* (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)) (alterations omitted).

It thus makes no sense to require the defendant to show how the prosecution made its strategic decisions.

That burden should instead fall on the prosecutor. After all, shifts in the burden of proof often “reflect judicial evaluations of probabilities and . . . conform with a party’s superior access to the proof.” *Int’l Bhd. of Teamster v. United States*, 431 U.S. 324, 359 n.45 (1977). Prosecutors know better than criminal defendants whether and to what extent information they gleaned from eavesdropping on confidential phone calls aided their investigation, prosecution, or negotiations with the defendant. In situations where these determinations are hard to make in hindsight because the misconduct has only come to light years after the fact, prosecutors are in a far superior position to reconstruct the trial-strategy decision-making process within their office than defense lawyers who never participated in that process to begin with.

Fundamentally, the Tenth Circuit’s rule hinders ethical enforcement and shields blatantly unethical conduct, rendering ethical prohibitions against such intrusions less meaningful. That is especially problematic for prosecutors, who “have rarely been subjected to disciplinary action by authorities[,]” and who “enjoy considerable autonomy in shaping their internal policies.”³ The Tenth Circuit’s rule further disincentivizes third parties, including judges, criminal defense lawyers, and criminal defendants, from treating ethical principles as a check on prosecutors and seeking to remedy ethical lapses

3. David Keenan, et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE (Oct. 25, 2011), <https://www.yalelawjournal.org/forum/the-myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct>.

by government officials. And it degrades any incentive for prosecutors to properly police their own conduct.

Given the various principles at stake, including the sacred attorney-client relationship and the confidentiality principles that undergird it, this Court should grant the petition. Without this Court's intervention, the Tenth Circuit's rule poses a systematic threat to the ethical practice of criminal law nationwide.

III. The Tenth Circuit's Rule Undermines Ethical Duties Governing Prosecutors and Criminal Defense Attorneys

In *Hohn*, the Tenth Circuit sent a chilling message: the legal system places diminished value on protecting this trust, the bond between attorney and client, when the government itself is the intruder. If the very entity prosecuting the client can eavesdrop on defense communications with a minimal risk of legal consequences, the client's foundational expectation of a loyal, confidential advocate is shattered. The Tenth Circuit's standard fails to adequately weigh this erosion of trust.

This erosion is not confined to individual cases; it corrodes access to justice writ large. Individuals, particularly those who may already harbor skepticism towards the legal system, may be discouraged from seeking legal counsel altogether. If they do seek counsel, they may be far less likely to be candid and open, fearing that their words will not be kept confidential from the government. This undermines the perceived legitimacy of the legal system and the very principles of fairness and due process it purports to uphold, including the

Prosecution's obligations as Ministers of Justice, as well as the foundational duties of confidentiality, competence, and diligence binding all attorneys.

A. Prosecutors' ethical obligations as ministers of justice

"A prosecutor occupies a unique role in our criminal justice system and it is essential that he carry out his duties fairly and impartially." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 826 (1987) (Powell, J., concurring). "Holding the prosecution to a higher standard is necessary, lest the 'special significance to the prosecutor's obligation to serve the cause of justice' be lost." *Arizona v. Youngblood*, 488 U.S. 51, 64 n.2 (1988) (Blackmun, J., dissenting) (citation omitted). Prosecutors are bound "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just [outcome]." *Berger*, 295 U.S. at 88.

The concept of the prosecutor as an officer bound by duties of fairness and impartiality that distinguish them from private advocates is no modern invention. It has deep historical roots in the common law tradition. Indeed, the public prosecutor emerged in part out of a need to separate "witnesses" from "triers" in Medieval English courts. John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314 (1973).

This traditional conception emphasizes the prosecutor's role in ensuring that no innocent person is wrongly convicted and that the process itself is fair. While the office of the public prosecutor as a distinct

entity was an “historical latecomer” to Anglo-American criminal procedure (arriving in the 16th century), its development and evolution incorporated the fundamental understanding that its function was not solely adversarial. *See generally id.* Instead, prosecutors must ensure that justice is administered impartially. *See generally* J. George Sharswood, AN ESSAY ON PROFESSIONAL ETHICS (F.B. Rothman 5th ed. 1993) (1854).

The deliberate act of a prosecutor to invade the confidential space of the attorney-client relationship, or that of agents acting at the prosecutor’s behest or with his acquiescence, is a flagrant violation of the accused’s Sixth Amendment right to counsel. It is also a direct repudiation of the prosecutor’s solemn ethical obligation to respect that right. *See* Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” If You’re Trying to Put That Lawyer’s Client in Jail?*, 69 *FORDHAM L. REV.* 997, 1001 n.12 (2000) (“[T]he prosecutor’s uniquely nonadversarial role . . . includes elements of neutral objectivity and dispassionate evaluation not only of the facts of a case, but of their legal, social, and moral implications.”). Such conduct fundamentally subverts the foundational premise of our justice system, which depends on both sides having the right and ability to prepare their case without undue and improper interference from the other. *See generally* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 *WASH. L. REV.* 35 (2009).

By eliminating the presumption of prejudice, the Tenth Circuit’s decision significantly weakens the deterrent against prosecutorial misconduct. If prosecutors or their agents believe they can engage in intentional intrusions

into the defense camp and then likely avoid any meaningful consequences, the deterrent effect of the rules prohibiting such conduct is severely, if not fatally, weakened.

The Tenth Circuit's decision diminishes accountability and runs directly counter to the tradition of demanding higher ethical conduct and meticulous fairness from those entrusted with the power of the state to prosecute. It represents a regrettable step backward from the evolving understanding of the prosecutor's solemn role as a guarantor of justice, effectively weakening the "minister of justice" standard and disregarding the historical trajectory towards greater prosecutorial accountability for actions that undermine the fairness of the criminal process. Prosecutors are not just regular lawyers; they wield extraordinary power and with that power come "special responsibilities." Model Rule of Professional Conduct ("ABA Model Rule") 3.8.

Deliberate and unjustified governmental intrusion into the confidential communications between an attorney and her client is, by its very nature, conduct prejudicial to the administration of justice, and is in direct violation of ethical rules. ABA Model Rule 8.4(d), for example, makes clear that a lawyer who "engage[s] in conduct that is prejudicial to the administration of justice" is guilty of professional misconduct. This behavior inflicts systemic harm that transcends prejudice to the outcome of a specific trial. Consequently, such an act can never be deemed truly "harmless" to the justice system.

The Tenth Circuit's decision alters the risk calculus for a prosecutor contemplating or condoning such misconduct. The potential benefit of illicit intelligence may now appear

to outweigh this diminished risk, creating a dangerous moral hazard.

By adopting a rule that makes it significantly harder to sanction serious ethical breaches like intentional, unjustified government intrusion into protected communications, the Tenth Circuit inadvertently signals a lower prioritization of protecting the sanctity of the attorney-client relationship from governmental overreach. This judicial posture can lead to a gradual erosion of ethical norms within prosecutorial offices if the judiciary does not serve as a firm and unwavering backstop against such misconduct. The integrity of the justice system demands a more robust deterrent than that provided by the Tenth Circuit's standard.

B. Defense counsel's ethical duties of confidentiality, competence, and diligence

Open communication is the lifeblood of effective representation. Indeed, the Supreme Court has recognized that the very purpose of the privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This principle is enshrined in ABA Model Rule 1.6, which provides broad protection for all information relating to the representation of a client.

A “lawyer cannot give effective assistance of counsel without knowing as much as possible about a client’s case,” but “clients will frequently withhold critical information from the lawyer unless the lawyer promises confidentiality.” Monroe H. Freedman, *Lawyer-Client*

Confidentiality: Rethinking the Legal Trilemma, 43 HOFSTRA L. REV. 1025, 1026 (2015). By making it substantially more difficult to obtain a remedy for governmental breaches of this confidentiality, the Tenth Circuit's prejudice standard disincentivizes full and frank communication. If clients perceive a heightened risk that their confidential discussions might be intercepted by the government and used against them—or simply that such intrusions will go unremedied due to the onerous burden of proving specific prejudice—they will naturally become more guarded and less forthcoming, and may therefore be complicit in their own convictions.

The mere possibility—let alone the documented reality in Kansas—that the government can intentionally and without justification eavesdrop on attorney-client communications, and then evade meaningful consequence by placing an insurmountable burden of proving prejudice on the defendant, casts a profound chill over the entire attorney-client relationship. This directly impairs the confidentiality that forms the cornerstone of effective representation. This incentive to “clam up” may be heightened in the pretrial detention setting. Clients who are detained awaiting trial may already be skeptical that their jailers respect the confidentiality of their attorney telephone calls at a moment when thorough communication may be especially valuable in mounting a defense.

This intrinsic harm to the sanctity of the attorney-client relationship is ignored by the Tenth Circuit's narrow focus on outcome-determinative prejudice. An intentional government intrusion is a severe breach of trust. This breach inherently damages the client's willingness to communicate openly, not only in the current case but potentially in any future interaction with the legal system.

See id. Focusing solely on whether the current trial's outcome was affected by the specific information obtained fails to address or deter this fundamental injury to the attorney-client relationship itself—an injury with lasting implications for both the client and the integrity of the justice system.

The ethical duty of confidentiality owed by a lawyer to a client is substantially broader than the attorney-client evidentiary privilege, and this broader protection is indispensable for the practical fulfillment of the Sixth Amendment right to effective counsel. While the Sixth Amendment undoubtedly protects the confidentiality of attorney-client communications as an integral component of the right to counsel, the ethical rules provide a more encompassing shield: a shield essential for the lawyer-client relationship to function as intended.

The ethical duty of confidentiality, as articulated in rules like ABA Model Rule 1.6, applies at all times and extends to all information relating to the representation, regardless of its source or its admissibility in court. This means it covers not only direct communications from the client but also information gathered from third parties, work product, and any other data acquired during the professional relationship. In stark contrast, the attorney-client privilege is primarily an evidentiary rule, applicable only in formal proceedings like trials or depositions, and it protects against the compelled disclosure of specific confidential communications made by the client to the attorney for the purpose of obtaining legal advice.

This distinction is critical. Even if a particular government intrusion does not yield information directly

introduced as evidence at trial (and thus does not strictly implicate the evidentiary privilege in its narrowest sense), the intrusion can still devastate the broader ethical duty of confidentiality and threaten the attorney-client relationship. This broader duty underpins the client's willingness to share openly aspects of their life and case, enabling the lawyer to provide comprehensive and effective Sixth Amendment counsel. A narrow judicial focus on outcome prejudice, as mandated by *Hohn*, fails to appreciate this vital distinction and the full spectrum of harm caused by government eavesdropping.

A broader ethical mantle of confidentiality is likewise necessary to foster the trust and candor required for effective legal representation. The Sixth Amendment right to counsel, to be meaningful, must therefore incorporate protections at least as robust as these fundamental ethical duties. The constitutional guarantee of effective counsel should prevent government conduct that either forces attorneys to violate these core ethical duties or renders their fulfillment practically impossible. The Tenth Circuit's standard effectively lowers the constitutional floor below the basic ethical standards essential to a trusting and functional lawyer-client dynamic.

With confidentiality, the ethical duties of competence and diligence are equally essential to the provision of effective legal representation. Counsel cannot provide competent or diligent representation without complete information from the client. Incomplete information prevents a lawyer from adequately investigating the facts, thoroughly analyzing the legal issues, weighing the pros and cons of various defense strategies, and providing sound advice to the client.

The fear of surveillance makes clients “less willing to speak fully and frankly, complicating efforts to devise an effective legal strategy.” Alex Sinha, *How US Government Surveillance Threatens Attorney-Client Privilege*, JURIST (Aug. 15, 2014), <https://tinyurl.com/2b59kn6v>. This predicament forces lawyers to operate with potentially critical blind spots, making it impossible to be fully prepared, to anticipate the prosecution’s moves, or to explore all viable defense avenues. Such a compromised position means counsel cannot meet the standards of thoroughness and preparation demanded by ABA Model Rule 1.1, nor the commitment and dedication to the client’s interests required by ABA Model Rule 1.3.

The Tenth Circuit’s rule, in practical terms, redistributes the risk of governmental misconduct—specifically, intentional intrusion into attorney-client communications—onto the client. Instead of the government bearing a burden to justify its actions or overcome a presumption of harm when it intentionally intrudes the defense camp, the Tenth Circuit imposes on the client an untenable choice: either engage in full and frank disclosure, thereby risking that an unremedied intrusion will compromise their defense, or engage in guarded and incomplete communication, thereby risking ineffective counsel due to the lawyer’s lack of complete information. This Hobson’s choice is incompatible with the legal profession’s ethical framework, and indeed with the Sixth Amendment. The Tenth Circuit’s myopic focus on demonstrable trial prejudice fails to account for these pervasive and damaging impacts on the entirety of legal representation.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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