No. 24-1084

In the Supreme Court of the United States

STEVEN M. HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to automatic post-conviction relief on his Sixth Amendment claim, where he "concede[d] that he suffered no prejudice by the prosecution's obtaining and listening to [a] six-minute call with his attorney."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-161a) is reported at 123 F.4th 1084. A prior opinion of the court of appeals is reprinted at 606 Fed. Appx. 902. The order of the district court (Pet. App. 162a-228a) is available at 2021 WL 5833911.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2024. On February 24, 2025, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari until April 15, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Kansas, petitioner was con-

victed on one count of conspiring to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) (2006 & Supp. IV 2010) and 846, and 18 U.S.C. 2; three counts of possessing a firearm as a user of a controlled substance, in violation of 18 U.S.C. 922(g)(3); and one count of possessing an unregistered short-barreled shotgun, in violation of 26 U.S.C. 5861(d). Judgment 1-2. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. 606 Fed. Appx. 902.

Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied the motion. Pet. App. 162a-227a. The court of appeals, sitting initially en banc, affirmed. *Id.* at 1a-161a.

1. Between 2010 and 2011, petitioner participated in a conspiracy to distribute methamphetamine. Presentence Investigation Report (PSR) ¶¶ 30-83; see 606 Fed. Appx. at 904. Petitioner sometimes traded firearms for methamphetamine, including a "sawed off 20 gauge shotgun and some CS gas grenades." PSR ¶ 65; see PSR ¶ 60. A December 2011 search of petitioner's home, pursuant to a warrant, revealed a stolen 9mm Springfield pistol, a stolen .22 caliber Ruger rifle, a .410 gauge Savage shotgun, and a .22 caliber Mossberg rifle. PSR ¶ 58. Petitioner also participated in the murder of one of the conspiracy's drug suppliers. PSR ¶¶ 75-76, 81-82.

A federal grand jury indicted petitioner on one count of conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(b)(1)(A) (2006 & Supp. IV 2010) and 846, and 18 U.S.C. 2; three counts of possessing a firearm as an unlawful drug user, in violation of 18 U.S.C. 922(g)(3); and one count of pos-

sessing an unregistered short-barreled shotgun, in violation of 26 U.S.C. 5861(d). Second Superseding Indictment 1-2, 7-9. Following a 12-day trial, which included testimony from law-enforcement officers and former co-conspirators, a jury found petitioner guilty on all counts. Pet. App. 5a, 164a. The court of appeals affirmed the convictions on direct appeal. 606 Fed. Appx. 902.

2. In 2016, in an unrelated case (called *Carter* or *Black*) involving a drug-distribution conspiracy by detainees of the Corrections Corporation of America facility in Leavenworth, Kansas (CCA or CoreCivic), it came to light that for years, federal prosecutors in Kansas "had been obtaining and listening to recorded attorney-client jail calls between CoreCivic detainees and their attorneys for 'a wide variety of criminal cases.'" Pet. App. 5a (quoting *United States* v. *Carter*, 429 F. Supp. 3d 788, 847 (D. Kan. 2019)). The district court overseeing that case appointed a special master "to determine the extent of the attorney-client communications that were obtained and/or accessed by the Government." *Carter*, 429 F. Supp. 3d at 799.

The special master's investigation revealed that prosecutors had subpoenaed three batches of calls that petitioner had made while detained at CoreCivic, one of which was in connection with the ongoing investigation into the drug supplier's murder. Pet. App. 5a, 7a. One four-call batch included a six-minute call on April 23, 2012, to petitioner's attorney. *Ibid.* At the time those calls occurred, CoreCivic provided detainees with a handbook alerting them that their calls would be monitored and recorded unless they followed a procedure to privatize their calls. *Id.* at 7a-8a. And the area next to the phones "displayed signs that read, 'all calls may be

recorded/monitored,' and/or 'calls are subject to monitoring and recording.'" *Id.* at 8a (citation omitted).

Petitioner also acknowledged signing a form "consenting to the monitoring and/or recording of his attorney-client calls unless he took certain steps." Pet. App. 184a. And three of the calls in the four-call batch were "privatized, according to CoreCivic's procedures." *Id.* at 7a. "At the beginning of the April 23, 2012 call, a recorded preamble states: 'This is a call from an inmate at CCA-Leavenworth Detention Center. This call is subject to recording and monitoring.'" *Id.* at 185a (citation omitted). Petitioner "admitted that he knew how to privatize attorney-client calls, yet he did not follow that protocol for the call he placed to his new attorney on April 23, 2012." *Id.* at 8a. Accordingly, that call was recorded. *Ibid.*

That call contained "legal advice or strategy" related to petitioner's federal charges, including his "desire to have a trial in the matter, his criminal history, what he believed the evidence against him to be and problems with that evidence, concern about his truck being impounded, and the general way that they would proceed to meet and discuss the case going forward." Pet. App. 193a. And although the prosecutor assigned to petitioner's case provided "sworn denials that she had never heard" that call, the district court found that "she had 'possessed' and 'listened to' [petitioner's] six-minute attorney call from April 23, 2012." *Id.* at 8a (citation omitted).

3. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, asserting that "the government's interception of the six-minute attorney-client call violated his Sixth Amendment right to communicate in confidence with his attorney." Pet.

App. 9a. He sought either vacatur of his conviction "with prejudice" or a sentence reduction. *Ibid.* Petitioner "stipulated that the six-minute attorney-client call was not introduced at trial, did not affect his trial, and did not affect his sentencing." *Ibid.*

Following an evidentiary hearing, the district court denied the motion for postconviction relief. Pet. App. 162a-227a. The court found that petitioner had no reasonable expectation of confidentiality in his April 23, 2012, call because he "believed his attorney-client calls were monitored or recorded" and "knew he could make an unmonitored call to his attorney but did not take steps to do so." *Id.* at 206a. In the alternative, the court found that petitioner had waived any attorney-client privilege "by knowingly and voluntarily disclosing attorney-client communications on a monitored or recorded phone line—effectively, a third party." *Id.* at 207a. And the court explained that, either way, petitioner had not established a Sixth Amendment violation. *Id.* at 210a. In doing so, the court "stresse[d] that this conclusion is limited to facts before it with respect to [petitioner]," and observed that unlike petitioner, many other CoreCivic detainees whose calls were recorded "did not understand that their attorney-client calls were subject to recording." *Ibid.*

4. The court of appeals, sitting initially en banc, affirmed by a vote of 8-2. Pet. App. 1a-161a.

The court of appeals explained that petitioner's Sixth Amendment claim "fails" because petitioner "concede[d] that he suffered no prejudice" from the recording of the April 23, 2012, call with his attorney. Pet. App. 3a; see *id.* at 1a-64a.

The court of appeals observed that under this Court's precedents, the Sixth Amendment's "'right to

counsel'" includes "a right to the effective assistance of counsel," and that "[p]art and parcel of the right to effective assistance is the right to communicate confidentially with an attorney." Pet. App. 11a-12a (citation omitted). The court then "assume[d] without deciding that Sixth Amendment protections attached to [petitioner's] attorney-client call from April 23, 2012," and that the case therefore involved "an intentional intrusion into the attorney-client relationship." *Id.* at 17a.

The court of appeals explained, however, that "[e]ven when the government intentionally intrudes into the defense camp, the Sixth Amendment is not violated unless the intrusion prejudiced the defendant during the criminal proceedings." Pet. App. 17a (citing *Weatherford* v. *Bursey*, 429 U.S. 545, 553-554 (1977)). And it overruled circuit precedent that had adopted a "structural-error rule that presumes prejudice to a defendant when the government intentionally intrudes into the attorney-client relationship without a legitimate law-enforcement purpose." *Id.* at 2a (citing *Shillinger* v. *Haworth*, 70 F.3d 1132 (10th Cir. 1995)).

The court of appeals found a structural-error rule "unsound" because it is inconsistent with this Court's precedents. Pet. App. 21a. The court of appeals observed that in *Weatherford* v. *Bursey*, this Court rejected the contention that "a per se Sixth Amendment violation occurs 'whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship.'" *Id.* at 22a (citation omitted); see *id.* at 22a-24a. The court of appeals also observed that in *United States* v. *Morrison*, 449 U.S. 361 (1981), this Court "assumed without deciding that a Sixth Amendment intrusion occurred" when federal agents advised a defendant to seek different counsel, and then held that "[w]ithout a

showing or allegation of prejudice" from the intrusion, "there was 'no effect of a constitutional dimension' that 'needed to be purged' and therefore 'no justification for interfering with the criminal proceedings.'" Pet. App. 25a (brackets and citation omitted); see *id.* at 25a-26a.

The court of appeals acknowledged (Pet. App. 23a) that in *Black* v. *United States*, 385 U.S. 26 (1966) (per curiam), and *O'Brien* v. *United States*, 386 U.S. 345 (1967) (per curiam), this Court ordered new trials based on "the government's illegal electronic surveillance of defendants' conversations with counsel before trial." But the court of appeals explained (Pet. App. 23a) that neither decision discussed prejudice, as this Court itself pointed out in *Weatherford*, 429 U.S. at 551-552. Similarly, the court of appeals acknowledged that in *Hoffa* v. *United States*, 385 U.S. 293 (1966), this Court had "'assumed without deciding' that the prosecution's becoming privy to attorney-client communications in a separate case *would have* violated the Sixth Amendment." Pet. App. 23a (citation omitted). But the court of appeals explained that because "*Hoffa* had merely assumed without deciding a Sixth Amendment violation," this Court in *Weatherford* "was unconvinced that *Hoffa* justified the * * * sweeping conclusion that a per se Sixth Amendment violation occurs whenever the government intentionally intrudes into the attorney-client relationship." *Id.* at 24a.

The court of appeals rejected petitioner's contention that "purposeful, unjustified intrusions into the attorney-client relationship are 'never harmless because they necessarily render a trial fundamentally unfair,'" observing that petitioner's "conce[ssion] that neither his trial nor his sentencing were made unfair by [the prosecutor's] becoming privy to his six-minute call" made

his "warning about a specter of fundamental unfairness ring[] hollow." Pet. App. 45a (citation omitted). The court also rejected petitioner's contention that prejudice is "'so likely' that evaluating prejudice for each individual defendant is not 'worth the cost,'" explaining that such an evaluation would be "simple[]," requiring only that petitioner "connect something he and his attorney discussed during those six minutes to anything used during the criminal proceedings that either disadvantaged him or advantaged the prosecution." *Id.* at 46a-47a (citation omitted). And the court rejected petitioner's contention that "'the right at issue is not designed to protect [him] from erroneous conviction but instead protects'" his "autonomy rights," explaining that unlike a defendant's right "to steer the ship of his own defense," the right to "effective assistance of counsel" has been "derived solely to promote adversarial fairness." *Id.* at 47a-48a (citation omitted).

The court of appeals acknowledged (Pet. App. 60a) that petitioner's argument for relief was "in concert with" with the Third Circuit's decision in *United States* v. *Levy*, 577 F.2d 200 (1978). But the court observed that *Levy* predated this Court's decision in *Morrison* and that the Third Circuit itself "has since rolled back *Levy*[]." Pet. App. 61a (citing *United States* v. *Mitan*, 499 Fed. Appx. 187, 192 n.6 (3d Cir. 2012), cert. denied, 570 U.S. 919 (2013)). The court also observed that every other circuit requires a showing of prejudice, although it disagreed with the rebuttable presumption of prejudice that it attributed to the First and Ninth Circuits. *Id.* at 61a-64a.

Judge Bacharach, joined by Judges McHugh and Rossman, dissented in part. Pet. App. 65a-86a. They would have followed the circuits that have adopted a re-

buttable presumption of prejudice. Judge Rossman, joined by Judge Bacharach, dissented. *Id.* at 87a-161a. They would have adhered to or reaffirmed circuit precedent adopting a "conclusive presumption of prejudice." *Id.* at 161a.

ARGUMENT

Petitioner contends (Pet. 23-29) that prosecutorial intrusion into a six-minute jailhouse phone call with his attorney warrants automatic relief, irrespective of whether he was prejudiced. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court. Petitioner asserts (Pet. 16-23) a circuit conflict, but petitioner overstates the scope of disagreement in the courts of appeals, and this case does not implicate any disagreement because petitioner could not prevail under any circuit's rule. In addition, this case is a poor vehicle in which to consider the question presented because petitioner knowingly waived any right to confidentiality of the six-minute call to his attorney. Further review is unwarranted.

1. The court of appeals correctly determined that petitioner is not entitled to automatic postconviction relief on his Sixth Amendment claim where he "concede[d] that neither his trial or his sentencing were made unfair by [the prosecutor's] becoming privy to his six-minute call." Pet. App. 45a; see *id.* at 1a-64a.

a. This Court has long recognized that even constitutional errors may be harmless. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967). To justify automatic reversal without regard to prejudice, an error must be a "structural * * * defect affecting the framework within which the trial proceeds," *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (citation omitted), such that it "def[ies] analysis by 'harmless-error' standards," *Ari-*

zona v. *Fulminante*, 499 U.S. 279, 309 (1991); accord *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). This Court has found errors to be structural "[o]nly in rare cases." *Washington* v. *Recuenco*, 548 U.S. 212, 218 & n.2 (2006). Examples include the complete denial of counsel, see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); a biased trial judge, see *Tumey* v. *Ohio*, 273 U.S. 510 (1927); racial discrimination in grand-jury selection, see *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); the denial of self-representation, see *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); the denial of a public trial, see *Waller* v. *Georgia*, 467 U.S. 39 (1984); and a defective reasonable-doubt instruction, see *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Most constitutional errors, including under the Sixth Amendment, are evaluated for harmlessness.

In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court rejected a "per se" rule that a Sixth Amendment violation "requir[ing] reversal and a new trial" occurs "'whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship.'" *Id.* at 549-550 (citation and emphasis omitted). The Court explained that a "per se rule" under which "trial prejudice to the defendant is deemed irrelevant" would "cut[] much too broadly" and require invalidating a conviction even where prejudice was clearly absent—for instance, where an undercover agent had merely participated in attorney-client conversations about "the weather or other harmless subjects." *Id.* at 552, 557-558 (emphasis omitted). The Court accordingly held that an undercover agent's presence at confidential attorney-client meetings did not violate the Sixth Amendment unless the agent "communicated the substance of the [attorney-client] conversations and thereby created at

least a realistic possibility of injury to [the defendant] or benefit to the State." *Id.* at 558.

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

b. The Tenth Circuit correctly applied those principles in determining that petitioner's requested structural-error rule is "untenable under Supreme Court law." Pet. App. 3a. This Court has not endorsed a per se rule of prejudice when the government intrudes on attorney-client communication. Instead, as the court of appeals explained, since *Weatherford*, this Court has "entrenched its view that a 'very limited class of cases' warrant structural error." *Id.* at 27a (citation omitted); see *Greer* v. *United States*, 593 U.S. 503, 513 (2021); *United States* v. *Davila*, 569 U.S. 597, 610-611 (2013); *Neder* v. *United States*, 527 U.S. 1, 7-10 (1999). The violation claimed here has not been placed in that very limited class, nor should it be.

It makes sense to evaluate the sort of intrusion at issue here for harmlessness. As the court of appeals explained, "[t]he right to communicate confidentially with an attorney originates from the Sixth Amendment's promise of effective assistance of counsel." Pet. App. 49a; see *Weatherford*, 429 U.S. at 554-555 n.4 (explaining that a "threat to the effective assistance of counsel" comes from "the inhibition of free exchanges between defendant and counsel because of the fear of being overheard"). And "because we derive 'the right to effective representation from the purpose of ensuring a fair trial,' we should 'also derive the limits of that right from that same purpose.'" Pet. App. 49a (quoting *Gonzalez-Lopez*, 548 U.S. at 147) (brackets omitted).

"The requirement that a defendant show prejudice * * * arises from the very nature of the specific element of the right to counsel at issue"—namely, "*effective* (not mistake-free) representation." *Gonzalez-Lopez*, 548 U.S. at 147. And "[c]ounsel cannot be 'ineffective' unless his mistakes have harmed the defense." *Ibid.* As a result, "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *Ibid.*; see *Mickens* v. *Taylor*, 535 U.S. 162, 166 (2002) ("[D]efects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation."). The only "exception" is where "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *Mickens*, 535 U.S. at 166. Petitioner does not contend that is the case here; to the contrary, petitioner "concede[d] that he suffered no prejudice" at all, Pet. App. 3a.

2. Petitioner's arguments for automatic appellate relief, irrespective of prejudice, lack merit.

a. Petitioner's reliance (Pet. 23-24) on *Black* v. *United States*, 385 U.S. 26 (1966) (per curiam), *O'Brien* v. *United States*, 386 U.S. 345 (1967) (per curiam), and *Hoffa* v. *United States*, 385 U.S. 293 (1966), is misplaced. This Court's decision in *Weatherford* explicitly rejected petitioner's reading of those cases as supporting a structural-error rule, stating that it "cannot agree" that those decisions, "individually or together, either require or suggest" a per se rule of prejudice. 429 U.S. at 551.

The Court explained that in *Black*, the "Solicitor General conceded that Black was entitled to a 'judicial determination' of whether 'the monitoring of conversations between Black and his attorney had any *effect* upon his conviction or the fairness of his trial.'" *Weatherford*, 429 U.S. at 551 (brackets and citation omitted). "In *O'Brien*, the Court wrote nothing further, merely citing the *Black per curiam*." *Id.* at 552. Indeed, *Black* and *O'Brien* "involved surreptitious electronic surveillance * * * which was plainly illegal under the Fourth Amendment," and "neither the Sixth Amendment nor the right to counsel was even mentioned." *Id.* at 551; see *id.* at 552.

The Court accordingly found that "[i]f anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Weatherford*, 429 U.S. at 552; see Pet. App. 50a-51a. And the Court made clear that such an approach was "a far cry from [a] *per se* rule" under which "trial prejudice to the defendant is deemed irrelevant." *Weatherford*, 429 U.S. at 552.

The Court in *Weatherford* also declined to read *Hoffa* as supporting such a rule. In *Hoffa*, a government informant "sat in on conversations that defendant Hoffa had with his lawyers" during a trial for violating labor statutes. *Weatherford*, 429 U.S. at 552. After the jury hung, Hoffa was tried for tampering with that jury. *Id.* at 553. At that second trial, which resulted in a conviction, the informant's testimony did not include any of Hoffa's conversations with his counsel, but did include other conversations that the informant had overheard. *Ibid.* This Court subsequently rejected a Sixth Amendment claim that Hoffa raised in challenging that conviction. *Ibid.*

"In doing so, the Court did not hold that the Sixth Amendment right to counsel subsumes a right to be free from intrusion by informers into counsel-client communications." *Weatherford*, 429 U.S. at 553. Instead, the Court merely "*assumed* without deciding, that had Hoffa been convicted at his first trial, the conviction would have been set aside because the informer had overheard Hoffa and his lawyers conversing and had reported to the authorities the substance of at least some of those conversations," while finding "that Hoffa's *assumed* Sixth Amendment rights had not been violated" by the informer's limited testimony at the second trial. *Ibid.* As the Court summarized, "[n]either *Black*, *O'Brien*, *Hoffa*, nor any other case in this Court to which we have been cited furnishes grounds for" an automatic-prejudice rule of the sort that petitioner now urges. *Id.* at 554.

b. Petitioner errs in analogizing (Pet. 25-26, 29) the right at issue here to a defendant's right to obtain his counsel of choice, see *Gonzalez-Lopez*, *supra*, consult with his lawyer, see *Geders* v. *United States*, 425 U.S.

80 (1976), or control certain aspects of his own defense, see *McCoy* v. *Louisiana*, 584 U.S. 414 (2018). Petitioner was not denied counsel, access to counsel, or the ability to provide directions to counsel. Nor did he even have reason to fear that his conversations would be overheard, as he had the ability to protect their confidentiality. The only possible infringement of his rights was the prosecution's overhearing the information that he failed to protect.

Petitioner is accordingly incorrect in asserting (Pet. 28-29) that his case falls within the "three broad rationales" that this Court identified for structural errors in *Weaver* v. *Massachusetts*, 582 U.S. 286 (2017). It is not the case that "harm is irrelevant to the basis underlying the right," *id.* at 295, where the only interference would come from the prosecution's use of overheard information. And petitioner's contentions (Pet. 28-29) that "the effects of the error are simply too hard to measure" or that the error "always results in fundamental unfairness," *Weaver*, 582 U.S. at 295-296, are belied by his own concessions below that he "suffered no prejudice," Pet. App. 3a, and that "neither his trial nor his sentencing were made unfair," *id.* at 45a.

c. Petitioner asserts that because the prosecution is to blame for the intrusion in his case, the case "belong[s] in a broader category of cases involving governmental interference with the Sixth Amendment right to counsel" that do not require him to show prejudice. Pet. 25; see Pet. 25-27. But this Court has explained that "the defining feature of a structural error is that it 'affects the framework within which the trial proceeds,' rather than being 'simply an error in the trial process itself.'" *Weaver*, 582 U.S. at 295 (brackets and citation omitted). Petitioner does not identify any authority from this

Court indicating that an error might be structural depending on *who* is responsible for the error.

To the contrary, constitutional errors, including Sixth Amendment violations, caused by intentional prosecutorial conduct require prejudice in order to warrant relief. See, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (incriminating statements made to police officer falsely posing as a fellow prisoner, in violation of Sixth Amendment, evaluated for harmlessness); *Fulminante*, 499 U.S. at 287, 310-311 (introduction of coerced confession, in violation of Sixth Amendment, evaluated for harmlessness). Petitioner provides no sound or principled reason why prejudice would be required for relief based on the introduction of an intentionally coerced confession at trial, while the recording of a six-minute pretrial conversation with his attorney that is never used at trial would be structural error.

Petitioner's proposal (Pet. I, 3, 4, 11, 13, 14, 16, 21-25, 28, 31, 32) to limit his structural-error rule to encompass only "intentional" and "unjustified" intrusions into attorney-client communications is therefore analytically mistaken. Whether an intrusion is intentional or accidental has no logical bearing on the nature of the error and its effects. Nor does the government's justification for the intrusion. Petitioner's proposal also would be unworkable, as a court addressing such a Sixth Amendment claim would presumably have to receive evidence about the mental states of various government officials (that is, their intent and motives) just to determine whether the asserted error is structural or amenable to a prejudice analysis.

3. Petitioner errs in contending that the decision "deepens a conflict among the courts of appeals." Pet. 16 (capitalization omitted); see Pet. 16-23. Petitioner

overstates the extent of any conflict on the question presented, and this case does not implicate any differences in approaches the courts of appeals take with respect to how prejudice must be established, given petitioner's concession that he suffered no prejudice here.

a. Petitioner overstates (Pet. 17) any conflict between the decision below and the Third Circuit's nearly half-century-old decision in *United States* v. *Levy*, 577 F.2d 200 (1978). There, the defendant's coconspirator, who was represented by the same attorney, revealed information learned from attorney-client communications about the defendant's "defense strategy" to government agents. *Id.* at 210. The Third Circuit deemed "the only appropriate remedy" to be "dismissal of the indictment." *Ibid.* But as the court of appeals here observed (Pet. App. 61a), it is not apparent that *Levy* has meaningful precedential force following this Court's decision in *Morrison*.

Morrison found error in the Third Circuit's grant of automatic relief—without a showing of case-specific prejudice—on a claim of law-enforcement interference with the attorney-client relationship. See 449 U.S. at 363-366; p. 11, *supra*. Accordingly, in light of *Morrison*, the Third Circuit itself has questioned *Levy*'s continuing vitality, see *United States* v. *Mitan*, 499 Fed. Appx. 187, 192 & n.6 (2012), cert. denied, 570 U.S. 919 (2013). Petitioner provides no sound basis to think that, if confronted with the question today, the Third Circuit would necessarily adhere to the outlier decision in *Levy*—especially given that the Tenth Circuit's decision in this case leaves *Levy* as the sole decision favoring a structural-error rule in these circumstances.

b. *Levy* aside, petitioner recognizes that every other circuit requires a showing of prejudice. See Pet. 17-22.

Petitioner states that different circuits impose different requirements for making that showing, asserting that the First and Ninth Circuits "apply a rebuttable presumption of prejudice"; the Fourth, Sixth, and D.C. Circuits use a "multifactor test"; and the Seventh and Eleventh Circuits have "not squarely confront[ed] the question." Pet. 17, 19, 21. Even if petitioner's description is correct, the decision below would not implicate any differences in approaches among the circuits.

As discussed above, petitioner "concede[d] that he suffered no prejudice by the prosecution's obtaining and listening to his six-minute call with his attorney—the communication at the heart of this case." Pet. App. 3a; see *id.* at 45a. Accordingly, in the court of appeals, petitioner's claim for relief "relied solely on" circuit precedent applying a structural-error rule. *Id.* at 3a. And his concession would preclude him from prevailing under any of the prejudice-based approaches that he describes.

To the extent that petitioner might dispute the scope of his concession, cf. Pet. App. 113a n.18 (Rossman, J., dissenting), that case-specific claim would not warrant this Court's review. See Sup. Ct. R. 10. And because the concession renders any difference in prejudice approaches irrelevant to the ultimate disposition of the case, this would not be an appropriate case in which to address the question presented. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

4. This case also would be a poor vehicle in which to address the question presented for the further reason that even if a governmental intrusion into confidential

attorney-client communications in violation of the Sixth Amendment were structural error, no such violation may be claimed here. Petitioner acknowledged signing a form "consenting to the monitoring and/or recording of his attorney-client calls unless he took certain steps." Pet. App. 184a. Petitioner further "admitted that he knew how to privatize attorney-client calls, yet he did not follow that protocol for the call he placed to his new attorney on April 23, 2012." *Id.* at 8a. And the "recorded preamble" to the call warned that it was "'subject to recording and monitoring,'" *id.* at 185a, yet petitioner and his attorney continued to conduct their conversation without taking steps to privatize the call.

Given those circumstances, petitioner in effect consented (or at least waived any objection) to the monitoring and recording of the April 23 call. A defendant who is able to protect the confidentiality of his communications with his attorney, but chooses not to do so, is in no realistic danger of suffering from an "inhibition of free exchanges" with his attorney, *Weatherford*, 429 U.S. at 554 n.4, and thus cannot claim any impairment of his right to effective assistance of counsel under the "intrusion" theory that petitioner presses here.

In light of its rejection of petitioner's structural-error argument, the court of appeals found it unnecessary to address whether petitioner had established a Sixth Amendment violation. See Pet. App. 17a & n.14. But the district court's factual findings support the view that he did not, cf. *id.* at 182a-187a, 206a-210a, and the government is entitled to "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation

omitted). At a minimum, petitioner's knowing exposure of his attorney-client communications would impede this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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