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*

## REPLY BRIEF FOR THE PETITIONER


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**REPLY BRIEF FOR THE PETITIONER**

Petitioner's case was tried by a now-disbarred prosecutor who listened to a recording of petitioner's conversation with his defense attorney that laid out petitioner's view of the strongest evidence against him and responses to that evidence. Over nearly 100 pages of dissents, a deeply divided Tenth Circuit overruled its prior precedent and held, in conflict with the decisions of other circuits, that prejudice is an element of a Sixth Amendment violation based on an intentional prosecutorial intrusion into attorney-client communications. Remarkably, it held that, even in the face of such prosecutorial misconduct, the defendant bears the burden of proving trial-specific prejudice.

The government's response to all this is to look away. In its brief in opposition, it focuses almost entirely on the proposition that a Sixth Amendment violation in this context should not be considered structural error and should instead be evaluated for harmlessness. But under that rule, petitioner is entitled to relief: the government does not dispute (as it has recognized as recently as a few weeks ago) that the standard harmlessness inquiry is whether the *government* can prove a *lack* of prejudice beyond a reasonable doubt. The government has not made that showing here, because the court of appeals held that prejudice is a prerequisite to establishing the Sixth Amendment violation itself and placed the burden on the defendant to establish trial-specific prejudice. The government says almost nothing in defense of that rule, which concededly conflicts with the decisions of other circuits.

The argument the government does make—that the structural-error rule should not apply—is also mistaken. The intrusion into the attorney-client relationship at issue here bears the hallmarks of Sixth Amendment claims, such as the denial of the counsel of one's choice, that this Court has recognized should warrant automatic relief. But the Court need not agree, or even reach the logically subsequent question whether the constitutional error is subject to review for harmlessness, as long as it rejects the outlying, defendant-burdening approach to the Sixth Amendment that the court of appeals adopted here.

To bridge the void between the rule it can bring itself to defend and the rule actually adopted below, the government relies on petitioner's stipulation (entered, it bears noting, at a time when binding circuit precedent instructed that prejudice to a defendant was presumed). The government claims that petitioner conceded that the intrusion had no effect. That is flagrantly wrong. The actual stipulation, which the government scrupulously avoids quoting, states that petitioner "does not assert that he can prove that he suffered any actual—as opposed to presumptive—prejudice due to the prosecution team's becoming privy to the one attorney-client call listed in his privilege log." D. Ct. Dkt. 50, at 4. That stipulation reflects the reality that, faced with a prosecutor who has engaged in misconduct, it will often be impossible for a defendant to *prove* exactly how the intentional intrusion on his communications with his attorney benefited his adversary at trial. But petitioner did not concede that the intrusion had no effects. And when that is understood, much of the government's argument against certiorari simply dissolves.

The brief in opposition confirms that the government will not clean its own stables. It averts its gaze from the rampant prosecutorial misconduct that gave rise to this case just as it ignores the question presented. The rule adopted by the court of appeals stands alone for a reason. And if it is left in place, it will incentivize future misconduct. The Court should grant review and confirm that the Sixth Amendment does not permit such subversion of the criminal justice system.

### A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The government does not dispute (Br. in Opp. 16-18) that the courts of appeals are divided on whether (and how) a defendant must demonstrate prejudice in order to claim a Sixth Amendment violation based on a prosecutor's intentional and unjustified intrusion into the defendant's attorney-client communications. Instead, the government merely contends that the acknowledged conflict is "overstate[d]," see *id.* at 9, and suggests that the broader reaches of the conflict are not implicated here because of the stipulation petitioner entered below, see *id.* at 17. Those arguments elide the question presented and mischaracterize the record.

1. The government concedes (Br. in Opp. 17) that the Tenth Circuit's decision below squarely conflicts with the Third Circuit's decision in *United States* v. *Levy*, 577 F.2d 200 (1978), which held that a defendant need not show discrete, trial-specific prejudice when he establishes an intentional prosecutorial intrusion into his attorney-client communications. See *id.* at 208-209. The government suggests that the Third Circuit has since "questioned" *Levy* in an unpublished decision. Br. in Opp. 17; see Pet. 17 (discussing that decision). But it does not dispute that *Levy* remains binding law in the Third Circuit, see, *e.g.*, *United States* v. *Anand*, Crim. No. 19-518, 2022 WL 3357484, at *10 n.6 (E.D. Pa. Aug. 15, 2022), and it provides no reason to think that the Third Circuit will overrule its longstanding precedent where no decision from this Court has "undercut [its] decisional basis," *Cabeda* v. *Attorney General*, 971 F.3d 165, 171 (3d Cir. 2020); see pp. 8-9, *infra*.

2. The government contends that every other court of appeals "requires a showing of prejudice." Br. in Opp. 17. But that contention skirts by the actual question presented: namely, whether, as the decision below holds, *a defendant* bears the burden of showing discrete, trial-specific prejudice in order to establish a Sixth Amendment violation once the defendant has shown an intentional, unjustified prosecutorial intrusion into his attorney-client communications.

No other court of appeals has required a defendant to establish prejudice from the intrusion. See Pet. 17-22. The First and Ninth Circuits (as well as numerous state courts) have adopted a rebuttable presumption of prejudice. See, *e.g.*, *United States* v. *Mastroianni*, 749 F.2d 900, 907-908 (1st Cir. 1984); *United States* v. *Danielson*, 325 F.3d 1054, 1071-1072 (9th Cir. 2003). Under that approach, once the defendant establishes an intentional prosecutorial intrusion, the defendant bears no burden of showing prejudice; at most, the government can seek to show the *absence* of prejudice. See *Mastroianni*, 749 F.2d at 907-908; *Danielson*, 325 F.3d at 1071-1072.

The Fourth, Sixth, and District of Columbia Circuits have adopted a multifactor test based on the nature of the intrusion, and none of those circuits has required the defendant to make a showing of discrete, trial-specific prejudice in order to establish a Sixth Amendment violation. See Pet. 19-21.

Finally on this point, although the Second, Seventh, Eighth, and Eleventh Circuits have not squarely addressed the question presented, each has precedent suggesting that it would not require a showing of discrete, trial-specific prejudice under the circumstances of this case. See Pet. 21-22.

3. The government seemingly does not dispute any of this. See Br. in Opp. 18. Instead, faced with this formidable body of precedent, the government argues that, besides the Third Circuit's decision in *Levy*, the Tenth Circuit's decision does not conflict with any of the other circuit decisions because petitioner purportedly stipulated in the district court that "he suffered no prejudice." *Ibid.* (quoting Pet. App. 3a). But the government blatantly ignores the actual language of the stipulation: that petitioner "does not assert that he can *prove* that he suffered any actual—as opposed to presumptive—prejudice due to the prosecution team's becoming privy to the one attorney-client call listed in his privilege log." D. Ct. Dkt. 50, at 4 (emphasis added); see Pet. App. 70a-71a & n.2 (Bacharach, J., dissenting). That stipulation thus would not bar petitioner's claim in any of the other circuits that have squarely addressed the question presented, precisely because those circuits do not require the defendant to prove discrete, trial-specific prejudice.

While the government cites the court of appeals' paraphrase of the stipulation (Br. in Opp. 18), the court of appeals itself did not rely on the stipulation to hold that petitioner's claim would fail even if the government bore the burden of showing the absence of prejudice. Instead, it held that petitioner bore the burden of showing discrete, trial-specific prejudice and could not do so. See Pet. App. 63a-64a. The government cannot make this case disappear by conjuring a stipulation petitioner never entered or a holding the court of appeals never adopted.

**B. The Decision Below Is Incorrect**

1. The court of appeals held that a defendant is required to show prejudice in order to make out a Sixth Amendment violation based on the prosecution's intentional and unjustified intrusion into attorney-client communications. See Pet. App. 17a, 63a-64a. Petitioner has challenged that holding, explaining that there is no sound basis to require prejudice as an element of the Sixth Amendment violation itself. See Pet. 23-27. The government responds with a non sequitur: that "automatic appellate relief" is the exception, rather than the rule, and that most constitutional violations are subject to harmlessness analysis. See Br. in Opp. 9-16. But even if the government were correct that the Sixth Amendment violation at issue here is subject to harmless-error analysis, it would mean only that the government would have an opportunity to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). To state the obvious, there is a world of difference between putting the burden on the defendant to prove case-specific prejudice as an element of his claim, as the decision below required, and leaving open the possibility that

relief could be denied if the government establishes harmlessness beyond a reasonable doubt.

If the Court were to reject the court of appeals' holding that the defendant bears the burden to establish prejudice, that would suffice to vacate the decision below. See Pet. App. 86a (Bacharach, J., dissenting) (urging remand for harmless-error inquiry). Consistent with its ordinary practice, the Court could leave open the logically subsequent question whether the government should have an opportunity to establish harmlessness for the Sixth Amendment violation or whether the error should be deemed a structural one that entitles petitioner to a new trial.

The government's failure directly to defend the court of appeals' actual rule speaks volumes. Truth be told, there is little to say in defense of the court's unprecedented approach to this type of Sixth Amendment violation. As to many closely related violations, this Court has repeatedly recognized that the violation is complete upon the relevant intrusion or interference and that no showing of prejudice is required to establish the violation. See Pet. 23-27. Indeed, in a merits brief filed just weeks ago, the government appeared to recognize that denying relief based on a Sixth Amendment violation related to judicial interference with the attorney-client relationship requires a showing that the error was "harmless beyond a reasonable doubt." U.S. Br. at 32, *Villarreal* v. *Texas*, No. 24-557 (July 22, 2025). And each of the cases the government invokes here as "requir[ing] prejudice in order to warrant relief," Br. in Opp. 16, actually instructs that the government can prevail if it proves harmlessness beyond a reasonable doubt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 296 (1991); *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972).

Buried in the government's obloquy against structural error is one argument that addresses the actual holding below: "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced," and the right against prosecutorial intrusion should be viewed as derivative of the right to effective representation. Br. in Opp. 12 (quoting *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147 (2006)). But that gets the government nowhere. In *Gonzalez-Lopez* itself, the Court rejected the government's effort to link a defendant's right to *choose his counsel* with the right to *effective counsel*, holding that, as to the former right, "[n]o additional showing of prejudice is required to make the violation 'complete.'" 548 U.S. at 146. Just so here. Petitioner's objection is not that his counsel was rendered ineffective, but rather that his relationship with counsel was impermissibly invaded by the government. See Pet. 27. Even if a defendant's counsel is Daniel Webster, it violates the Sixth Amendment for the prosecution to listen in on Webster's meeting with his client.

2. The government fares no better as to the sliver of petitioner's merits argument that it addresses head-on. As petitioner has explained, a prosecutor's intentional and unjustified intrusion into a defendant's attorney-client communications falls squarely into the limited class of cases that constitute a structural error warranting at least a retrial by an untainted prosecutor. See Pet. 28-29. Such an intrusion signals "fundamental unfairness"; its effects are "hard to measure"; and the right protects the adversarial character of the trial process, even beyond a particular defendant's interest in avoiding an erroneous conviction. See *McCoy* v. *Louisiana*, 584 U.S. 414, 427 (2018).

The government contends (Br. in Opp. 10-11) that this Court's decisions in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), and *United States* v. *Morrison*, 449 U.S. 361

(1981), reject per se rules with no showing of prejudice. But in those cases, the Court rejected rules requiring remedies for violations that could not possibly have caused prejudice. In *Weatherford*, the attorney-client communications were never conveyed to the prosecutor, yet a per se rule would have required a new trial, see 429 U.S. at 548-549; similarly, in *Morrison*, no attorney-client communication was even involved, yet a per se rule would have required dismissal of the indictment, see 449 U.S. at 362-363. The Sixth Amendment claim here does not involve the combination of features—the impossibility of prejudice and a mandatory remedy—that the Court found problematic in *Weatherford* and *Morrison*. See Pet. 24-25. What is more, *Morrison* left open the possibility that, faced with a "pattern of recurring violations," a court could impose a meaningful remedy in order to deter deliberate infringements. See 449 U.S. at 365 n.2. And in explaining why a per se rule in that case was overly broad, the Court in *Weatherford* identified the very Sixth Amendment boundaries that were violated here. See Pet. 24-25.

Likewise, the government claims, the Court in *Weatherford* "rejected petitioner's reading" of *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967); and *Hoffa* v. *United States*, 385 U.S. 293 (1966). Br. in Opp. 13. But *Weatherford* held only that those cases did not support mandatory remedies for violations that could not have possibly been prejudicial. See 429 U.S. at 551, 554.

Finally as to the merits, the government brushes off the similarities between the violation at issue here and other violations where this Court has found structural error. See Br. in Opp. 14-15. But those violations—the denial of "counsel, access to counsel, or the ability to provide directions to counsel," *id.* at 15—are closely analogous.

For example, just like the denial of a defendant's counsel of choice, an intentional prosecutorial intrusion into a defendant's attorney-client communications has "unquantifiable and indeterminate" consequences at trial. *Gonzalez-Lopez*, 548 U.S. at 150. While the question presented here focuses on the scope of the constitutional right, rather than the appropriate remedy for a violation of that right, the doctrine of structural error further supports the conclusion that the court of appeals erred by holding that a defendant bears the burden of showing trial-specific prejudice from an intentional prosecutorial intrusion.

### C. The Question Presented Is Exceptionally Important And Warrants This Court's Review In This Case

1. The government does not dispute that the extraordinary prosecutorial misconduct that occurred in this case presents a question of exceptional importance—as the briefs supporting petitioner from a wide array of amici confirm. See Current and Former Prosecutors Br. 5-12; Law Professors Br. 6-18; Cato Br. 13-18; Due Process Institute Br. 1-3. Nor does the government contest that further percolation is unwarranted, especially in light of the over 160 pages of opinions from the en banc Tenth Circuit. Indeed, it would be perverse to await further examples of "government intrusion of the grossest kind." *Hoffa*, 385 U.S. at 306.

2. Instead, the government argues (Br. in Opp. 18) that this case is a poor vehicle because it might turn on a "case-specific claim" about the scope of petitioner's stipulation. But as explained above, see pp. 5-6, there can be no dispute about the scope of the stipulation, which is plain on its face. Nor, in any event, did the scope of the stipulation have any bearing on the Tenth Circuit's actual holding: namely, that petitioner was required to show trial-specific prejudice to establish his Sixth Amendment claim.

If the Court agrees that trial-specific prejudice is not required, it can simply remand to the lower courts to determine whether petitioner is entitled to a remedy. See p. 7, *supra*.

3. Finally, the government suggests (Br. in Opp. 18-20) that this case is a poor vehicle because it may seek to defend the judgment on the alternative ground that petitioner failed to "tak[e] steps to privatize the call." But it is a familiar principle that the mere failure to act does not rise to the level of a "knowing, intelligent, and voluntary" waiver of a constitutional right. *Maryland* v. *Shatzer*, 559 U.S. 98, 104 (2010). In any event, as the government acknowledges, the court of appeals did not address any such argument. See Br. in Opp. 19 (citing Pet. App. 17a & n.14). The government fails to explain why the Court should not simply follow its familiar practice of not "resolv[ing] issues that the [c]ourt of [a]ppeals did not address in the first instance" and remanding those issues in the event of a reversal. *Ames* v. *Ohio Department of Youth Services*, 605 U.S. 303, 313 (2025). The possibility the government might make a (mistaken) alternative argument is no bar to reviewing, and reversing, the court of appeals' erroneous and deeply troubling Sixth Amendment holding.

*     *     *     *     *

The petition for writ of certiorari should be granted.

Respectfully submitted.

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